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**REFUSALS TO DEAL**

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Refusals to Deal held by the Competition Committee in October 2007.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur le refus de vente qui s'est tenue en octobre 2007 dans le cadre du Comité de la concurrence

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*by the Secretariat*

1. From the issues paper, the country submissions, and the discussion at the roundtable, the following points emerge:

- (1). *The term “refusal to deal” (or “refusal to supply”) describes a situation in which one firm refuses to sell to another firm, is willing to sell only at a price that is considered “too high”, or is willing to sell only under conditions that are deemed unacceptable.*

It is widely accepted that non-dominant firms have a right to choose with whom they deal. Every day, in the ordinary course of business, all firms must make decisions whether or not to deal with another firm – whether the other firm is a downstream distributor or retailer, an upstream supplier, or a joint-venture partner. A firm might cease a trading relationship with another firm for a variety of reasons, such as a failure of the second firm to provide complementary inputs like advertising or sales effort, an increase in the supplier’s costs, or simply because one firm wants a change. Non-dominant firms are free to make these decisions without risk of violating competition laws.

Competition concerns sometimes arise when a firm in a dominant position refuses to deal with another firm and that refusal to deal (“RTD”) has a material impact on competition, to the detriment of end-users. A firm need not refuse to supply entirely to have an important impact on competition. By supplying less than the full amount requested, by supplying irregularly or with long delays, or by offering to supply only at a different or variable level of quality, a dominant firm might significantly impair competition.

In some instances a firm might technically offer to deal, but only at such high prices or upon such onerous terms and conditions, that a viable commercial relationship is impossible. Such behaviour is referred to as a “constructive RTD”.

In other instances, agreement to deal might be conditional on one party taking certain feasible actions. This is referred to as a “conditional RTD”. A conditional RTD might be used as a tool for enforcing other potentially anticompetitive practices such as exclusive dealing (“I won’t deal with you if you deal with my rivals”), tying (“I won’t deal with you unless you carry one or more of my other products”), or resale price maintenance (“I won’t deal with you if you discount my products”). Conditional RTDs tend to be easier for competition authorities to address because there is often (but not always) an existing pattern of dealing – either with other firms or with the same firm in the past. In such cases an appropriate remedy may be simply to prohibit the condition. Japan reported one such case in which an upstream distributor of glass pipes tried to refuse the orders of a downstream distributor which attempted to import glass pipes from overseas. In this case the remedy that the Japanese competition authority proposed was to require the dominant firm (upstream distributor) to abandon the refusal to supply in order to restore the same terms and conditions that it offered to other customers, i.e., small medicine bottle manufacturers/sellers.<sup>1</sup> (During the hearing procedure, the dominant firm voluntarily terminated its attempt.)

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<sup>1</sup> In most jurisdictions such conditional refusals are dealt with respectively as exclusive dealing, tying etc. This roundtable did not further address those topics.

- (2). *RTD cases sometimes raise policy issues that overlap with the field of traditional public utility regulation, which makes analysing them more complicated.*

All RTD cases have the potential to require implicit or explicit consideration of the terms and conditions at which the product or service in question must be provided. If a firm could avoid liability by simply making an offer to deal, it would offer terms and conditions that the other firm could never accept (a constructive RTD). Furthermore, in all constructive RTD cases, if the courts or competition authorities are to impose a remedy, they must to some extent play the role of a conventional regulator, mandating the provision of service at specific terms and conditions.

Some courts and competition authorities feel uncomfortable taking on the regulatory role by setting the terms and conditions at which one firm should deal with another. This reluctance arises in part from the differences in institutions themselves. Courts and competition authorities are usually called on only to intervene *ex post*, on an *ad hoc* basis, when a dispute arises. Conventional regulators, on the other hand, often have an on-going role, with formal powers of monitoring and oversight of the costs, prices and terms and conditions of a regulated firm. In the US, the Supreme Court has observed that courts are inferior to regulatory bodies for managing mandatory transactions among firms.

In addition, some courts and competition authorities have expressed concerns that explicit regulation of the terms and conditions of supply of a dominant firm will reduce the incentives for innovation and investment by firms in many sectors - for fear that (once dominant) the firm will be forced to share the benefits of that investment or innovation with others at regulated terms and conditions. At the same time, concerns have been expressed that mandated access will reduce the incentives for potential entrants themselves to invest in their own facilities, choosing to instead rely on the facilities of the incumbent. Put another way, the concern has been expressed that mandating access at regulated terms and conditions may appear to be pro-competitive in the short-term whereas it risks limiting competition in the long-term.

There are counter arguments, however. The RTD itself limits investment and innovation in complementary services which rely on access to the essential input provided by the dominant firm. Where the incumbent firm's dominance is particularly "unassailable", and especially where that dominance was obtained through a government-created or government-owned monopoly, it may be preferable to promote investment to develop complementary services rather than wait for investment in substitute services to break down or eliminate the incumbent firm's dominance.

- (3). *The reluctance of some courts and competition authorities to get involved in setting the terms and conditions of trade is reflected in higher thresholds for finding that RTDs are in violation of competition law.*

Although many potential RTDs are addressed through sectoral regulatory frameworks, RTDs also occur in markets that are not subject to sector-specific regulation. These cases usually fall under the jurisdiction of the courts and/or the competition authority.

Some commentators have argued that RTDs should be *per se* legal. Most competition authorities and some economists, however, propose a less extreme position – that, in some cases, the cautious and judicious application of a mandated dealing requirement can materially improve competition and overall welfare.

Some jurisdictions, however, such as the EU and the US, have been adopting higher thresholds for RTD claims. Although the precise standards for evaluating RTDs differ in those two

jurisdictions, the basic trend in judicial attitudes toward RTDs is the same: the courts have become less willing to find dominant firms liable. Today, it is quite difficult to win an abuse of dominance case based on an RTD in either the EU or the US. Some other OECD countries treat RTDs rather harshly by comparison.

In those cases where a competition authority has been required to set terms and conditions of supply, one practice has been to set up a new entity or arbitrator with responsibility for reconciling competing claims. In the *Microsoft* case, for example, a “Monitoring Trustee” was established to arbitrate competing requests. Switzerland reported a case in which the authority mandated a firm in a dominant position to continue to supply parts for the manufacture of watches. The decision of the Swiss competition authority included the establishment of a new entity charged with setting the prices and terms and conditions of supply.

- (4). *However, courts and competition authorities have been more willing to attack RTDs when there is an existing or historic pattern of dealing in the product or service in question.*

Courts and agencies have more readily set the terms and conditions of trade between two firms in cases where the dominant firm is either currently providing the product or service in question to other firms, or it has done so in the past. One of the reasons for this tendency is that it is far easier to enjoin the use of certain conditions or various bases for price discrimination than to set an overall price cap.

In these cases, the courts or competition authorities draw some comfort from the facts that (a) it is technically and economically feasible to provide the product or service in question; (b) there is less likely to be an objective justification for the refusal to supply; and (c) the terms and conditions at which the service is provided elsewhere provide a benchmark at which they could mandate service by the dominant firm. Although these other prices are not a perfect benchmark (since conditions may change or differ across markets), they are less likely to be imperfect than setting a regulated access price *de novo*.

A potential side-effect of applying greater scrutiny in cases where there is a history of dealing is that dominant firms might react by not forming commercial relationships with external firms in the first place. Instead, dominant firms might vertically integrate so as to internalise what would have otherwise been arms-length transactions.

- (5). *RTD cases tend to be harder when the dominant firm has no history of providing the product or service in question to external firms. In these cases a number of pricing benchmarks have been used to determine liability.*

Such cases might arise where the dominant firm is vertically integrated and deals only with its own downstream or upstream business unit(s). The difficulty stems from (a) the need to determine whether it is technically and economically feasible for the dominant firm to provide the requested product or service at all; and if so, (b) the need to determine (or identify a process for determining) appropriate terms and conditions for mandated supply.

The requirement to provide service may result in the loss of economies of integrated operation or other undesirable effects that outweigh any potential benefits from enhanced competition and innovation in related markets. In Chinese Taipei, for example, access to coke (a by-product of steel manufacturing) was denied to a downstream firm when the competition authority could not be satisfied that environmental concerns would be adequately addressed by that firm.

Setting the terms and conditions at which access to a vertically-integrated firm should be mandated is inevitably contentious. One approach is to rely primarily on measurement of the “cost” of producing the product or service. Measures of marginal or variable cost do not allow the dominant firm to recover any contribution to its fixed or sunk costs, but measures of average cost do not yield a unique measure of cost when there are significant sunk costs that must be amortized over time. Problems also arise where the dominant firm has made a substantial investment in a climate of uncertainty and for which it requires an appropriate return to compensate for the risks it faced at the time it made the investment.

One possible approach is to ask the question: At what price could the dominant firm sell its product or service without any loss of economic profit? A refusal to sell at a higher price would then involve a foregone economic profit (a “profit sacrifice”) to the dominant firm which would then be held to be evidence of an anti-competitive refusal to deal. A related approach focuses on the financial viability of the dominant firm’s own downstream or retail arm as a stand-alone entity after imputing the price rivals must pay for the access service. If the dominant firm’s own downstream subsidiary is not able to compete viably in the downstream market, this is usually taken as prima facie evidence of an attempt by the dominant firm to exclude rivals.

These tests have been criticised as only applying to the context where the rival firm uses the dominant firm’s input to provide a service to end-users which is identical to the service provided by the dominant firm to its own end-users. In cases where the rival firm produces a differentiated product, the impact on the incumbent’s sales is difficult to estimate, making these tests less useful.

Another complicating factor is that the dominant firm’s own downstream subsidiary may benefit from substantial economies of scale and scope not available to rival firms. In this case, even a price which leaves the dominant firm’s downstream arm with zero economic profit might deter all possible competition from rivals. More generally, even if the dominant firm’s pricing passes a price squeeze test, the concern remains that the resulting margins left to the rival may be too small to allow it to invest and compete vigorously. Most competition authorities take the view that such objectives are better left to more formal regulation.

(6). *In any given jurisdiction, a number of elements have to be satisfied before an RTD will be found to constitute a violation of competition law. These may include:*

1. The refusing firm must have a dominant position in some product or service. The precise degree of dominance required varies from country to country. In some countries the required degree of dominance is high - that is, the refusing firm must offer an “essential” product, or be an “unavoidable trading partner”. In other countries, it is sufficient for rivals to be placed at a significant disadvantage by the refusal to deal.
2. The refusing firm must not be willing to sell at terms and conditions which are deemed to be “appropriate”. The definition of “appropriate” is, of course, a key issue and will vary from case to case. Account may be taken of the patterns of trade of the refusing firm with other firms or the complainant firm in the past.
3. The denial of service at “appropriate” terms and conditions must have a material impact on competition in a related market, to the detriment of consumers. It is not sufficient that the RTD eliminates a specific competitor. It must be the case that the refusal to deal eliminates at least some competition (and in some jurisdictions, all competition) from the related market, to the detriment of consumers.

4. There must not be an objective commercial justification for the denial of service. Another way to evaluate this element is to ask: Would the defendant refuse to deal even if the refusal did not reduce or eliminate competition?
5. It must be technically and economically feasible for the refusing firm to provide the requested service – that is, it must be possible to provide service without risk to safety, the environment, or other processes and operations of the firm. In addition the firm must be able to provide the service without undue disruption, loss of economies of integration, or loss of flexibility.
6. It must be possible to fashion a remedy which ensures that the relevant service is provided, on an on-going basis, at appropriate terms and conditions. This remedy might consist of prohibiting some form of discrimination or some condition on dealing. In other cases, the remedy might include a pricing rule and/or some mechanism (such as an arbitration mechanism) for ensuring that the firms are able to reach agreement.



## SYNTHÈSE

### *du Secrétariat*

1. Les points qui ressortent du document sur les questions à examiner, des notes soumises par les pays et des débats de la table ronde sont les suivants :

- (1). *On entend par « refus de vente » une situation dans laquelle une entreprise oppose un refus de vente à une autre entreprise ou n'est prête à vendre qu'à un prix considéré comme « trop élevé » ou est prête à vendre uniquement à des conditions jugées inacceptables.*

Il est généralement admis que les entreprises non dominantes peuvent choisir les entreprises avec lesquelles elles établissent des relations commerciales. Quotidiennement, dans le cadre de leur gestion courante, toutes les entreprises doivent décider de traiter ou non avec telle ou telle entreprise, que cette entreprise soit un distributeur ou détaillant en aval, un fournisseur en amont, ou un partenaire dans le cadre d'une coentreprise. L'entreprise peut mettre fin à une relation commerciale avec telle ou telle entreprise pour des raisons diverses, comme l'incapacité de la seconde entreprise à fournir un apport supplémentaire tel qu'un effort de vente ou de publicité ou l'augmentation des coûts pour le fournisseur ou purement et simplement une volonté de changement de la part de l'entreprise. Les entreprises non dominantes sont libres de prendre ces décisions sans risque d'enfreindre la législation sur la concurrence.

Des problèmes de concurrence surviennent parfois lorsqu'une entreprise en position dominante oppose un refus de vente à telle ou telle entreprise et que ce refus a un impact important sur la concurrence, au détriment des utilisateurs finals. Il n'est pas nécessaire que l'entreprise oppose un refus de vente intégral pour que l'impact sur la concurrence soit important. Par un approvisionnement inférieur à l'ensemble des quantités commandées, une irrégularité ou de longs retards dans l'approvisionnement ou une limitation de l'offre de vente à certains niveaux de qualité ou des niveaux de qualité variables, une entreprise dominante peut entraver considérablement la concurrence.

Dans certains cas, il arrive qu'une entreprise propose théoriquement de conclure un marché mais uniquement à des prix si élevés ou des conditions si onéreuses qu'une relation commerciale viable est impossible. On qualifie ce type de comportement de « refus de vente implicite ».

Dans d'autres cas, il arrive que le contrat de vente soit soumis à la condition qu'une des parties adopte certaines mesures réalisables. On appelle cela un « refus de vente conditionnel ». Le refus de vente conditionnel peut servir d'instrument pour imposer d'autres pratiques éventuellement anticoncurrentielles comme la distribution exclusive (« Je ne traite pas avec vous si vous avez des relations commerciales avec mes rivaux », les ventes liées (« Je ne traite pas avec vous sauf si vous prenez un ou plusieurs autres de mes produits » ou l'application de prix imposés (« Je ne traite pas avec vous si vous vendez mes produits au rabais »). Il est généralement plus facile pour les autorités de la concurrence de traiter les refus de vente conditionnels parce qu'il existe souvent (mais pas toujours) un modèle de transaction, soit avec d'autres entreprises soit avec la même entreprise dans le passé. Dans ce cas, il est possible que la solution adéquate soit simplement de prohiber la condition en question. Le Japon a cité une affaire dans laquelle un

fabricant de tubes en verre a tenté de refuser les commandes d'un distributeur qui essayait d'importer des tubes en verre de l'étranger. Dans ce cas, la solution a été d'exiger de l'entreprise dominante (distributeur en amont) qu'elle approvisionne ce distributeur aux mêmes conditions que les autres distributeurs, à savoir les fabricants et revendeurs de petits flacons pharmaceutiques<sup>1</sup> (Durant la procédure, l'entreprise dominante a volontairement mis fin à sa tentative).

- (2). *Les affaires de refus de vente soulèvent parfois des questions qui se recoupent avec le domaine de la réglementation traditionnelle des services publics ce qui rend leur analyse plus complexe.*

Toutes les affaires de refus de vente peuvent nécessiter de manière implicite ou explicite de prendre en considération les conditions générales auxquelles le produit ou le service en question doit être fourni. Si l'entreprise pouvait éviter d'être mise en cause simplement en faisant une offre, elle proposerait des conditions générales que l'autre entreprise ne serait jamais en mesure d'accepter (refus de vente implicite). Par ailleurs, dans toutes les affaires de refus de vente implicite, si le tribunal ou l'autorité de la concurrence est censé imposer une solution, il doit d'une certaine façon se comporter en organisme de tutelle classique et imposer que la prestation du service en question soit assurée à des conditions générales spécifiques.

Certains tribunaux et certaines autorités de la concurrence sont peu enclins à assumer une fonction de réglementation, s'agissant de fixer les conditions de vente appliquées par une entreprise à une autre entreprise. Cette réticence provient en partie de particularités liées aux institutions à proprement parler. Les tribunaux et les autorités de la concurrence ne sont habituellement appelés à intervenir qu'a posteriori, de manière ponctuelle, en cas de litige. En revanche, les organismes de tutelle traditionnels assument souvent une fonction permanente, étant dotés de pouvoirs formels de surveillance et de contrôle des coûts, des prix et des conditions générales de vente des entreprises réglementées. Aux États-Unis, la Cour suprême a fait observer que les tribunaux étaient moins bien placés que les organismes chargés de la réglementation pour gérer les transactions obligatoires entre entreprises.

Par ailleurs, certains tribunaux et certaines autorités de la concurrence redoutent qu'une réglementation explicite des conditions générales de vente d'entreprises dominantes limite les incitations à innover et investir des entreprises dans beaucoup de secteurs – de crainte qu'une entreprise (une fois en position dominante) soit obligée de partager avec d'autres les avantages découlant d'un investissement ou d'une innovation, à des conditions réglementées. En même temps, certains expriment leurs inquiétudes sur le fait qu'un accès imposé réduirait les incitations d'éventuels entrants à investir dans leurs propres installations, choisissant à la place de dépendre des installations de l'opérateur historique. En d'autres termes, on craint qu'imposer un accès à des conditions réglementées puisse sembler pro-concurrentiel à court terme alors que cela risque de limiter la concurrence à long terme.

Toutefois, il existe des arguments contradictoires. Le refus de vente à proprement parler limite l'investissement et l'innovation dans des prestations de service supplémentaires qui sont tributaires de l'accès au moyen de production fourni par l'entreprise en position dominante. Lorsque la position dominante de l'opérateur historique est particulièrement « inattaquable » et plus spécialement si cette position dominante est liée à un monopole créé ou contrôlé par l'État il est sans doute préférable de promouvoir l'investissement pour développer des prestations de

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<sup>1</sup> Dans la plupart des juridictions, de tels refus conditionnels sont traités comme des ventes exclusives, des ventes liées, etc... Cette table ronde n'a pas traité de ces sujets.

service supplémentaires au lieu de briser ou d'éliminer la position dominante de l'opérateur historique.

- (3). *La réticence de certains tribunaux et de certaines autorités de la concurrence à être impliqués dans la fixation de conditions générales de vente se traduit par la définition de seuils élevés permettant d'établir qu'un refus de vente porte atteinte à la loi sur la concurrence.*

Même si on peut traiter de nombreux refus de vente potentiels dans le cadre des réglementations sectorielles, certains refus de vente se produisent également sur des marchés qui ne font pas l'objet d'une réglementation sectorielle spécifique. Ces affaires relèvent habituellement de la compétence des tribunaux ou de l'autorité de la concurrence.

Certains observateurs préconisent de considérer les refus de vente (plus spécialement les refus de vente inconditionnels d'entreprises intégrées verticalement) comme licites *per se*. Toutefois, la majorité des autorités de la concurrence et certains économistes proposent une position moins extrême selon laquelle, dans certains cas, l'application prudente et judicieuse d'une condition de vente obligatoire permet d'améliorer considérablement la concurrence et le bien-être en général.

Néanmoins, certaines juridictions, comme l'UE et les États-Unis, ont adopté des seuils relativement élevés autorisant le dépôt de plaintes pour refus de vente. Bien que les normes d'évaluation des refus de vente diffèrent dans ces deux juridictions, les tribunaux ont tendance à adopter la même attitude à l'égard de ces comportements. Il est aujourd'hui assez difficile de gagner un procès d'abus de position dominante sur la base d'un refus de vente au sein de l'UE comme aux États-Unis. D'autres pays de l'OCDE traitent par comparaison assez durement les refus de vente.

Dans les cas où l'autorité de la concurrence est obligée de fixer les conditions générales de vente une des pratiques consiste à créer une nouvelle entité ou un nouvel arbitre chargé de rapprocher les revendications concurrentes. Dans l'affaire *Microsoft*, par exemple, on a mis en place un « Monitoring Trustee » chargé d'arbitrer les demandes concurrentes. La Suisse a cité une affaire dans laquelle l'autorité a obligé une entreprise en position dominante à continuer de livrer des pièces pour la production de montres. La décision de l'autorité de la concurrence suisse incluait la création d'une nouvelle entité chargée de fixer les prix et conditions générales de vente.

- (4). *Toutefois, les tribunaux et les autorités de concurrence sont plus enclins à s'attaquer aux refus de vente lorsqu'il existe un modèle actuel ou historique de vente du produit ou service en question.*

Il est plus facile pour les tribunaux ou les autorités de fixer des conditions commerciales entre deux entreprises dans les affaires où l'entreprise dominante fournit actuellement ou a fourni dans le passé le produit ou le service en question à d'autres entreprises. L'économiste Carl Shapiro explique notamment cette tendance en observant qu'il est beaucoup plus facile d'enjoindre l'application de certaines conditions ou de prohiber certaines formules de discrimination par les prix que de fixer un plafond général pour les prix.

Dans ce cas, les tribunaux et les autorités de concurrence se sentent plus à l'aise du fait (a) qu'il est techniquement et économiquement possible de fournir le produit ou le service en question, (b) qu'il est moins probable qu'il existe une justification objective du refus de vente et (c) que les conditions auxquelles le service est fourni ailleurs constituent une référence qu'ils pourraient imposer à l'entreprise dominante pour la prestation de ce service. Bien que ces autres prix ne constituent pas une référence parfaite (étant donné que les conditions peuvent changer ou être

différentes selon les marchés) ils ont moins de chances d'être imparfaits que lorsqu'on fixe un prix d'accès réglementé *de novo*.

Il est généralement plus facile pour les autorités de concurrence de traiter les refus de vente conditionnels parce qu'il existe souvent (mais pas toujours) un modèle de transaction, soit avec d'autres entreprises soit avec la même entreprise dans le passé. Dans ce cas, il est possible que la solution adéquate soit simplement de prohiber la condition en question. Le Japon a cité une affaire dans laquelle un fabricant de tubes en verre a tenté de refuser les commandes d'un distributeur qui essayait d'importer des tubes en verre de l'étranger. Dans ce cas, la solution a été d'exiger de l'entreprise dominante qu'elle continue d'approvisionner ce distributeur aux mêmes conditions qu'elle appliquait aux autres distributeurs.

L'effet secondaire potentiel d'un renforcement de la surveillance s'il existe des antécédents de relations commerciales est que les entreprises dominantes risquent de réagir en n'établissant tout simplement pas de relations commerciales avec des entreprises externes. À la place, les entreprises dominantes pourraient procéder à une intégration verticale de façon à internaliser ce qui serait autrement des transactions indépendantes.

- (5). *Les affaires de refus de vente sont en général plus complexes si l'entreprise dominante n'a pas d'antécédents de vente du produit ou service à des entreprises externes. Dans ce cas, plusieurs références de prix sont utilisées pour établir s'il y a infraction.*

On peut rencontrer des affaires de ce type dans le cas où l'entreprise dominante est intégrée verticalement et ne traite qu'avec ses propres entités en aval ou en amont. La difficulté est liée (a) à la nécessité de déterminer si l'entreprise dominante est bien capable, techniquement et économiquement, de fournir le produit ou le service demandé et, le cas échéant, (b) à la nécessité de déterminer (ou définir un processus pour déterminer) les conditions générales de vente appropriées en cas d'approvisionnement imposé.

L'obligation de fournir le service en question peut avoir pour effet la perte d'économies liées à l'exploitation intégrée ou d'autres effets indésirables qui priment sur tout avantage potentiel du renforcement de la concurrence et de l'innovation sur les marchés connexes. Dans le Taipei chinois, par exemple, une entreprise en aval s'est vu refuser l'accès au coke (sous-produit de la production d'acier) tant que l'autorité de la concurrence n'était pas convaincue que cette entreprise serait capable de répondre aux problèmes d'environnement de manière adéquate.

Fixer les conditions auxquelles il faut imposer l'accès à une entreprise intégrée verticalement prête inévitablement à controverse. L'une des approches consiste à se baser essentiellement sur l'évaluation du « coût » de production de ce produit ou service. Les mesures du coût marginal ou variable n'autorisent pas l'entreprise dominante à récupérer une quote-part des coûts fixes ou irrécupérables, mais les évaluations du coût moyen ne permettent pas d'obtenir une seule évaluation de coût s'il y a des coûts irrécupérables importants qui doivent être amortis dans le temps. Des problèmes surviennent également si l'entreprise dominante a réalisé des investissements substantiels dans un contexte d'incertitude ou exigeant une rentabilité suffisante pour compenser les risques encourus au moment de la réalisation des investissements.

Une approche peut consister à s'interroger sur le prix auquel l'entreprise dominante pourrait vendre son produit ou service sans perte de bénéfice économique. Le refus de vendre à un prix plus élevé impliquerait alors la renonciation à un bénéfice économique (un « sacrifice de bénéfice ») pour l'entreprise dominante, renonciation qui serait alors considérée comme un élément de preuve d'un refus de vente anticoncurrentiel. Une approche connexe se concentre sur

la viabilité financière de la branche commerciale ou en aval de l'entreprise dominante en tant qu'entité indépendante après l'imputation du prix que les concurrents sont obligés de payer pour le service d'accès. Si la propre filiale en aval de l'entreprise dominante ne peut pas être concurrentielle sur le marché en aval de manière durable, on considère habituellement qu'il s'agit d'un commencement de preuve de tentative d'exclusion des concurrents par l'entreprise dominante.

Ces critères ont été remis en cause puisqu'ils ne s'appliquent qu'au contexte dans lequel l'entreprise concurrente utilise le moyen de production de l'entreprise dominante pour fournir un service à des utilisateurs finals qui est identique au service fourni par l'entreprise dominante à ses propres utilisateurs finals. Dans le cas où l'entreprise concurrente offre un produit différent, l'impact sur les ventes de l'opérateur historique est difficile à évaluer ce qui rend ces critères moins intéressants.

Un autre élément qui complique les choses est que la propre filiale en aval de l'entreprise dominante peut profiter d'économies d'échelle et de gamme importantes qui n'existent pas pour les entreprises concurrentes. Dans ce cas, même un prix qui dégagerait un bénéfice économique nul pour la division en aval de l'entreprise dominante pourrait dissuader toute concurrence possible de la part de rivaux. Plus généralement, même si les prix de l'entreprise dominante satisfont au critère de compression des prix, on peut craindre que les marges dégagées et laissées au concurrent ne soient trop faibles pour permettre des investissements et une concurrence vigoureuse. La majorité des autorités de la concurrence considèrent que ces objectifs sont mieux servis par une réglementation plus formaliste.

(6). *Dans une juridiction donnée, plusieurs éléments doivent être réunis avant de conclure qu'un refus de vente constitue une infraction au droit de la concurrence, notamment :*

1. L'entreprise opposant le refus doit nécessairement avoir une position dominante concernant un produit ou un service particulier. Le degré précis de domination nécessaire est différent selon les pays. Dans certains pays la domination requise est forte, c'est-à-dire que l'entreprise opposant le refus doit offrir un produit « essentiel » ou être un « partenaire commercial incontournable ». Dans d'autres pays, il suffit que les concurrents soient considérablement désavantagés du fait du refus de vente.
2. Il faut que l'entreprise opposant le refus ne soit pas prête à vendre à des conditions jugées « appropriées ». Effectivement, la définition du terme « approprié » est un élément majeur et diffère d'une affaire à l'autre. On peut prendre en considération les modèles de relations commerciales que l'entreprise opposant le refus entretient avec d'autres entreprises ou entretenait avec l'entreprise requérante dans le passé.
3. Le refus de prestation de service à des conditions « appropriées » doit avoir un impact important sur la concurrence sur un marché connexe au détriment des consommateurs. Il ne suffit pas que le refus de vente élimine un concurrent particulier. Il faut véritablement que le refus de vente élimine, dans une certaine mesure au moins, la concurrence (et dans certaines juridictions, toute concurrence) sur le marché concerné au détriment des consommateurs.
4. Il ne doit pas exister de justification commerciale objective au refus de prestation de service. Autre façon d'évaluer cet élément, le contrevenant refuserait-il la vente même si son refus ne réduisait pas ou n'éliminait pas la concurrence ?

5. Il faut que l'entreprise opposant le refus soit techniquement et économiquement en mesure de fournir la prestation de service demandée, c'est-à-dire qu'il faut qu'elle puisse fournir ce service sans danger pour la sécurité, l'environnement ou les autres processus ou activités de l'entreprise. Par ailleurs, l'entreprise doit pouvoir assurer cette prestation de service sans perturbations excessives, perte d'économies d'intégration ou perte de flexibilité.
6. Il faut qu'il soit possible de trouver une solution pour que le service correspondant soit assuré, de manière permanente, à des conditions appropriées. Cette solution peut être d'interdire certaines formes de discrimination ou certaines conditions de vente. Dans d'autres cas, la solution peut inclure une règle ou un mécanisme de fixation des prix (comme un mécanisme d'arbitrage, par exemple) garantissant que les entreprises parviennent à un accord.

## BACKGROUND NOTE

by the Secretariat\*

### 1. Introduction

Unilateral refusals to deal (“RTDs”) by dominant firms are not uncommon.<sup>1</sup> RTDs can take many forms, from straightforward rejections to refusals that apply only under certain circumstances or trade terms that discourage buyers rather than unequivocally turning them away. RTDs may be vertical, horizontal, or complementary. When carried out by dominant firms, RTDs may harm competition by preventing entry that would have eroded or eliminated the dominant position. They may also restrict competition in markets where the dominant firm’s product is an input or a complement. Moreover, RTDs may be a means of carrying out other potentially anticompetitive conduct such as tying, resale price maintenance, and exclusive dealing.

It may be appropriate for legal standards and analytical approaches to differ across the assorted types of RTDs. There are also differences, however, in the ways that various jurisdictions approach the same types of RTDs. This Note addresses issues that competition authorities will usually need to consider when analysing RTDs no matter what particular standards apply under their competition laws. It will be seen that although unilateral RTDs are generally easier to recognise than certain other unilateral conduct, such as predatory pricing, they are not much easier to analyse rigorously. The reason is that the same fundamental difficulty that plagues the analysis of most other unilateral conduct also afflicts RTD analysis: Anticompetitive RTDs can be difficult to distinguish from healthy competitive behaviour. Indeed, some RTDs may properly be considered harmful to competition in the short run and beneficial to it in the long run.

The case law in some jurisdictions shows a progression over time from scepticism toward RTDs by dominant firms to even deeper scepticism toward those who claim they are unlawful. Some courts have developed fairly clear standards along the way. Despite the clarity, however, scholars are still not certain that the standards are clear enough, or even that they are economically sound. In some other jurisdictions, courts have unfortunately made a confused muddle of things, reaching decisions by relying on a shifting amalgam of tests and principles. That has left the door open for commentators to deliberate about exactly what the basis for finding an RTD to be illegal is, as well as what it should be. Much of the scholarly dialogue on RTD analysis has tended to collapse into the broader and at least equally important debate about how to analyse unilateral conduct in general. In other words, the academic discourse about RTDs often uses them simply as a medium in which to discuss the ongoing search for a principled way to distinguish “competition on the merits” from conduct that harms competition.

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<sup>1</sup> RTDs are also known as refusals to supply. The acronym is intended to cover both terms. In addition, the word “dominant” in this Note is intended to encompass the entire range of market power thresholds used in statutes that govern unilateral conduct in OECD member countries. Defining dominance, substantial market power, etc., is a separate issue that will not be addressed here. Instead, this Note deals with the subject of how to determine whether RTDs by firms that have already been found to be dominant should be deemed harmful to competition.

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This Note deals with unilateral RTDs only – it does not cover concerted RTDs. Furthermore, because there have been several roundtables touching on intellectual property issues in recent years, it does not dwell on refusals to license or sell IPR. Similarly, although essential facilities issues are an inextricable part of the discussion, they will not be emphasized because previous roundtables have focused directly on essential facilities. Finally, RTDs that serve as a mechanism for achieving some other type of conduct such as exclusive dealing, tying, and resale price maintenance are excluded.

Part 2 addresses the theoretical issues involved in analysing RTDs, including the significance of differences such as conditional versus unconditional refusals and outright versus constructive refusals. It also discusses some standards and tests that can be used to identify RTDs that harm competition. Part 3 traces the development of the case law on unilateral RTDs in two major jurisdictions and compares those precedents with two fairly recent cases from other jurisdictions.

The main points of this paper are:

- There are a number of ways to categorise RTDs. There is not universal agreement on what labels such as “vertical” and “horizontal” mean in the RTD context. Other classifications, such as “outright” versus “constructive” RTDs and “conditional” versus “unconditional” RTDs, are interpreted more consistently. Achieving uniformity on how to label RTDs, however, is less important than considering all of the facts and understanding all of the forces at work in each case.
- For example, it is vital in RTD analysis to keep both upstream and downstream effects in mind. RTDs can have effects in adjacent markets that may seem surprising or even counter-intuitive at first. Furthermore, there is a potential conflict between short term and long term competitive effects from RTDs (and remedies that may be imposed for RTDs found to be unlawful). For instance, the number of viable competitors in a market that has been subjected to an RTD by a dominant firm can be quickly boosted by forcing that firm to deal. But the longer term picture is more complex. Such interventions may also have effects on firms’ incentives to invest, innovate, and compete.
- Some commentators find the difficulties associated with analysing and remedying vertical, unconditional RTDs to be so great that they advocate treating them as per se legal. Most of the complexity has to do with how to set an appropriate price ceiling for the purpose of determining whether a price is so high that it should be treated as an unlawful RTD. The same difficulty exists at the remedy stage if the court or agency aims to impose a behavioural remedy because simply ordering the defendant to start supplying customers is meaningless unless there is also some control over the price it is allowed to charge. Other commentators (and many courts) are not so sceptical even though they acknowledge the difficulty of setting a price benchmark.
- Intuitively, conditional RTDs may seem easier to analyse and remedy because as long as the dominant firm is selling to someone, the price at which such transactions take place is a possible benchmark. Nevertheless, some economists are still reluctant to advocate intervention in such cases because they do not like the idea of using that benchmark. If the conditions discriminate against a vertically integrated defendant’s downstream rivals, for example, there may be legitimate reasons for them. The key point is that it may be unprofitable for such defendants to supply their downstream rivals at the same price other buyers pay: doing so creates an opportunity cost to the dominant firm in the form of lost downstream sales and profits. Furthermore, if dominant firms are not allowed to

discriminate between downstream rivals and non-rivals, they might react by raising the price they charge to non-rivals. Their expected behaviour is not clear, though.

- The essential facilities doctrine, which is part of the body of case law on RTDs, arose in the US. Although in a technical sense it is not dead there yet, it has been seriously hobbled by a recent Supreme Court decision. Commentators on both sides of the Atlantic, including judges, have been sharply critical of the doctrine, as well, finding it to be superfluous and ill-advised. Nevertheless, part of the doctrine is arguably alive and well in EU case law on RTDs, which requires the relevant product to be “indispensable.”
- Many different standards and tests may potentially be used to determine whether RTDs are unlawful. Although none of them are perfect, some are more imperfect than others.
- The EU and US have relatively lengthy histories of court decisions on RTDs, which makes it possible to study the development of the case law over a fairly broad time period. Although the precise standards for evaluating RTDs differ in these two jurisdictions, the basic trend in judicial attitudes toward RTDs is the same: over time, the highest courts in both jurisdictions have become far less willing to find dominant firms liable for RTDs. Today, it is quite difficult to win an abuse of dominance case based on an RTD in either the EU or the US. Some other OECD countries treat RTDs rather harshly by comparison.

## 2. Unilateral Refusals to Deal: Theoretical Issues

This part of the Note reviews theoretical issues associated with RTDs, including the various ways of characterising them, the economic implications of those characterisations, factors that are typically relevant when assessing RTDs, and a number of standards and tests that may be used to help determine whether a given RTD is harmful to competition.

### 2.1 *Various Types of RTDs*

RTDs can vary in several ways. This section explores the meaning of a number of labels that can be used to describe different kinds of RTDs.

#### 2.1.1 *Vertical versus Horizontal RTDs*<sup>2</sup>

There are several ways in which one could define different types of RTDs by using the terms “vertical” and “horizontal.” For example, one might propose that the term “vertical RTD” refers to a situation in which a vertically integrated input supplier refuses to deal with its non-integrated downstream rivals. That meaning of the term could also cover situations in which an integrated firm refuses to deal with non-rival downstream customers. (By doing so, it might damage those customers and consequently damage its upstream rivals indirectly by limiting or even completely eliminating downstream demand for their products.)

Alternatively, one might propose that it is incorrect to refer to those types of RTDs as “vertical” because a purely vertical RTD would involve a firm that operates in only one market in the chain of production (i.e., the firm is not integrated in contrast to the above case) and refuses to deal with one or

<sup>2</sup> This section could also have included a category called “complementary RTDs.” Complementary RTDs occur when the dominant supplier of one product sells that product to customers as part of a bundle with a related product but refuses to sell the first product alone to a rival who wants to use it in offering its own bundle. Bundling and tying are beyond the intended scope of this Note, so they are not addressed.

more non-rival firms operating at an adjacent level in the chain. That would occur, for example, when the RTD was serving as a tool to achieve exclusive dealing or resale price maintenance. Because exploring those other types of behaviour would broaden the scope of this roundtable very substantially, these kinds of RTDs have been largely excluded from the discussion.

In any event, if one accepts the meaning from the preceding paragraph for a “vertical RTD,” then the term “horizontal RTD” would refer only to situations in which the foreclosed company is both an actual or potential customer *and* an actual or potential competitor. Under that approach, the horizontal/vertical distinction depends on the direction in which the foreclosure effect from the RTD flows – toward a rival or toward a non-rival.

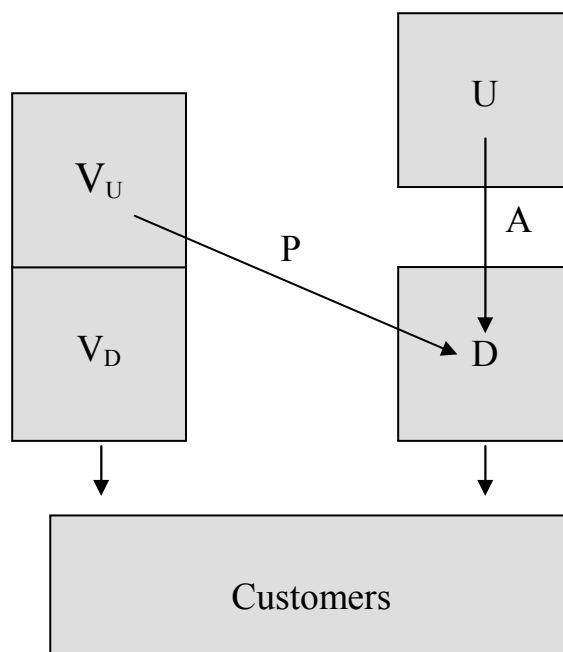
Ultimately, the vertical and horizontal labels do not seem to matter a great deal because the labels themselves do not contribute substantially to a better understanding of how to determine whether an RTD is harmful to competition. While it is necessary to take into account whether companies are vertically integrated as well as which market(s) the dominant firm’s RTD affects, the way in which one chooses to distinguish vertical RTDs from horizontal ones is not crucial.

Whether it is called vertical or horizontal, a very common unilateral RTD fact pattern in practice is represented in Figure 1.<sup>3</sup> A vertically integrated firm, V, operates both an upstream division, V<sub>u</sub>, and a downstream division, V<sub>d</sub>. V<sub>u</sub> produces an input that V<sub>d</sub> uses to produce something else, which is then sold to customers. An unintegrated downstream firm, D, is trying to compete with V<sub>d</sub>. D needs the input product and tries to buy it from V<sub>u</sub> but for some reason the two companies cannot come to an agreement on the terms of the purchase. P is the price V<sub>u</sub> offers to D. An absolute refusal to supply D would simply correspond to a very high value of P. The next best alternative source of the input charges price A, regardless of whether a) there is no alternative source to V<sub>u</sub>, in which case A is a very large number; b) D is able to integrate upstream and produce the input itself at cost A; or c) D can buy the input from some other supplier, U, at price A.

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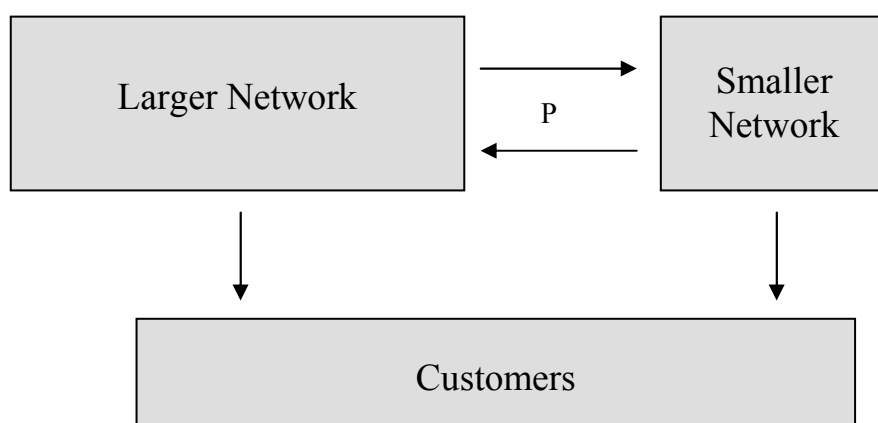
<sup>3</sup> Figure 1 and the scenario it represents are based on Carl Shapiro, “Exclusionary Conduct,” Testimony Before the Antitrust Modernization Commission, (29 September 2005), at p. 6.

Figure 1. A Common Type of Unilateral RTD.



A different diagram is necessary to represent another scenario that is becoming more common in the modern economy. This fact pattern involves at least two companies, one larger than the others, who are competing in a network effects market. See Figure 2.<sup>4</sup> The issue here is that the larger network may become a monopolist unless the smaller networks' members/products can communicate or interoperate with members/products in the larger network. The *Aspen Skiing* case, discussed below, is an example of this fact pattern, but it could also arise in industries such as software and wireless communication technologies.

Figure 2. RTD in a Network Effects Market.



<sup>4</sup> Figure 2 is based on *id.* at 9.

### 2.1.2 *Outright Refusals versus Constructive Refusals*

If the law required there to be an outright, overt refusal in RTD cases it would be an easy matter for dominant firms to avoid liability simply by making their terms of trade so onerous that no buyer would ever find it worthwhile to make a purchase. An obvious way to deter buyers, for example, would be to set an inordinately high price, but there are endless other ways to keep buyers away if a firm desires to do so. For example, a firm could nominally accept an offer but then create unacceptable delays in delivering the product, or it could impose inconvenient requirements such as forcing the buyer to undergo complicated, expensive, and time-consuming “buyer certification” procedures. To close such loopholes, courts and agencies have long recognised that firms may be refusing to deal in effect even if they are not literally refusing to deal. Such refusals are known as “constructive” RTDs and once they are identified as such they are treated in the same manner as outright RTDs.

An interesting and significant implication of recognising constructive RTDs is that an effective behavioural remedy for unlawful RTDs in general cannot simply be an order to deal. Logically, such an order would at the very least need to specify a price ceiling and provide for some kind of oversight. Otherwise, there would be nothing to prevent the defendant from technically “complying” with the order by agreeing to deal, but only at a price so high and/or under conditions so unattractive to buyers that it would amount to a constructive RTD. As Part 3 will show, the idea of courts setting prices and acting as regulatory agencies has not had universal appeal.

Naturally, a key question is “What counts as a constructive RTD?” In other words, how does one tell the difference between merely “high” prices and prices that are so high that they constitute a constructive RTD? That subject is addressed in section 2.2.

### 2.1.3 *Conditional versus Unconditional RTDs*

At first glance it may seem like unconditional and outright RTDs are one and the same, but in fact both outright refusals and constructive refusals may be either conditional or unconditional. The outright/constructive characterisation has to do with whether the refusal is expressly communicated as a refusal, whereas the conditional/unconditional characterisation has to do with whether the refusal applies in all circumstances or only in some. For example, a dominant firm might absolutely refuse to sell to certain buyers – say, downstream competitors – but not to others (a conditional outright RTD). Alternatively, the firm might flatly refuse to supply anyone other than its own downstream division (an unconditional outright RTD).

Another possibility is that the firm could decline to give small buyers a guarantee that its product will perform to certain specifications but provide that guarantee to large buyers. If the market is one in which the guarantee would be essential for any buyer, then this would be an example of a conditional constructive RTD. On the other hand, if the firm declined to give all potential buyers a guarantee in such a market, that would be an unconditional constructive RTD.

The practical importance of the conditional/unconditional distinction is discussed in more detail in section 2.2.3.

## 2.2 *Issues in RTD Analysis*

This section reviews some factors that can be helpful to consider when assessing RTDs.

### 2.2.1 Preliminary considerations: looking at all the dimensions.

RTDs are like many other types of unilateral conduct in that it can be very difficult to distinguish pro-competitive (or at least benign) conduct from anti-competitive conduct. If courts and agencies do not consider all of the forces at work in an RTD, they risk doing more harm than good to competition. Some of those forces are less obvious than others. Being fully aware of them requires a dynamic perspective on all of the markets that could be affected.

Keeping both upstream and downstream effects in mind

Consider the scenario described in Figure 1. If the integrated firm's RTD causes its unintegrated downstream competitor to exit the market, not only is a competitor eliminated but any other unintegrated actual and potential downstream competitors will probably be more mindful of the possibility that they will receive the same treatment. That may make them more likely to act the way the integrated firm wants them to act (or to stay out of the market in the first place). Obviously, then, the RTD's effects on the downstream market have to be considered. It may be less obvious, however, that the RTD can also reduce competition in the upstream market. That could happen, for instance, if the RTD persuades potential upstream entrants that they would have to enter at both the upstream and downstream levels to survive. After all, there may be fewer independent downstream firms for them to sell to once the RTD has had its effect. For the same reason, any independent, unintegrated competitors in the upstream market will have to exit (or integrate downstream) if there are not enough downstream buyers left with whom they can do business. Consequently, the RTD's effects on the upstream market have to be considered, too.

Moreover, when contemplating a remedy such as forcing the upstream dominant firm to deal with its downstream competitors by charging them a lower price, one has to consider all the effects of that action, too. It clearly has the potential to strengthen competition in the downstream market. But it may also make entry in the upstream market less feasible and thereby reduce the likelihood that the dominant position in that market will be eroded by natural market forces. Why? Because upstream entrants would have to compete against a dominant firm that is now being forced to charge lower prices. The dominant firm would have no choice but to sell to downstream buyers at a price they find acceptable (or even attractive), rather than not dealing with them at all or dealing with them on terms that the buyers find unattractive. Furthermore, it would be clear that any firm that eventually becomes dominant may be forced to deal with buyers against its will or on terms that are imposed on it by the government.<sup>5</sup> That factor also makes entry less attractive to potential upstream entrants.

A different kind of awareness is necessary in cases where the integrated firm has an unassailable upstream position, *i.e.*, there is no possibility of competition in the upstream market. That might happen, for instance, if the firm has exclusive control over a unique, irreproducible asset such as crucial intellectual property or an essential natural resource. Competitors in the downstream market are unavoidably reliant on the upstream monopolist. That, in turn, means that they are not truly independent downstream competitors. In other words, if the integrated firm is allowed to refuse to deal, it can eliminate its downstream rivals, leaving a single firm in both the upstream and downstream markets. If the integrated firm is forced to sell its input at the monopoly price that an unintegrated firm would charge, then there may be a monopoly upstream and a competitive market downstream. But creating some competition in the downstream market may be of little or no benefit as long as there is an upstream monopolist. (That is the single monopoly profit scenario, which is discussed further in section 2.3.1.) Shapiro implies that

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<sup>5</sup> *Id.* at 11.

enforcement actions should therefore be undertaken reluctantly when there is no possibility of competition in the upstream market.<sup>6</sup>

The potential conflict between short term and long term competitive effects

The number of viable competitors in a market that has been subjected to an RTD by a dominant firm can be quickly boosted by forcing that firm, in one way or another, to deal with the firms it previously would not supply. Suddenly the buyers become more effective competitors because they now have access to an important input on better terms. If that were all there is to the problem, the optimal competition policy toward RTDs by dominant firms might be fairly obvious and simple: Prohibit all of them.

But there is more to the problem. While interventions that force dominant firms to supply buyers on terms different from those the dominant firm would choose can have purely beneficial effects on consumers in the short term, the longer term picture is more complex. Such interventions will have effects on firms' incentives to invest, innovate, and compete, too. Investing, innovating, and competing are typically what earn dominant firms their dominant positions (putting deregulated and privatised state-owned monopolies aside). When the government signals that it will force dominant firms to share the fruits of their investment, innovation, and/or other competitive efforts with other firms, some of whom may be or may become competitors, becoming dominant loses some of its appeal. Therefore so does investing, innovating, and competing. All of those things are in consumers' long run interests, though.

Moreover, forced sharing harms the incentives of smaller firms to invest and innovate in another way. If they are legally entitled to access the dominant firm's product or service on better terms than the dominant firm wanted to give them, then the smaller firms' incentive to develop their own substitute will decrease.<sup>7</sup>

An unavoidable tension between short run and long run efficiency therefore exists in competition policy toward RTDs. That tension could also be described as existing between static and dynamic efficiency.<sup>8</sup> Consumer welfare may be increased by promoting short term price competition, but the development of new products and better production methods through greater innovation may augment consumer welfare even more in the longer term.

It is because of those facts that governments grant intellectual property rights to innovators, for example, even though by doing so governments may be subjecting consumers to market power for many years. IPRs are the result of a trade-off between the drawbacks of possible temporary market power and the benefits of encouraging greater innovation. The same kind of trade-off comes into play when governments choose how to approach RTDs.<sup>9</sup>

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<sup>6</sup> *Id.* at 12 (“This observation suggests caution in vertical and complementary refusal to deal cases if the strength of the underlying monopoly is not at issue.”) Shapiro also notes that in purely horizontal cases, such as the one illustrated in Figure 2 above, imposing a requirement to deal would directly undermine the root monopoly. *Id.* at n.10.

<sup>7</sup> US Antitrust Modernization Commission, Report and Recommendations (April 2007), at pp. 101-02.

<sup>8</sup> Dynamic efficiencies in the context of mergers were discussed in a recent Competition Committee roundtable. See OECD, Dynamic Efficiencies in Merger Analysis (forthcoming 2007).

<sup>9</sup> See Shapiro, *supra* n.3 at 12 (considering the American legal system and voicing his concern “that the salience of short-term benefits to customers (and competitors) to judges and juries will lead to an erosion of the returns necessary to fuel risk-taking and innovation”).

### 2.2.2 Regulation

If the RTD takes place in a regulated industry, the regulations may supersede the competition statute and thereby leave analysis of the RTD to a regulatory agency rather than the competition agency. In fact, even if the applicable regulations do not supersede the competition statute, courts may still decide to leave the matter in the hands of the regulatory agency. That happened in the US case *Trinko*, for example. That decision strongly suggests that there can never be antitrust liability for RTDs whenever sufficient regulatory relief is available. The reason given by the Supreme Court is that courts are inferior to regulatory bodies for managing mandatory transactions among firms.<sup>10</sup>

### 2.2.3 Whether the RTD Is Conditional or Unconditional.

As noted earlier, unconditional RTDs can have different economic effects from conditional RTDs. Some commentators therefore believe they should be treated differently.

#### Unconditional RTDs

Shapiro takes a perfectly clear position on unconditional RTDs, at least when they are vertical: “I favour an approach whereby vertical unconditional refusals to deal never trigger antitrust liability, regardless of whether the monopoly input is especially valuable[.]”<sup>11</sup> He explains his position by pointing out that unconditional RTDs are harder to correct with behavioural remedies than conditional RTDs are. The latter type can be remedied simply by prohibiting further use of the conditions that trigger the refusal. If the RTD is unconditional, though, designing a behavioural remedy is more difficult because there are no conditions to eliminate and no other buyers generating transactions that can serve as benchmarks. Instead, the court or agency will have to calculate a price ceiling (and/or regulate some non-price transactional factors). While Shapiro recognises that even in the case of unlawful conditional RTDs some oversight will probably be required to ensure that the seller does not circumvent the remedy, he emphasises that “it is far easier to enjoin the use of certain conditions, or to prohibit various bases for price discrimination, than to set an overall price cap.”<sup>12</sup> From his perspective, the experience of industry-specific regulation is ample reason to doubt that courts are qualified to remedy unconditional RTDs with price ceilings and by setting the terms of trade. Furthermore, he notes, the benefits of intervening in such cases are unclear because of the potential for causing unwanted, harmful effects in adjacent markets and/or in the longer term.<sup>13</sup>

In comparison to those facing the problem of forcibly setting prices and other terms, agencies and/or courts in jurisdictions that allow monetary sanctions for abuse of dominance may have an easier time finding a remedy that works. Rather than setting a price ceiling, they have the option of simply imposing a fine and leaving it up to the defendant to stop the unlawful RTD and start selling on terms that cannot be considered a constructive RTD. If the firm does not stop its unlawful refusal or attempts to reach the same results by imposing different onerous terms, it risks facing another (probably heavier) fine. Nevertheless, a problem may persist at the liability phase of the analysis. If the conditional RTD is also a constructive RTD that involves setting prices that are “too high” and that therefore discourage buyers, a price ceiling will have to be set to determine where liability begins and legitimate pricing ends.

<sup>10</sup> *Verizon Communications Inc. v. Trinko*, 540 U.S. 398, 414-15 (2004)

<sup>11</sup> Shapiro, *supra* n.3 at 13. Shapiro defines a vertical RTD as something that “arises when a dominant input supplier refuses to sell its input to downstream rivals.” *Id* at 1. That is the scenario depicted in Figure 1.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Id.* at 12.

Elhauge takes a position that is similar, though not identical, to Shapiro's. His proposed test for identifying harmful unilateral conduct by dominant firms does not condemn RTDs unless they discriminate against the defendant's rivals.<sup>14</sup> (A discriminatory RTD is a conditional RTD.) Therefore, Elhauge would agree that unconditional RTDs should never trigger liability under competition laws.

In any event, not everyone agrees that intervening against unconditional RTDs is a bad idea, as several major court decisions illustrate. A selection of those cases is discussed below in Part 3. Some economists are not particularly troubled by the idea, either, even though they acknowledge Shapiro's point about the difficulty of setting a price benchmark. Salop, for instance, is not deterred by the prospect of courts and agencies having to set what he calls "non-exclusion benchmarks," by which he means price ceilings that are just low enough not to constitute constructive RTDs or to harm competition. He reviews several possible ways to set the non-exclusion benchmark. Those are discussed in Part 2.2.3.3.

### Conditional RTDs

When dealing with conditional RTDs, the first logical step is to understand what conditions trigger the refusal. The next step would ordinarily be to determine why the dominant firm set those conditions. Even understanding just those two things may yield quite a bit of information about the competitive implications of the RTD. For example, a seller might refuse to supply any retailer who does not have a trained sales force. The reason might be that the relevant product is complex and would not be well understood by most customers unless they have professional help. On the other hand, a dominant firm might be willing to sell its product to any customer who does not also buy that product from the firm's rivals, but it refuses to sell to anyone who does business with its rivals. The first example appears to be competitively benign, or even pro-competitive. The second example might raise serious concerns.

Another useful step is to sort out cases in which the conditions discriminate against all downstream rivals but not downstream non-rivals from cases in which the conditions discriminate against some downstream rivals but not others. Consider an example of the first type of case: a vertically integrated leather producer, LB, also sells in the downstream market for rugby balls. LB is willing to sell leather to downstream firms that operate in markets unrelated to the rugby ball market, such as the leather jacket market, at price R. But the price LB charges other rugby ball manufacturers is higher than R. R has the potential to be a useful benchmark for the purpose of placing a price ceiling on LB's sales to other rugby ball manufacturers. But would consumers be better off in the long run if LB were not allowed to price discriminate between its downstream rivals and non-rivals?

Shapiro's answer is no, for two reasons.<sup>15</sup> First, he contends that the price charged to downstream firms in unrelated markets is not reliably connected to the price ceiling that should be put in place with regard to downstream rivals. Assuming that the ceiling is intended to be the price that a profit-maximising, unintegrated upstream monopolist would charge downstream rivals, there is no reason to expect that R would even be close to that price because an input monopolist who was not refusing to deal might nevertheless charge different prices to downstream firms operating in different markets. One has to consider that sales to downstream competitors create an opportunity cost to LB in the form of lost downstream profit margins. Second, if it were not allowed to discriminate between downstream rivals and non-rivals, LB might react by raising the price it charges in the unrelated downstream markets, thereby harming those customers. Or it might not. The expected effects are ambiguous.

Glazer agrees, pointing out that even if selling to non-rival customers is feasible and economical, that does not necessarily mean it is profitable to sell to rivals, nor that compulsory dealing would create good

<sup>14</sup> Einer Elhauge, "Defining Better Monopolization Standards," 56 Stanford Law Review 253 (2003).

<sup>15</sup> Shapiro, *supra* n.3 at 14.

incentives. Of course compulsory dealing can make consumers better off in the short run. But it may damage the incentive to invest and innovate, too, which will harm consumers in the long run.<sup>16</sup>

In the second type of case, which involves conditions that discriminate against some downstream rivals but not others, Shapiro observes that we can draw no guidance from economic theory. The effects of price discrimination on consumers and efficiency are indeterminate. Any attempt to reach a clear answer would require understanding why the integrated firm is treating some downstream rivals differently from others. Some of them might be more effective competitors than others, for instance, meaning that supplying some customers costs the integrated firm relatively more in terms of lost downstream sales than supplying the less effective rivals. “I am not aware of any reason in general to believe that such price differences harm customers,” Shapiro states. “Courts and enforcement agencies should be cautious in this area, since mandating uniform dealing runs the risk of adversely affecting risk-taking and innovation and may even lead to higher prices for at least some downstream firms.”<sup>17</sup> Shapiro is apparently reluctant to take enforcement action against *any* type of unilateral RTD in which it is a relevant fact that the defendant is vertically integrated.

There are types of conditional RTDs that do not necessarily involve vertically integrated firms, of course. One example involves a dominant firm that is willing to sell to any customer, provided that the customer does not do business with the dominant firm’s rivals. There is widespread agreement that this kind of RTD harms competition and ought to be unlawful because it does nothing for consumers while impeding rivals from getting a foothold in the market and being able to compete. Further exploration in that area would lead to the topic of exclusive dealing, which is not one of the subjects of this roundtable.

#### Detour: Setting Price Benchmarks

Why do some commentators contend that setting a price benchmark (or “ceiling”) is so difficult? Shapiro discusses three possible methods and finds all of them to be unsatisfactory. First, one could try to use the dominant firm’s internal transfer price as the price ceiling for external sales. (The transfer price is the price at which the input is transferred from the integrated firm’s upstream division to its downstream division.) But the transfer price has more to do with accounting methods and internal organisation than it does with an actual economic price being charged in an arm’s-length transaction. That makes the use of the internal transfer price as a true price benchmark or measure of cost problematic. Second, one could set the price ceiling equal to the monopoly price that an upstream firm would charge for its input – if that price were known. That price is not observed in practice and is not easy to calculate. Nevertheless, it could be done, but if the upstream monopolist engages in price discrimination, the problem would become harder. Finally, one could try to determine the price ceiling based on a short-term profit sacrifice theory. The price ceiling would be the lowest price at which a vertically integrated firm could sell the input but earn no less in the short term than it would have earned by refusing to deal. The reasoning behind that concept can be hard to understand, but the key point is that even if one understands what it is in principle, determining what that price ceiling should be in an actual case would probably be even harder.<sup>18</sup>

As mentioned above, Salop is less pessimistic than Shapiro about the possibility of setting benchmark prices. He discusses several possible approaches.<sup>19</sup> First, he dismisses the idea of setting the benchmark

<sup>16</sup> Kenneth Glazer, “Three Key Distinctions Under Section 2,” Testimony Before the Antitrust Modernization Commission (29 September 2005), at 5.

<sup>17</sup> Shapiro, *supra* n.3 at 14.

<sup>18</sup> Shapiro is “highly dubious that this price could be measured with any accuracy in practice, even if agreement in principle could be reached regarding the appropriate ‘short-term’ time frame.” *Id.* at 13.

<sup>19</sup> Steven Salop, “Avoiding Error in the Antitrust Analysis of Refusals to Deal,” Written Submission to the Antitrust Modernization Commission (21 September 2005), at pp. 7-11.

equal to the defendant's marginal cost of producing the input (except in limited circumstances that he does not address). He points out that the MC benchmark would deprive the defendant of being able to earn a return on its input sales that corresponds to the market power it has earned legitimately in that market. Furthermore, he observes, a price above MC may be necessary to maintain sufficient incentives for investment. Perhaps it goes without saying, but Salop does not mention one other problem, namely that MC is extremely difficult to calculate in practice.

Second, Salop makes the point that in cases where the RTD ends a history of dealing, the previous price is available as a potential non-exclusion benchmark. Similarly, if the RTD is conditional such that the defendant supplies some customers but not others, the price in the transactions that are completed could serve as the benchmark. Salop acknowledges that neither of those benchmarks would be perfect; conditions may change or differ across markets. He might have added that the defendant could have perfectly legitimate reasons for wanting to price discriminate among its customers and therefore that forcing it not to do so could be an ill-advised choice. Perhaps he intended that such mistakes would be avoided at the stage when objective justifications are considered.

Next, Salop turns to the task of setting a benchmark in cases where there was no prior dealing between the defendant and any other firm. He mentions the idea of using the price that a hypothetical, unintegrated upstream monopolist would charge if it had the same degree of (legitimately achieved) market power that the actual defendant has in the upstream market. This is basically the same as the second idea considered by Shapiro, who found it unsatisfactory on the whole.

Finally, Salop discusses the idea of setting the benchmark at whatever price level would maintain the profits of the integrated defendant. In other words, he means the price that would yield the same total upstream and downstream profit for the integrated firm that it would receive if by refusing to deal. Although Salop mentions these ideas almost casually, as if they would be easy to implement, Shapiro's sceptical view may be more appropriate. It may not be trivial to determine the price that will maintain the defendant's profits, for example. Data availability may be a problem and many other variables are likely to affect the analysis. Furthermore, from the point of view of businesses looking for safe harbours, these benchmarks will be undesirable as indicators of liability if they are not very easy to anticipate and calculate.

#### 2.2.4 *Essential Facilities*

A subset of RTD cases has evolved in some jurisdictions based on a concept called "essential facilities" (EF). The EF doctrine originated in commentary on United States case law and now has a variety of meanings, each concerning the mandatory provision of access to some resource or input for firms who would not otherwise have access. There must be two relevant markets for the EF concept to be applicable, usually one upstream and one downstream. Typically, one firm is active in both markets and other firms are active or wish to become active in the downstream market. When the downstream competitor wants to buy the input from the vertically integrated company but is refused, the EF doctrine defines certain conditions under which the integrated firm will be legally required to sell the input.

Although the EF doctrine arose from US case law, it has never been expressly embraced or rejected by the US Supreme Court. The leading EF case in the US is *MCI Communications Corp. v. AT&T*.<sup>20</sup> In that decision an appellate court identified four elements that are necessary to establish liability under the EF doctrine:

1. Control of the EF by a monopolist;

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<sup>20</sup> 708 F.2d 1081 (7th Cir. 1983).

2. a competitor's inability practically or reasonably to duplicate the EF;
3. the denial of the use of the EF to a competitor; and
4. the feasibility of providing the EF.<sup>21</sup>

In general, a facility is "essential" if competitors cannot compete without access to it. The second element, that duplication be impractical or unreasonable, cannot be satisfied merely by showing that access to the defendant's facility is more economical than alternatives. "As the word 'essential' indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible."<sup>22</sup> The third element, denial of access, may be an outright denial or a constructive denial, such as unreasonable rates or changes in service.<sup>23</sup> The fourth element is fact-intensive and there do not appear to be general standards for evaluating it.

An important characteristic of the EF doctrine, at least as it was defined in *MCI*, is that it does not require proof of harm to competition. It does not even require a likelihood of such harm. That observation has led more than one commentator to disparage the doctrine. Hovenkamp, for example, remarks that by failing to require proof of harm to competition, the EF doctrine "loses its mooring in §2 of the Sherman Act. It begins to operate as a 'fair access' statute that forces one set of private firms to accommodate another set even when competition is not improved. As a result the doctrine is either superfluous or else inconsistent with basic antitrust principles."<sup>24</sup>

Other commentators have found the EF doctrine to be superfluous, as well. Shapiro sees no economic distinction between the common RTD scenario represented in Figure 1 where the input is critical to downstream firms and cases involving an EF.<sup>25</sup> Pate has stated that "the notion that 'essential facilities' provides a stand-alone basis for liability is thoroughly discredited." At most, he continued, "the essential facilities doctrine is 'a label that may aid in the analysis of a monopoly claim, not a statement of a separate violation of law.'"<sup>26</sup> In *Trinko* (discussed below), even though the Supreme Court did not choose to reject the doctrine formally, it nearly did so, going so far as to cite approvingly certain articles that attack the doctrine.<sup>27</sup>

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<sup>21</sup> 708 F.2d at 1132-33.

<sup>22</sup> *Twin Laboratories v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990).

<sup>23</sup> See, e.g., *Laurel Sand & Gravel, Inc. v. CSX Transportation*, 924 F.2d 539, 544-45 (4<sup>th</sup> Cir. 1991) (holding that an unreasonable change in service or price can constitute denial of access to a facility).

<sup>24</sup> Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 310 (2d ed. 1999), cited in Alison Jones, "A Dominant Firm's Duty to Deal: EC and US Antitrust Law Compared," in *Handbook of Research in Transatlantic Antitrust* (Philip Marsden, ed. 2006) at n.197.

<sup>25</sup> Shapiro, *supra* n.3 at 7.

<sup>26</sup> R. Hewitt Pate, "Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts," Testimony Before the Antitrust Modernization Commission (29 September 2005), at 13 (quoting *Viacom International v. Time Inc.*, 785 F. Supp. 371, 376 n.12 (S.D.N.Y. 1992).

<sup>27</sup> See *Trinko*, 540 U.S. at 410-11 (citing Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 *Antitrust Law Journal* 841 (1989)). See also James Keyte, "The Changing Face of Class Action Litigation: The Class Action Fairness Act," 20 *Antitrust* 44, 45 (2005) (contending that in *Trinko*, the Supreme Court "did not kill the theory outright, but it strongly signaled that it would likely do so when the right opportunity arose").

The EF doctrine has come under fire in Europe, as well. As they have in the US, commentators have repeatedly criticised the EF doctrine and urged that its application be limited.<sup>28</sup> A familiar criticism is that the doctrine is simply unnecessary. Doherty, for example, observes that “attaching an ‘essential facilities’ label to a particular situation adds nothing to the legal analysis of the case: it is still necessary to show a breach of EC law.”<sup>29</sup> Furthermore, Judge Advocate General Jacobs of the ECJ dealt with the EF doctrine extensively in his *Bronner* opinion. He criticised it for three major reasons: it discourages investment, a competitive downstream market will regulate competition anyway, and giving broad application to the EF doctrine would be unworkable.<sup>30</sup>

Some observers, however, disagree with the criticisms levelled at the EF doctrine. Stothers, for examples, argues that AG Jacobs’ criticisms are “highly misleading.” With respect to the criticism that allowing access under the EF doctrine would discourage investment, Stothers asserts that as long as the dominant firm receives a competitive return for providing access, normal incentives to create the facility will remain. He adds that “this should have beneficial dynamic effects on the economy, by encouraging a distribution of resources not distorted by the charms of monopoly rents from ‘essential facilities.’”<sup>31</sup> Although Stothers’ is correct, of course, when he says that even normal returns provide an incentive to invest, AG Jacobs’ point seems to have been that when there is a possibility of earning monopoly-level returns, that incentive may be even stronger. Taking away any possibility of attaining monopoly returns would also removes some of the incentive to invest, innovate, and compete vigorously.

Moreover, by giving competitors the right to use facilities on competitive terms that they would otherwise have to pay a premium for (or not be able to use at all), the EF doctrine undermines the competitors’ incentives to circumvent the essential facility in the long run by technologically leaping past it. It is probably inaccurate to label all such investments in innovation “distortions of resources.” Stothers, however, views that as a misleading point, too: “The determination of dominance considers whether potential substitutes operate to control the market power of the firm owning the resource in the ‘relevant market.’ Therefore, refusal to supply will only constitute abuse if it is determined that there is not a sufficient possibility of such substitutes to prevent dominance.” But the determination of dominance involves a relatively short term perspective. AG Jacobs’ point seems to be that if everyone knows the dominant firm will be forced to share access to its facility, it is less likely that competitors will invest in developing substitutes even in the longer term – beyond the time horizon used in determining dominance. There are two reasons to expect that effect to occur: 1) Why would a competitor bother to invest in its own alternate facility when it can assume less risk and pay competitive rates to use one that someone else already built? 2) If the courts have signalled that they will apply the EF doctrine, then even if a firm does invest in innovation and successfully supplant the current technology, there will be no possibility of monopoly profits. The investment is therefore less attractive.

### 2.3 *Potential Standards and Tests for Evaluating RTDs*

This section describes a number of standards and tests that may be used to help determine whether an RTD should be considered an abuse of dominance or not.

<sup>28</sup> E.g., Alan Overd & Bill Bishop, “Essential Facilities: The Rising Tide,” 4 European Competition Law Review 183 (1998); Derek Ridyard, “Essential Facilities and the Obligation to Supply Competitors,” 8 European Competition Law Review 438 (1996).

<sup>29</sup> Barry Doherty, “Just What Are Essential Facilities?” 38 Common Market Law Review 397, 404-05 (2001).

<sup>30</sup> Case 7/97, *Oscar Bronner v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791, [1999] 4 CMLR 112, paras. 57-58, 69.

<sup>31</sup> Christopher Stothers, “Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union,” [2001] European Competition Law Review 256, 260.

### 2.3.1 *Absolute Right to RTD (Per Se Legality).*

There is a school of thought that believes sellers should always have the right to choose the parties with whom they will and will not deal. In fact, a version of that principle can be found in English common law decisions dating from medieval times and American courts continue to include it in their decisions. But while US courts have always tempered that principle with exceptions and jurisdictions such as the EU historically adopted the premise that dominant firms actually have a responsibility to deal, the view that unilateral RTDs should never be a basis of liability under competition law is still occasionally aired.

For a number of years it appeared that there might be a sound theoretical basis for a rule that all RTDs by vertically integrated monopolists should be considered legal per se. The work of economist Joseph Spengler showed that consumers were made no worse off – and might even be made better off – when a vertically integrated firm that already has a monopoly in at least one of its markets acquires a monopoly in an adjacent upstream or downstream market.<sup>32</sup> This “single monopoly profit” theory implied that RTDs in such situations must be efficient because the refusing firm would have already been extracting all the monopoly profit it could get by virtue of its first monopoly, so its RTD must have served some purpose other than increasing monopoly power.

Salop is among those who are against a rule of per se legality for RTDs. He argues that adopting that rule would excuse other conduct that can also be characterised as an RTD but that is clearly not and should not be per se legal (such as tying).<sup>33</sup> Furthermore, Salop points out that economists have learned that Spengler’s single monopoly profit theory is applicable only under “a number of strong and limiting theoretical conditions that do not apply to most real world markets.”<sup>34</sup> Stated in the negative, the theory does not hold if any of the following conditions apply:

- *The input market is regulated but the output market is unregulated.* The integrated firm might refuse to sell the input at the regulated price in order to be able to extract monopoly profits in the unregulated output market.
- *There is a modest amount of actual or potential competition in the input market, i.e., the integrated firm does not have monopoly power in the input market.* If the integrated firm is “merely” dominant or it is part of an oligopoly in the input market, instead of being a monopolist, then refusing to deal with unintegrated rivals may soften up competition in the input market. In other words, the refusing firm may be trying to let its upstream rivals win business without having to price as competitively as they did without the RTD in place. The resulting “umbrella pricing” effect in the input market may lead to higher prices in the output market (in which the refusing firm also participates). Alternatively, if there is only potential competition in the input market, the defendant may use an RTD to raise entry barriers into that market so as to protect its dominance. What Salop seems to be saying is that the upstream monopolist could simply refuse to supply any other downstream companies. Without that input supply, those other companies would have to exit the market, thus leaving potential upstream entrants without any downstream customers to serve. The dominant firm would therefore force potential upstream entrants either to give up their entry plans or to enter both the upstream and downstream markets.

<sup>32</sup> Joseph Spengler, “Vertical Integration and Antitrust Policy,” 68 *Journal of Political Economy* 347 (1950).

<sup>33</sup> Steven Salop, Opening Statement to the US Antitrust Modernization Commission (29 September 2005), available at [www.amc.gov/commission\\_hearings/pdf/Salop\\_Opening\\_Statement.pdf](http://www.amc.gov/commission_hearings/pdf/Salop_Opening_Statement.pdf).

<sup>34</sup> Salop, *supra* n.19 at 3.

- *The integrated firm actually or potentially competes with the victim of the RTD (or with its customers or partners) in a related market.* This is a tying or bundling situation. The integrated firm refuses to sell the tying good to actual and potential competitors in the tied good market as part of an effort to achieve or maintain market power in that market.
- *The defendant cannot price discriminate.* If the integrated firm cannot price discriminate against its unintegrated competitors because of limitations such as regulation or the potential for *arbitrage*, then the integrated firm may use RTDs as a next-best strategy. That may bring about higher prices and consequently harm consumers.
- *The production technology does not use all inputs in fixed proportions.* Unlike the other factors, the possibility of varying the proportions of inputs used in production is not by itself a primary incentive to implement anticompetitive RTDs. It does, however, mean that if an *anticompetitive* RTD (or other strategy) is used to undermine competition in the downstream market, the single monopoly profit theory will not apply and thus there will be some harm to consumers.<sup>35</sup>

### 2.3.2 *Per Se Illegality*

This rule would impose an absolute, unconditional duty to deal on dominant firms. To make any sense from a practical standpoint, the duty would have to be accompanied by guidance on pricing and other terms of trade. For example, the duty might require dominant firms to sell at their average variable cost, or at some well-defined cost-plus price. Furthermore, there would have to be provisions for oversight by a court, agency, or regulatory body. A *per se* illegality standard would be likely to lessen firms' incentives to invest and innovate.

### 2.3.3 *Profit Sacrifice Test*

The profit sacrifice ("PS") test holds that when a dominant firm engages in conduct requiring it to forego short run profit, the conduct should be deemed unlawful if it would be irrational without its tendency to eliminate or reduce competition in the longer run. On its surface, at least, the test has some appeal because it seems to distinguish deliberately harmful conduct from healthy responses to competition. The PS test was discussed extensively in a previous Note. It is therefore addressed more briefly here.<sup>36</sup>

In the RTD context, the PS test asks whether the dominant firm's refusal to supply causes it to absorb a short run profit sacrifice that can be rationalised only if the RTD also tends to eliminate or reduce competition in the longer run. If that is the case, then according to the test the RTD should be considered unlawful.

On first inspection it may seem that the PS test is over-inclusive in the RTD context because it would apparently condemn every RTD by a dominant firm. After all, a firm clearly sacrifices profit when it refuses to deal . . . doesn't it? This notion will not trouble those who believe that RTD analysis ought to begin with the presumption that dominant firms have a duty to supply and that they should be allowed to do so only when they have an objective justification. For others, the seemingly wide reach of the PS test may be more disturbing, especially in instances where a vertically integrated defendant refuses to deal simply because it wants to keep as much downstream business for itself as it can. That is, the firm is not necessarily striving to eliminate downstream competition; it simply wants to supply no one other than itself

<sup>35</sup> The reason is that when only the upstream (input) market is monopolised, downstream firms can react by altering their input mix so as to minimise the amount of the monopolised good that they use in production.

<sup>36</sup> OECD, Competition on the Merits, Background Note, DAF/COMP(2005)17 (June 2005).

and not be forced to assist others who would then be better able to sell their own products in the downstream market. This is one of the more interesting policy scenarios with respect to RTDs. Should RTDs be unlawful in that situation?

As it turns out, the PS test has fairly clear implications – in theory, at least – for all scenarios in which a vertically integrated firm that is dominant in an upstream market decides not to supply its downstream rivals (and potential rivals). To apply the test properly, one has to take into account that an integrated firm loses downstream revenue every time it enables a downstream rival to make a sale by supplying it with the necessary input in the upstream market. Accordingly, if the opportunity cost to the integrated firm of the downstream sales it will lose by supplying rivals with the necessary input outweighs the gains from selling that input to them in the upstream market, then the RTD does not actually cause a short run profit sacrifice and the PS test indicates no liability.<sup>37</sup> Incidentally, that remains true even if the dominant firm has anticompetitive intent.

One weakness of the PS test regarding RTDs is that it does not necessarily capture opportunistic behaviour, such as encouraging other firms to interconnect or interoperate with one's network just until a dominant position is obtained and then imposing less favourable terms of dealing. That scenario is discussed in further detail in Part 2.3.8. There is no reason why such behaviour requires a profit sacrifice by the dominant firm. Actually, the temptation to behave opportunistically is probably strongest when a dominant firm finds it profitable to change the terms of dealing once it becomes dominant.

#### 2.3.4 No Economic Sense Test

The no economic sense (“NES”) test holds that conduct should be unlawful only if it makes no economic sense apart from its tendency to eliminate or lessen competition. It differs from the PS test in that profit sacrifice is neither a necessary nor a sufficient condition for failing the NES test. It therefore avoids the two major criticisms levelled at the PS test. The NES test is supported by the U.S. Department of Justice, which advocated its use in several cases brought under section 2 of the Sherman Act in recent years.<sup>38</sup> In 2005, former Assistant Attorney General Pate testified before the US Antitrust Modernisation Commission that the NES test is the correct standard for analysing RTD cases.<sup>39</sup>

In the RTD context, the NES test essentially asks whether the dominant firm's refusal to supply makes economic or business sense apart from its tendency to harm competition. If it does, then according to the test the RTD should not be considered unlawful. To be clear, liability under the NES test requires proof of four elements:

the defendant has market power in the input market;

<sup>37</sup> Presumably the test would incorporate the downstream prices that would apply if the rivals remained in the market, since otherwise the test would allow the refusing firm to benefit from a reduction in competition. Salop agrees with this view. Salop, *supra* n.19 at 13.

<sup>38</sup> See, e.g., Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, *Verizon Communications Inc. v. Trinko*, 540 U.S. 398 (2004), available at [www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682.mer.ami.pdf](http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682.mer.ami.pdf); Brief of the Appellees United States and the States Plaintiffs at 48, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), available at [www.usdoj.gov/atr/cases/f7200/7230.htm](http://www.usdoj.gov/atr/cases/f7200/7230.htm); Brief for the United States at 26 (redacted version), *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005), available at [www.usdoj.gov/atr/cases/f202100/202141.htm](http://www.usdoj.gov/atr/cases/f202100/202141.htm).

<sup>39</sup> The NES test was discussed at length in a previous Note. OECD, Competition on the Merits, Background Note, DAF/COMP(2005)17 (June 2005).

the defendant actually or constructively refuses to sell that input;

there is no economic rationale for the refusal, other than its tendency to maintain, strengthen or acquire market power; and

the defendant maintains, strengthens or acquires market power as a result of the RTD.<sup>40</sup>

Like the PS test, the NES test has fairly clear theoretical implications for scenarios in which a vertically integrated firm that is dominant in an upstream market decides not to supply its downstream rivals (and potential rivals). If the opportunity cost to the integrated firm of the downstream sales it will lose if it supplies rivals with the necessary input outweighs the gains from selling that input to them in the upstream market, then the RTD makes business sense and the test indicates no liability. Again, that is the case even if the dominant firm has anticompetitive intent.

Salop – a critic of the PS and NES tests – observes that comparing the downstream opportunity cost against upstream profits is easy only when the products sold by the integrated firm and its unintegrated competitor are identical and consumer demand is not price sensitive.<sup>41</sup> When those conditions are present, if the integrated firm refuses to provide X units of the input to its competitor, then it will be able to sell X more units of its own product to consumers. The analysis becomes more complicated, though, if the products are differentiated and consumer demand is sensitive to prices. The one-to-one substitution effect disappears. It is certainly possible that as a result of the RTD some consumers would react by buying more from the dominant firm’s downstream division. But others might switch to a third supplier. To use the PS or NES tests in that situation, the substitution effect would have to be estimated, which in Salop’s words “is not an easy task.”<sup>42</sup>

### 2.3.5 *Equally Efficient Firm Test.*

The equally efficient firm (“EEF”) test aims to identify dominant firm conduct that harms competition by asking whether the conduct would be likely to exclude rivals that are at least as efficient as the dominant firm is. If the answer is that EEFs would probably be excluded, then the conduct is considered harmful to competition. Otherwise, the conduct is considered lawful. This test avoids the pitfall of protecting competitors rather than competition because, under competitive conditions, a market will be served only by the most efficient firms. Therefore, it is not considered harmful for less efficient firms to be eliminated.<sup>43</sup>

In the RTD context, the EEF test asks whether the dominant firm’s refusal to supply would be likely to exclude an equally efficient competitor. If it would, then according to the test the RTD should be considered unlawful. In other words, the EEF test permits RTDs that eliminate rivals that are less efficient than the dominant firm. The dilemma that necessarily comes with this test is, “What does ‘equally efficient’ mean?” If the defendant is vertically integrated, does EEF mean a firm that is equally efficient only in the downstream market, or equally efficient in both the upstream and downstream markets (*i.e.*, vertically integrated)? The former standard would make the test much harder for defendants to pass. Furthermore, can one choose a hypothetical EEF that is equally efficient at some level of output (say, for

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<sup>40</sup> US Antitrust Modernization Commission, *supra* n.7 at 103.

<sup>41</sup> Salop, *supra* n.19 at 13.

<sup>42</sup> *Id.* at 13. Salop also offers more complex criticisms of the PS and NES tests in the RTD context. *See id.* at 14-16.

<sup>43</sup> The EEF test was also discussed at length in a previous Note. OECD, Competition on the Merits, Background Note, DAF/COMP(2005)17 (June 2005).

example, the low levels at which new entrants are likely to operate) but not every level, or must the EEF be equally efficient when operating at the defendant's scale? Again, the former standard would make the test much harder for defendants to pass.

### 2.3.6 *Consumer Welfare Balancing Test.*

The consumer welfare ("CW") test in its most general form holds that conduct is not unlawful unless there is a tendency for it to reduce consumer welfare by raising prices and lowering output. The test has intuitive appeal because, unlike tests that rely on other factors such as profit sacrifice to predict welfare effects, the CW test is directly connected to promoting consumer welfare. When a dominant firm's conduct reduces welfare without contributing to any increase in the firm's efficiency, this test is relatively easy to apply. The harder case, of course, is when the firm's conduct has the potential both to reduce CW and to enhance the defendant's efficiency.<sup>44</sup>

In the context of RTDs where the defendant has market power in a market for an input used by the firm's rivals, the CW test requires a determination of whether the defendant's RTD (actual or constructive) would result in above-normal prices in any market. To justify a finding of liability, it would have to be shown that the rivals were willing to pay a sufficient price for the input. A sufficient price is a price high enough to justify an inference that the RTD at that price was anti-competitive. If the rival was (or rivals were) willing to pay a sufficient price, then the defendant has the burden to show that the RTD was necessary to create efficiencies, and that those efficiencies outweighed the RTD's harmful effects.<sup>45</sup>

The main problem with this test is that welfare balancing is hard to do well. It is doubtful that either competition agencies or courts could reliably, consistently quantify the anticipated effects of conduct that both enhances efficiency and reduces consumer welfare. If courts would be unlikely to know the exact numbers involved but instead would engage in a rough balancing of effects, then the process will be prone to subjective impressions and reasoning, which will make it less predictable. Gavil believes that comparing changes in CW with changes in firms' production efficiency is to compare apples with oranges. It is not clear, he argues, that there is a one-to-one tradeoff between the two.<sup>46</sup>

### 2.3.7 *Anticompetitive Intent*

Proponents of using intent evidence in abuse of dominance cases tend to support their position by pointing out that business managers, not government agencies or judges, are in the best position to determine whether their conduct is likely to eliminate competition. Since these managers are knowledgeable, rational actors, any evidence showing that they intended to harm a competitor or even competition itself is more reliable than guesswork by outsiders about whether such results are likely.

The idea of using general evidence of anticompetitive intent as a means of distinguishing legitimate, pro-competitive conduct from conduct that harms consumers, however, does not enjoy a great deal of respect among economists. That is not to say that there is no value at all in intent evidence; if it is specific enough it can help to establish that anticompetitive effects are likely. The comments of Carl Shapiro are typical:

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<sup>44</sup> This test was also discussed extensively in a previous Note. OECD, Competition on the Merits, Background Note, DAF/COMP(2005)17 (June 2005). One other test – Einer Elhauge's efficiency test – is discussed thoroughly there, as well. It is relatively complex and therefore is not addressed here.

<sup>45</sup> Salop, *supra* n.19 at 2, 5-7.

<sup>46</sup> Andrew Gavil, "Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance," 72 *Antitrust Law Journal* 3, 71-72 (2004).

[T]he central antitrust question in the area of exclusionary conduct is whether that conduct is likely to harm customers. In other words, we are concerned about the likely effects of the conduct in question. Evidence regarding *intent* is only relevant to the extent that it is informative regarding likely effects. Evidence that executives at a dominant firm were attempting to “beat the competition,” “dominate the market,” or even “kill the competition” is typically not very informative in distinguishing legitimate competition from exclusionary conduct . . . . On the other hand, executives are likely to understand the actual operation of markets in which they operate far better than judges or juries, so their more specific language regarding aims, such as “weakening competitor X by denying it access to customers” may be highly informative regarding the likely effects on competition and customers.<sup>47</sup>

Lawyers and even judges have joined sometimes share the view that general intent evidence, with nothing more, is not very informative. Glazer, paraphrasing US Supreme Court Justice John Paul Stevens, writes that “it is far too late in the history of antitrust jurisprudence to be shocked at a firm that wants to have the market to itself.”<sup>48</sup>

Furthermore, if the presence of anticompetitive intent is an element of the test for abuse of dominance, then an absence of proof of such intent would suggest that the defendant should be exonerated. That could lead to undesirable outcomes for competition and consumer welfare because a forward-thinking company might successfully abuse its dominance without leaving any evidence of its intent to do so.<sup>49</sup>

### 2.3.8 *History of Dealing.*

There are arguments for and against the relevance of this factor. It refers to whether the dominant firm is refusing to deal with customers it previously supplied or customers it never supplied. If there is a history of dealing between the dominant firm and the target(s) of its RTD, and if the target(s) made relationship-specific investments such as advertising a product that can be made only with the upstream product, then the RTD tends to cause more harm because it destroys the value of those investments. Furthermore, the fact that the upstream firm had been willing to sell to the customer(s) provides some evidence that, at least during that period, it was profitable to do so. Unless conditions changed in a way that made selling on the previous terms unprofitable, the RTD may fail the PS and/or NES tests.

A key part of this factor is determining whether there have been any changes that justify the RTD. If the dominant firm’s costs have increased for some reason, or if it has improved its product somehow, a higher price could be justified even though it might initially seem like a constructive RTD. If the RTD is part of a new business strategy, though, difficult questions can arise. For example, what if a vertically integrated firm decides that it should raise its price to downstream rivals because the current price does not take into account the opportunity cost of lost downstream sales?<sup>50</sup> If this change is simply the result of

<sup>47</sup> Shapiro, *supra* n.3 at 4-5 (emphasis in original).

<sup>48</sup> Glazer, *supra* n.16 at 5; *see also* *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989) (Easterbrook, J.) (“Almost all evidence bearing on ‘intent’ tends to show both greed-driven desire to succeed and glee at a rival’s predicament. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one’s rivals is entirely consistent with, often is the motive behind, competition.”).

<sup>49</sup> *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1<sup>st</sup> Cir. 1983) (Breyer, J.) (noting that under an intent-based test, firms might refrain from describing the motives and consequences of their actions, thereby thwarting the test).

<sup>50</sup> This example is discussed in Shapiro, *supra* n.3 at 15.

recognising that the old price measured economic cost incorrectly, then one could argue that fixing that error should not be deemed anti-competitive, even though the higher input price be passed on to the final customers. Whether such an error is the real reason for the price increase or just a pretext could be very difficult to prove one way or the other.

One of the few scenarios in which Shapiro is less apprehensive about imposing antitrust liability for unilateral RTDs involves installed base opportunism.<sup>51</sup> This can occur in network effects markets when a firm achieves a dominant position in part by implementing “open” policies that encourage cooperation by complementary firms. Once the complementary firms have committed, the dominant firm can exploit that commitment by imposing less favorable interconnection terms or refusing to interconnect at all. Shapiro notes that it is common in the computer industry for firms that operate “platforms” to welcome firms with complementary products even if those firms also sell products that are directly competitive with some of the first firm’s products. That kind of “openness” can be vital for building a platform’s initial success. But if the firm becomes dominant it may be tempted to stop being so cooperative.

Shapiro has two reasons for being less concerned about prosecuting installed base opportunism cases.<sup>52</sup> First, unlike the right to keep the fruits of one’s investment to oneself or to change the terms of dealing for legitimate economic reasons, the right to engage in opportunistic RTDs is not necessary to encourage innovation. In fact, the fear of being subjected to opportunism can blunt other firms’ incentives to make investments. Second, there will always be a set of selling terms that applied in the past, and those can be used when imposing a duty to deal. Although he acknowledges that difficulties may remain because there may have been some changes in economic conditions, Shapiro finds it significant that there was “a relevant, real-world benchmark based on prior dealing[.]” Interestingly, this second reason seems to apply in every RTD case involving a prior course of dealing, but Shapiro’s willingness to take action increases only when the defendant has behaved opportunistically.

On the other hand, imposing a general duty to continue supplying other firms once they become customers may make upstream firms reluctant to begin selling their input to downstream rivals in the first place. That, in turn, would slow capacity expansion and the development of new products and services, which would also harm consumers. Elhauge agrees that such a duty would be undesirable because it would discourage dominant firms from ever dealing with their rivals, thereby “encouraging precisely the sort of discrimination against rivals that is least necessary to further ex ante incentives for investment.”<sup>53</sup> Glazer adds that a duty to continue cooperating with rivals could harm consumers in a more fundamental way: by facilitating collusion.<sup>54</sup>

Even if a court or agency is not comfortable with using a history of dealing as a basis of liability, if there is enough other evidence to support a liability finding then one could argue that the history of dealing might still help to determine a price ceiling (if one is going to be imposed). The price that the dominant firm had previously charged is an obvious candidate. But requiring firms to continue dealing with their

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<sup>51</sup> *Id.* at 16.

<sup>52</sup> *Id.* at 16.

<sup>53</sup> Einer Elhauge, “Defining Better Monopolization Standards,” 56 *Stanford Law Review* 253, 314 (2003). *See also* Glazer, *supra* n.16 at 4 (contending that a duty to continue a course of dealing “sets up a perverse incentive in which a monopolist is better off never starting down the road of cooperation at all, lest it find itself stuck forever in a bad marriage”); Eleanor Fox, “Is There Life in *Aspen* After *Trinko*? The Silent Revolution of Section 2 of the Sherman Act,” 73 *Antitrust Law Journal* 153, 160 (2005) (“Monopoly firms would hesitate to cooperate in the first instance; the law would put a premium on old ways of doing things”).

<sup>54</sup> Glazer, *supra* n.16 at 5.

rivals on unchanging terms is not practical in a dynamic world. Some flexibility will have to be permitted so that the seller's cost changes and any improvements in quality that it makes can be taken into account. Nevertheless, the former price could at least provide a rough idea of what an appropriate price might be, whereas no such clues are available when there is no history of dealing.

### 2.3.9 *Objective Justifications*

This topic is related to intent, in a sense, but objective justifications are used to exonerate defendants rather than to prove their liability. In the RTD context, an objective justification is essentially a special circumstance that excuses an otherwise unlawful refusal. No matter what test or standard has been used to determine that the RTD should be unlawful, the analysis will be incomplete unless it considers any plausible objective justifications because there are sometimes valid, even pro-competitive reasons why dominant firms refuse to deal.

Typically, the burden of establishing an objective justification falls on the defendant. To make its case, the company has to show that its RTD was necessary or at least rational for some reason other than bringing about harm to competition. Therefore, it should be able to show that it would have refused to deal even if doing so would not have harmed competition. If the company makes that showing, even critics of anticompetitive intent evidence would probably agree that it is appropriate for a competition agency to use any such evidence it has to rebut the proffered justification.

For example, a downstream buyer may have a history of doing substandard work and therefore may damage the upstream supplier's reputation if the downstream firm is allowed to use that supplier's product in its own product or service. Alternatively, a manufacturer might need to impose a quota system to ration supplies of a vital medicine or some other product that is critical to public health or safety. Putting aside questions about whether the quota system is improperly biased in some way, once a party's quota is filled the manufacturer could be justified in refusing to sell further supplies to that party. There are many other examples of potentially legitimate, objective justifications, a few of which are listed here:

- The dominant firm experiences cost increases or it makes product improvements that justify higher prices, even though those price increases might initially seem like a constructive RTD.
- A vertically integrated firm might find that selling its upstream input to other firms might be infeasible for some reason, such as that the integrated firm lacks adequate capacity or it is too expensive to adjust the design or production of the input to meet the demands of the buyers.
- The buyer has failed to pay for goods it has received from the dominant firm in the past, so the latter is unwilling to sell or to extend credit to the buyer again.

## 3. **Development of the Law on Unilateral Refusals to Deal**

This section traces the development of the case law on RTDs in two major jurisdictions, the EU and the US. Both jurisdictions have a rich body of case law and a rather clear trend in the stance that their courts have taken toward RTDs. There is also a discussion of two relatively recent cases from other jurisdictions. The approaches and outcomes in those cases are compared with what likely would have happened if the cases had been brought in the EU or US.

### 3.1 *European Union*

Because Article 82 is part of the EC Treaty, it has been interpreted in light of the Treaty's broad objectives. Of course Article 82 and legal decisions based on it are concerned with conduct that harms consumers, but sometimes the decisions have given other considerations equal or even more attention. For example, some major decisions have expressed concern about dominant firm conduct that manipulates or stops the flow of commerce between EU Member States, conduct that impedes access to markets and, at least in early cases, conduct that harms smaller firms.<sup>55</sup> Collectively, recent Article 82 cases still have not consistently required that anticompetitive effects be shown.<sup>56</sup> As we will soon see, though, the RTD cases in that group are exceptions.

The baseline presumption in Europe has traditionally been that dominant firms have a general duty to supply. The word "general" is important, though; the presumption was never so strong as to create an unconditional duty to deal.<sup>57</sup> In any event, the European Court of Justice's 1998 *Bronner* decision seems to have eliminated that general duty or at least to have weakened it. *Bronner* and other recent cases like *Magill* and *IMS* have tipped the balance in favour of dominant firms who refuse to deal. But to gain some perspective on the Court's current position, it is necessary to begin with the more aggressive approach used in earlier cases.

The first RTD case decided by the ECJ was *Commercial Solvents Corporation v. Commission*.<sup>58</sup> The defendant, a dominant firm in the market for aminobutanol, had cut off its supply of that chemical to a small Italian firm, which used it to produce a certain ethambutol-based drug. The defendant said its motive for the RTD was that it had decided to enter the market for producing that drug itself and that it was no longer able to supply aminobutanol. Finding in favour of the Commission, the ECJ ruled that the evidence did not support Commercial Solvents' contention that it was unable to continue supplying other firms. The Court also ruled that a dominant upstream firm could not eliminate competition from its former customers, which "would amount to eliminating one of the principal manufacturers of ethambutol in the Common Market," just because it had decided to enter their market.<sup>59</sup> That part of the ruling implies that the Court was focusing more on harm to a competitor than on harm to competition, thereby setting a lower threshold for liability. This passage confirms it:

[A]n undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is in itself a manufacturer of these derivatives, and therefore risks eliminating all competition *on the part of this customer*, is abusing its dominant position.<sup>60</sup>

It is also noteworthy that the Court did not consider any efficiencies that the defendant's vertical integration might have caused.

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<sup>55</sup> See Case C-27/76 *United Brands v. Commission* [1978] ECR 207, [1978] 1 CMLR 429; Cases 6 & 7/73 *Commercial Solvents Corp v. Commission* [1974] ECR 223, [1974] 1 CMLR 309.

<sup>56</sup> OECD, Competition on the Merits, Background Note, DAF/COMP(2005)17 (June 2005).

<sup>57</sup> Jones, *supra* n.24 at 245-46.

<sup>58</sup> Cases 6 and 7/73, [1974] ECR 223, [1974] 1 CMLR 309.

<sup>59</sup> *Id.* at para. 25.

<sup>60</sup> *Id.* at para. 25 (emphasis added).

The next major ECJ decision involving an RTD was *United Brands v. Commission*.<sup>61</sup> The conditional RTD in *United Brands* was not imposed directly on a competitor of the defendant, but rather on a customer who had cooperated with one of the defendant's competitors. Specifically, United Brands ("UB") cut off its supply of Chiquita bananas to a Danish distributor because the distributor had participated in an advertising campaign with one of UB's rivals. As a result of that participation, the distributor sold fewer of UB's Chiquita bananas. Although this conduct is a form of exclusive dealing and therefore beyond the intended scope of this Note, it is useful to study the Court's reasoning and to compare it with the analysis it used in subsequent cases.

The European Commission decided that UB's conduct was an abuse of a dominant position. The ECJ agreed on the basis that the RTD "would limit markets to the prejudice of consumers" and would "discourage its other []distributors from supporting the advertising of other brand names and that the deterrent effect of the [RTD] imposed upon one of them would make its position of strength on the relevant market that much more effective."<sup>62</sup> The ECJ also ruled that a dominant firm could not discontinue a lengthy course of dealing with a customer who adheres to regular commercial practices. To cut off supply under such circumstances would be a discriminatory act that could eliminate a firm from the relevant market.<sup>63</sup> Furthermore, while it noted that even dominant firms have the right to protect their commercial interests, the Court also limited that right, stating that a dominant firm's conduct must be "proportionate" to the threat and it must not be carried out for the purpose of strengthening or abusing its dominant position.

The Court in *United Brands* was at least somewhat mindful of the conduct's potential effects on competition (as opposed to its potential effects on competitors). Nevertheless, it did not explain in much detail what the specific effects would be or how they would come about, nor did it require a showing that they had actually occurred or were likely to occur.<sup>64</sup> The right of a dominant firm to protect itself was also described rather vaguely. "Proportionate" is a subjective and therefore unpredictable standard, and the firm's intent was given more importance than the conduct's actual effects. Furthermore, one might wonder about the wisdom of discouraging dominant firms from trying to strengthen their positions. But *United Brands* is now nearly 30 years old and some of the Court's views have changed.

Although the next major case involved intellectual property, it is included here because its influence may have spread – or may eventually spread – beyond cases involving refusals to license IP. In 1995's *Magill*, three television broadcasters had used the copyrights they held over their TV program schedules to prevent the publisher of a weekly program guide from listing their programs. At the time, there was no other weekly TV program guide covering all three stations available in the relevant market. The ECJ took a much more sceptical view of RTD claims than it had taken in either *Commercial Solvents* or *United Brands*, most likely because it was concerned about giving proper deference to IPRs. The Court ruled that an RTD could be an abuse only under "exceptional circumstances" satisfying three conditions: i) the product to which the refusal to supply relates is an indispensable input required for the marketing of a new product; ii) there is no justification for such refusal; and iii) the dominant company reserves for itself the secondary downstream market. In reviewing the elements of an unlawful RTD, the Court actually added a

<sup>61</sup> [1978] ECR 207, [1978] 1 CMLR 429.

<sup>62</sup> *Id.* at paras. 183, 192.

<sup>63</sup> *Id.* at paras. 182-183.

<sup>64</sup> Jones points out that there did not seem to be any intention on the defendant's part to stop its distributors from carrying rival goods. Instead, the RTD was seemingly designed to discourage further participation in rivals' advertising programs. She therefore concludes that the Court's analysis should have concentrated on whether and to what extent the RTD raised UB's rivals' costs or reduced their access to the market. Jones, *supra* n.24 at 247 n.103.

new one (that the input be required for marketing a new product) and ratcheted up the *Commercial Solvents* element (that the RTD “risks eliminating all competition on the part of this customer”) into a tougher standard (that the RTD not only eliminates all competition from the customer, but that the defendant has a monopoly over the downstream market). Despite the stiffer requirements, the Court found that they were all met in *Magill* and, accordingly, ordered compulsory licensing.<sup>65</sup>

In 1998, *Oscar Bronner v. Mediaprint*<sup>66</sup> confirmed that the ECJ’s views on RTDs had shifted even in non-IPR cases. Like *Magill*, *Bronner* set a higher bar for liability than either *Commercial Solvents* or *United Brands* did. Bronner published a regional Austrian newspaper and wanted access to the home distribution system of a larger national newspaper publisher. The larger firm, which had a dominant share of the daily newspaper market, refused Bronner’s request. The ECJ held that, to be unlawful, the RTD had to i) relate to a product or service that is indispensable to the business of the firm requesting access, there being no actual or potential substitute; ii) eliminate all competition from the firm requesting access; and iii) be incapable of objective justification.<sup>67</sup>

The Court made it clear that the “indispensability” element would not be satisfied merely by showing it would not be economically viable for the firm requesting access to create a duplicate facility. Instead, it would at least have to be shown that it was not economically viable for a firm in a position similar to the *defendant’s* (not the victim’s) to create the facility. Interestingly, *Bronner* uses the old *Commercial Solvents* version of the “eliminate competition” element (the RTD must eliminate competition from the victim) rather than the newer, more selective *Magill* version (the RTD must eliminate all competition in the secondary market). The Court decided that it did not need to rule yet on whether *Magill* would be applicable in non-IPR cases because the *Bronner* facts did not even meet the lighter *Commercial Solvents* standard, let alone the *Magill* standard. The Court reasoned that competition from Bronner would not be eliminated because several substitutes for Mediaprint’s delivery service were available, including postal delivery and newspapers kiosks. Furthermore, there were no technical, legal, or economic obstacles preventing Bronner from setting up its own home delivery system or making it unreasonably difficult to do so. The Court therefore ruled in favour of the defendant.<sup>68</sup>

What may strike one as strange about *Bronner* is that it conflates the determination of dominance with standards for finding an abuse. First, the indispensability requirement, which expressly requires that there be no actual or potential substitutes, is simply a reconsideration of the factors involved in finding that the defendant is dominant. Granted, the bar is raised to the level of monopoly rather than dominance, but the point is that the element is about market power, not abusive conduct. Second, the “eliminate all competition from the victim” requirement is just another way of asking whether the victim could compete without access to the defendant’s input.<sup>69</sup> In other words, it is just another way of asking whether any substitutes are available.

Writing separately, the Judge Advocate General Jacobs took the opportunity to make several points that seem to have been heeded by the full Court. First, he stated that “the right to choose one’s trading partners and freely to dispose of one’s property . . . [are] generally recognised principles in the law of the Member States, in some cases with constitutional status.”<sup>70</sup> Interestingly, those principles sound more like

<sup>65</sup> *Magill*, Joined Cases C-241 & 242/91P, [1995] E.C.R. I-743, 4 C.M.L.R. 718, 799-800.

<sup>66</sup> Case 7/97, *Oscar Bronner v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791, [1999] 4 CMLR 112.

<sup>67</sup> *Id.* at para. 41.

<sup>68</sup> *Id.* at paras. 43-46.

<sup>69</sup> Stothers, *supra* n.31 at 259.

<sup>70</sup> *Bronner*, [1998] ECR I-7791 at para. 56.

the presumption that applies under US case law than the traditional European presumption that dominant firms have a general duty to supply. In addition, Judge Advocate General Jacobs stated that the incentives for dominant firms and their competitors to invest in efficient facilities should not be weakened by allowing competitors to share them whenever they ask.<sup>71</sup>

Most recently, the ECJ confirmed in another copyright case that a dominant firm's refusal to grant a license may be unlawful in certain circumstances. In 2004's *IMS* decision, the Court held:

It is clear from the case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition in a secondary market.<sup>72</sup>

Those are the same requirements that applied in *Magill*.

This time the Court explained what it meant by a "secondary market." The term does not refer to a separate antitrust market. Rather, it is sufficient that two different, interconnected stages of production could be identified where the upstream product was a necessary input for a downstream product that the competitor sought to produce and supply. The requirement that the refusal to license must exclude *any* competition in the so-called secondary market nevertheless seems to be a substantial tightening of the old *Commercial Solvents* standard, which required only the exclusion of competition from the firm requesting access. In addition, the requirement that the party who was refused access must have been aiming to produce a new product raises the liability bar even higher. Finally, and unfortunately, the Court refrained from explaining when a refusal to license could be justified, leaving a significant question unanswered.

While still not quite as transparent as they could be, the ECJ's RTD decisions show a marked shift in focus toward effects on competition and consumers instead of on a lone competitor, as well as a willingness to consider factors that might justify the conduct.

### 3.2 *United States*

Unlike the pre-*Bronner* framework in the EU, the traditional presumption in the US has always been that dominant firms do not have a general duty to deal, even if they are monopolists and their refusal limits competition. The strength of that presumption has fluctuated over time, but it has been stated repeatedly in the case law since the 1919 Supreme Court decision *United States v. Colgate*. The Court held that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognised 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."<sup>73</sup> There was a period, between the *Aspen Skiing* and *Trinko* decisions (1985 - 2004), when it appeared that the presumption had withered away and that firms with substantial market power could refuse to deal only if they had a "legitimate business reason."<sup>74</sup> Without that justification, courts would presume that the purpose and likely effect of

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<sup>71</sup> *Id.* at paras. 56-58.

<sup>72</sup> Case C-418/01, *IMS Health Care GmbH & Co. KG v. NDC Health GmbH & Co. KG*, Judgment of April 29, 2004, at ¶38.

<sup>73</sup> 250 U.S. 300, 307 (1919).

<sup>74</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corporation*, 472 U.S. 585, 597 (1985).

the RTD were to eliminate a competitor. *Trinko* appears to have swung the pendulum back in the other direction – and indeed to have placed it even beyond the *Colgate* position. Both cases are discussed below.

The relative importance of anticompetitive intent in US RTD jurisprudence has also waned in recent years even though it remains a required element for a finding of attempted monopolisation. That trend culminated in an outright snub by the *Trinko* Court, which conspicuously deleted the phrase “[i]n the absence of any purpose to create or maintain a monopoly” when it quoted the *Colgate* passage above. For many years, though, intent was an important factor.<sup>75</sup>

The mid-20<sup>th</sup> century case *Lorain Journal Co. v. United States* may be the only US monopolisation case for which virtually every commentator agrees liability was warranted.<sup>76</sup> *Lorain Journal* involved a dominant firm that conditionally refused to deal with any customers who did business with the firm’s rival. Relying on the findings that the defendant’s intent was to destroy its competitor and that by doing so it would have maintained a monopoly, the Supreme Court decided that this case was an exception to the *Colgate* presumption and affirmed the defendant’s liability for attempted monopolisation. The conduct in *Lorain Journal* was, in essence, a form of exclusive dealing, so it is not necessary to dwell on it here. The key point is simply that *Lorain Journal* confirmed that there are exceptions to the general right to refuse to deal.

The Supreme Court’s 1985 decision *Aspen Skiing Co. v. Aspen Highlands Skiing Corporation* immediately became the leading unilateral RTD case in the US and held that position for nearly 20 years.<sup>77</sup> In that case, the Court was asked to determine the conditions under which a dominant firm must continue a joint marketing arrangement with a rival. The defendant (“Ski Co.”) owned three of the four ski sites in the relevant market. The plaintiff (“Highlands”) owned the only other site. For years, the two firms had cooperated in offering a joint ticket that permitted skiers to use the ski lifts at all four of their locations. The firms shared the revenue from the joint ticket sales on the basis of usage at each location. Eventually, Ski Co. demanded that Highlands accept a fixed percentage of the revenue that was well below Highlands’ historical average based on usage. The firms could not agree on how to allocate the revenue between them, and Ski Co. eventually terminated the arrangement. Highlands attempted various workarounds, including offering vouchers for lift passes at the three Ski Co. mountains. The vouchers would have reimbursed Ski Co. at the full retail value of the passes, but Ski Co. refused to accept them.<sup>78</sup>

The Supreme Court acknowledged that “even a firm with monopoly power has no duty to engage in joint marketing with a competitor.”<sup>79</sup> Nevertheless, it found that Ski Co. did have such a duty, rephrasing

<sup>75</sup> See, e.g., *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927) (affirming liability for monopolisation where Kodak was trying to integrate downstream and had refused to sell supplies at wholesale prices to a retailer that had declined to be acquired, relying in part on the finding that Kodak’s RTD was “in pursuance of a purpose to monopolize.”) Fox claims that the fact that the omitted words from the *Colgate* passage had been relied upon in cases like *Lorain Journal* and *Aspen Skiing* shows that, “before *Trinko*, there was no general first principle that a monopolist has the right to refuse to deal.” Fox, *supra* n.53 at 157 n.15 (emphasis in original). But that is incorrect. Even monopolists had that right under *Colgate*. What they were not allowed to do was refuse to deal for the purpose of maintaining their monopolies. In any event, using intent to maintain a monopoly as a standard for liability is ill-advised because as a matter of logic we should want monopolists to try to maintain their monopolies (by pro-competitive means, of course). If they did not try to maintain their monopolies – indeed if they did not try to strengthen them – then they would not be competing to the best of their ability.

<sup>76</sup> 342 U.S. 243 (1951); Glazer, *supra* n.16 at 7.

<sup>77</sup> 472 U.S. 585 (1985).

<sup>78</sup> *Aspen Skiing*, 472 U.S. at 592-94.

<sup>79</sup> *Id.* at 600.

it as a less-than-absolute right to refuse to deal: “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.”<sup>80</sup> Precisely why the Court considered Ski Co.’s conduct to have crossed the line has been the subject of a great deal of commentary, in part because the decision’s reasoning is not entirely clear.

The outcome is based on a variety of decisional standards. Their importance relative to each other is not specified. The Court may have considered all of them to be equally important, or it may have thought that some were more vital than others. Furthermore, one cannot tell from the opinion whether any of the standards, when satisfied, were deemed to be individually sufficient to warrant a finding of liability, or instead whether several or all of the standards had to be met to reach that finding.

What can be discerned from the opinion is, first of all, that the Court considered the effects of Ski Co.’s conduct on competition and consumers as well as on the parties themselves:

[I]t is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been ‘attempting to exclude rivals on some basis other than efficiency’, it is fair to characterise its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.’s smaller rival, and on Ski Co. itself.<sup>81</sup>

There are at least three standards in that passage. 1) The defendant’s conduct cannot unnecessarily restrict competition (whatever that may mean); 2) the defendant cannot attempt to eliminate rivals on a basis other than efficiency (basically, the EEF test); and 3) the conduct’s effects on consumers, the victim of the RTD, and the defendant itself have to be considered in some manner. The Court found that consumers were harmed because they preferred to have the multi-area pass and Ski Co. discontinued it; Highlands was injured by the RTD in that it was losing market share; and the defendant had no plausible justification for its RTD.<sup>82</sup>

The decision also emphasises the fact that Ski Co. had discontinued an established history of cooperating with Highlands, as opposed to refusing a new proposal to cooperate. Furthermore, Ski Co. refused to sell tickets to Highlands even at retail prices. These factors mattered because they prompted the Court to infer that the prior course of dealing with Highlands had been profitable to Ski Co. and that its desire to harm Highlands was so strong that Ski Co. was willing to forego business even on the same terms that it currently dealt with customers. Therefore, the Court reasoned, “the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”<sup>83</sup> There is at least one more standard in that passage: 4) the defendant cannot sacrifice short-run benefits in order to harm a rival.

In principle, at least, there could have been other reasons why Ski Co. wanted to stop cooperating with Highlands.<sup>84</sup> The arrangement may no longer have been profitable due to a change in circumstances, or perhaps Ski Co. had simply figured out that it would be preferable to keep all of the sales revenues from

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<sup>80</sup> *Id.* at 601.

<sup>81</sup> *Id.* at 605.

<sup>82</sup> *Id.* at 608.

<sup>83</sup> *Id.* at 610-11.

<sup>84</sup> George Hay, “*Trinko*: Going All the Way,” 50 Antitrust Bulletin 527 (2005) 527, 533 n.27.

its three mountains than some percentage of the revenues from the four-mountain combination. Unfortunately, the decision does not indicate whether the latter reason would have qualified as a legitimate business justification.

Not surprisingly, lower courts sometimes struggled to find useful guidance in *Aspen Skiing*. Reflecting on the decision, one appellate court wrote that “[i]f it stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolisation if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition.”<sup>85</sup> The use of the word “may” shows that the one principle the lower court was confident enough to draw from *Aspen Skiing* was by no means determinative. Even so, it might have done well to be even more cautious, given that the next major Supreme Court decision on RTDs did not even mention that one principle.

In *Verizon Communications, Inc. v. Trinko*,<sup>86</sup> the U.S. Supreme Court clarified the law on a monopolist’s duty to assist its rivals, but once again applied an assortment of standards that left considerable uncertainty intact, not only with regard to RTDs, but with respect to monopolisation law in general. The case arose because the Telecommunications Act of 1996 aimed to inject competition into local telephone service markets by requiring incumbent local exchange carriers (ILECs) to share their networks with competitors. A certain ILEC (which later became part of Verizon) therefore signed interconnection agreements with its rivals, making the operations support system that processed customer orders available to them. Complaints that the ILEC nevertheless failed to fill rivals’ orders on an equal basis were addressed by a consent decree under the Telecommunications Act. One day after that decree was finalised, Trinko – a customer of one of the rivals – filed an antitrust complaint. It alleged that the same conduct that led to the consent decree also violated section 2 of the Sherman Act by discouraging customers from using competitors’ services and thereby obstructing the rivals’ ability to compete.<sup>87</sup>

The Court explained that the Sherman Act does not impose a general duty on monopolists to share the source of their advantage with rivals because doing so would conflict with the underlying purpose of antitrust law. In particular, it could reduce the incentive for the monopolist, the rival, or both to invest in the economically beneficial facilities in the first place. Furthermore, enforcing such a duty would require courts “to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited.” Finally, the Court observed that forcing competitors to negotiate with each other could facilitate collusion.<sup>88</sup>

The Court acknowledged that certain exceptions to the general rule that there is no duty to aid a rival had been made in the past, but it also noted that such exceptions are limited “because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.”<sup>89</sup> One of the most noteworthy exceptions was made in *Aspen Skiing*. Interpreting the rationale behind that decision, the Court first pointed out that there was a prior history of dealing between the two companies involved in that case. Next, the Court noted that the defendant in *Aspen Skiing* refused to deal with the plaintiff even on the same terms it used with retail customers. Both of those facts supported a conclusion that the defendant had “a willingness to forsake short-term profits to achieve an anticompetitive

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<sup>85</sup> *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379 (7<sup>th</sup> Cir. 1986).

<sup>86</sup> 540 U.S. 398 (2004).

<sup>87</sup> The Act provides that “nothing in this Act . . . shall be construed to modify, impair, or supercede the applicability of . . . the antitrust laws.” *Id.* at 406 (quoting § 601(b)(1) of the Telecommunications Act).

<sup>88</sup> *Id.* at 407-08.

<sup>89</sup> *Id.* at 408.

end.”<sup>90</sup> Finally, the Court noted that the *Aspen* defendant had refused to provide services to its rival that it willingly provided to the public.

The Court then observed that none of those factors was applicable in *Trinko*. There was no history of dealing between Verizon and its rivals. It could not be inferred that Verizon was giving up profits by not fully cooperating because the price it would have received was not a price it set itself, but rather a regulation-imposed, cost-based price. Last, the relevant service in *Trinko* had never been available to the public.<sup>91</sup> In fact, the only reason Verizon made it available to rivals at all was that the Telecommunications Act forced it to do so. Therefore, because the circumstances did not fit within the exception carved out in *Aspen Skiing*, the Court confirmed the dismissal of *Trinko*’s complaint because it failed to state a cognisable claim under the Sherman Act.

Several standards are at work in *Trinko*, especially in the Court’s description of *Aspen Skiing*. The first, concerning the prior course of dealing between the defendant and its rival, has been widely criticised because it could either discourage monopolists from ever dealing with rivals lest they be forced to deal with them perpetually.<sup>92</sup> Alternatively, it could encourage monopolists to collude with their rivals. In fact, one might well wonder why the two rivals in *Aspen Skiing* were ever allowed to have a joint venture in the first place. The Court gave stature to the prior course of dealing standard anyway, though, by using it to distinguish the facts of *Trinko*.

The second rationale includes language that seems to endorse the PS test. One of the problems with the PS test remains unresolved, though, which is that the Court gave no useful guidance regarding the meaning of the term “an anticompetitive end.” Damaging a rival cannot always be considered “an anticompetitive end” even if it does require profit sacrifice because such conduct sometimes increases social welfare.

Significantly, *Trinko* also states that *Aspen* is “at or near the outer boundary” of cases in which a refusal to cooperate with rivals can constitute a violation of Section 2.<sup>93</sup> Thus, the *Trinko* Court used three standards, at least two of which have serious weaknesses, then undermined them all by saying that the case on which they are based is an outlier. In doing so, the Court left a hazy impression of how to identify cases that are within the boundary of Section 2 liability. As Lopatka and Page wryly observe, “We are left with the clear rule that monopolists do not have a duty to assist their competitors, except when they do. The boundary of § 2 liability remains indistinct.”<sup>94</sup> In recognition of the confusion that lingers after *Trinko*, the US Antitrust Modernisation Commission issued a report this year that states: “Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as . . . whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.”<sup>95</sup>

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<sup>90</sup> *Id.* at 409.

<sup>91</sup> Hay notes that the leading Australian RTD case concerned exactly the same type of situation but the outcome was different from that in *Trinko*. See Hay, *supra* n.84 at 535 n.32 (citing *Queensland Wire Industries Pty. Ltd. v. Broken Hill Proprietary Co. Ltd.*, 167 C.L.R. 177 (1989)).

<sup>92</sup> Elhauge, *supra* n.14 at 314; Glazer, *supra* n.16 at 4-5.

<sup>93</sup> *Trinko*, 540 U.S. at 409.

<sup>94</sup> John Lopatka & William Page, “Bargaining and Monopolization: In Search of the ‘Boundary of Section 2 Liability’ Between *Aspen* and *Trinko*,” 73 Antitrust Law Journal 115, 152 (2005).

<sup>95</sup> US Antitrust Modernization Commission, *supra* n.7 at 12; see also *id.* at 101 (“Although the Court’s decision in *Trinko* provided some guidance on the factors that might suggest liability for a refusal to deal

Not surprisingly, *Trinko* is expected to have a limiting effect on RTD claims in the US. Jones, for example, predicts that the decision's "sceptical view of refusal to deal claims indicates that it will now only be in a narrow set of circumstances that a refusal to aid a competitor will constitute unlawful monopolisation in US law."<sup>96</sup> Keyte states that "*Trinko* has provided all but antitrust immunity for refusals to deal by monopolists that had not 'voluntarily' provided access to rivals, but did so only by regulatory compulsion."<sup>97</sup> Fox adds that lower courts now "typically recite the catechism that plaintiffs state a cause of action only if the facts fall within Aspen's narrow exception from the no-duty-to-deal principles, or within a nearly obliterated essential facilities doctrine."<sup>98</sup>

### 3.3 Comparative Assessment

Hay devised a hypothetical RTD fact pattern in the aftermath of *Trinko* to help explain the decision's implications for future cases.<sup>99</sup> His scenario is also useful for comparing the *Trinko* approach with the EU's approach. The scenario involves a vertically integrated defendant (M) who is the sole producer of an input (I) that is used to make the downstream product (D), for which there are no good substitutes. To avoid *Trinko*'s implied immunity for defendants who have never made their input available to the public, Hay assumes that M has occasionally sold I on the open market (at a monopoly-level price). Furthermore, because M has complete control over I, it also has a monopoly in the market for D and has charged monopoly prices in that market, too. Firm C, attracted by M's profit in the D market, sees that if it can obtain supplies of I at some "reasonable" price it could compete in the market for selling D. But when C asks M to supply it with I on reasonable terms, M refuses. C then complains to its jurisdiction's court or competition agency that the RTD is harming both C and competition in the market for selling D.

When the agency asks M why it refuses to sell I to C, M claims that no firm in its position would want to sell I to C. M explains that it currently faces no competition in the sale of D due to M's control over I. M therefore is able to charge a monopoly price for D. But if M sells I to C at a "reasonable" price – something like M's incremental cost – then C will be able to undercut M's monopoly price for D. Consequently, M would either lose market share in the D market or be forced to lower the price M charges for D such that most or all of the monopoly profits currently being earned there are eliminated.

On the other hand, M explains, it knows that it could make as much profit as it currently does if it were to sell I to C at a monopoly price, and consumers would still pay essentially the same price that they do now. In any event, M says, the reason it refuses to sell to C is that C refuses to pay the monopoly price for I. M views that as a legitimate, objective justification. In other words, M is trying to prevent any competition from a rival that M would be subsidising with an artificially low price for I. Alternatively, if M can charge a price for I that is high enough to enable M to make the same profit even if C takes over a

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with a rival, the decision is far from definitive. Businesses need better guidance from the courts on how to avoid antitrust scrutiny for a refusal to deal with a rival.”).

<sup>96</sup> Jones, *supra* n.24 at 262; see also Hay, *supra* n.84 at 528 (“When *Trinko* is taken to its logical conclusion, it may be that the ‘duty to deal’ has either been eliminated entirely or has been confined to a very tiny pocket of exceptional situations”).

<sup>97</sup> Keyte, *supra* n.27 at 44.

<sup>98</sup> Fox, *supra* n.53 at 154. See also *Covad Communications v. Bell Atlantic* 407 F.3d 1220 (D.C. Cir. 2005) (dismissing Section 2 claim where there was no history of dealing between the parties and stating that “*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*”); *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9<sup>th</sup> Cir. 2004) (holding that termination of a history of dealing was not a Section 2 violation because defendant intended to increase its short term profit)).

<sup>99</sup> Hay, *supra* n.84 at 538-541.

substantial portion of the market for D, then M would see no need to eliminate C (other than in what Hay describes as “a few pathological situations where M still has a long run interest in eliminating C as a competitor”).<sup>100</sup>

The interesting question is what M would have to do under the applicable laws and precedents in various jurisdictions to avoid liability in this situation. Hay considers four possibilities:

- (a) M must offer to sell I to C at a reasonable price, *i.e.*, a cost-based or competitive price;
- (b) M must offer to sell I to C at a price that does not require M to sacrifice any of the profit it currently earns from selling D;<sup>101</sup>
- (c) M must offer to sell I to C, but M can set any price it wants to set; or
- (d) M can do whatever it wants to do, including refusing to deal with C altogether.

Hay contends that US law as it is set forth in *Trinko* does not seem to require that M go so far as (a) to avoid liability. The decision recognises the difficulty that courts would have in determining what a reasonable price is and shies away from it. To do otherwise would require courts “to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited.”<sup>102</sup> Another reason that (a) would not fare well after *Trinko*, Hay argues, is the decision’s appreciation of monopoly profit as an important business incentive.<sup>103</sup>

Option (d) is really no different from (c), since (c) can achieve the same result as (d) without resorting to an outright refusal. Thus, if we reject (a), we are left with (b) and (c), which are different only in that (b) captures those “few pathological cases where M has a long run interest in making sure that C is not viable even if M is not required to subsidise C’s participation in the downstream market.”<sup>104</sup> As Hay notes, this standard corresponds to the NES test because it prohibits RTDs that would make no economic sense but for the fact that they eliminate C. But Hay doubts that courts actually are able to discern between prices that do and do not meet standard (b). Furthermore, he rightly argues, well-counselled defendants will not rescue courts from this difficulty by refusing to deal outright and thereby making the inquiry easier. Instead, they will at least offer to deal at some price, forcing courts to grapple with the complex issue of whether defendants are constructively refusing to deal by pricing significantly above their profit-maximising level. Hay asserts that making that determination would be even harder than figuring out whether a firm is pricing below its cost in a predatory pricing case.<sup>105</sup>

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<sup>100</sup> *Id.* at 541.

<sup>101</sup> This concept can be difficult to understand. Another way of stating it is that M must offer to sell I to C at a price that is no higher than the price at which M would not sacrifice any of the profit it currently earns from selling D. The idea is to allow M to continue earning all of the monopoly profit it gets from selling D at the monopoly price even if it sells I to C (thereby allowing C to compete in the market for D and take some of M’s business in that market) by charging a sufficiently high price for I – while simultaneously not allowing M to charge such a high price for I that the price constitutes a constructive RTD.

<sup>102</sup> *Trinko*, 540 U.S. at 408.

<sup>103</sup> Hay, *supra* n.84 at 544 (“the mere possession of monopoly power, and the concomitant charging of monopoly prices is not only not unlawful, it is an important element of the free market system,” quoting *Trinko*, 540 U.S. at 406).

<sup>104</sup> Hay, *supra* n.84 at 545.

<sup>105</sup> *Id.* at 545-46.

Consequently, courts will either tackle the problem of distinguishing prices that maximise profits from prices that are rational only because they eliminate a competitor, thereby introducing substantial possibilities for errors and uncertainty into the analytical process, or they will give up and fall back on standard (c). It is more likely that they will opt for (c), especially in light of *Trinko*'s warning about courts acting like central planners. Once they are at (c), courts may as well go all the way to (d). Therefore, Hay concludes, “[i]f one follows the path carved out in the opinion to its logical conclusion, there will be few, if any, exceptions to the principle that a firm, even a monopolist, has absolutely no duty to sell or to cooperate with a potential competitor[.]”<sup>106</sup> If he is correct, then under US law the hypothetical firm M would not be held liable for its RTD even if its refusal is outright.

In the EU, the outcome is substantially less certain. First, it would depend on whether the hypothetical is analysed under *Magill*'s and *IMS*'s standards or *Bronner*'s standards. If the former standards were applied, the result would be exactly the same as what Hay predicts would happen under current US law: M would not be held liable even if its refusal is outright. The reason is that we have no reason to believe that C will use I to create a new product. C simply wants to enter the market for selling D, a product that is already being sold by M.

If the *Bronner* standards apply, however, the outcome is not clear. We know that the withheld product, I, is indispensable to C's desired business. We also know that if M outright refuses to supply I to C, it will eliminate all competition from C in the market for selling D. Therefore, assuming that European courts would not be receptive to M's argument that its desire to reap monopoly profits in both the I and D markets is an objective justification because M has a legitimate monopoly in I, we may conclude that option (d) is not available to M.<sup>107</sup> On the other hand, if M chooses to price in accordance with option (a) the courts presumably would not find the resulting competitive price to be a constructive RTD, so M would not be held liable.

But what if M is cagier and chooses to offer I at a price that corresponds with option (b), or even just (c)? We really have no way of knowing what the ECJ would do in either of those situations. *Commercial Solvents*, *United Brands*, and *Bronner* all involved outright RTDs; it was perfectly clear that the defendants had refused to supply. The Court has not yet faced the more difficult task of having to determine the point at which an offer price ceases to be lawful and becomes an unlawful, constructive refusal to supply. Until it does, dominant firms may have an incentive to use constructive rather than outright refusals whenever they wish to deny supplies to another firm. Nevertheless, it is certainly possible that when such a case arises European courts will be stricter than US courts. For example, a European court might rule that unless M sold I to C at the same price that M sold I to other customers, which it has occasionally done according to Hay's fact pattern, M would be liable for unlawful discrimination. Alternatively, a court could find that anything other than a price that fits within (a) would constitute unlawful discrimination between M's own downstream division and downstream rivals.

<sup>106</sup> *Id.* at 547. There is a fifth possibility that Hay considers in a footnote: (e) M must offer to sell I to C at the same price that M has sold I on the open market to other customers. Although that standard seems to have the Supreme Court's support in *Trinko*, it has serious flaws, too, for reasons that have already been discussed. First, standard (e) cannot account for any changes in circumstances that occur after the sales to other customers take place, such as rising costs in producing I. Second, it does not take into account that M might have legitimate reasons for price discriminating between rivals and non-rivals.

<sup>107</sup> Based on ECJ decisions to date, this assumption appears to be safe. The Court has already rejected similar proffered justifications at least twice. See *Commercial Solvents*, [1974] ECR 223 (defendant who was dominant in upstream market refused to supply former customer because defendant wanted to enter downstream market and compete with that customer); *Magill*, 1995] E.C.R. I-743 (defendant refused to supply television listing information to new downstream rival because defendant wanted to protect its downstream magazine business).

Despite the different standards that the US and EU use to evaluate RTDs, the overall trend is the same in both jurisdictions. The highest courts have shown an increasing reluctance to force dominant firms to deal with their competitors. In *Magill*, the ECJ said that RTDs would constitute an abuse only in exceptional circumstances. Likewise, in *Trinko*, the Supreme Court said it would depart from the general rule that there is no duty to aid a rival only in limited circumstances. It also transformed what had been the leading RTD case into a quirky exception that now barely qualifies as a violation.<sup>108</sup>

### 3.4 Cases from Other Jurisdictions

Not all OECD countries have moved in the same direction as the US and EU with respect to RTDs. In some nations RTDs by dominant firms continue to be dealt with on strict terms, as the first case below illustrates. Furthermore, different countries have different ways of dealing with dominant firms who have been found liable for refusing to deal. As we saw in a recent roundtable, some jurisdictions are more likely to impose monetary sanctions than others, a difference that has interesting implications in RTD cases.<sup>109</sup> The second case below illustrates that issue.

#### 3.4.1 South Korea

In 2001 the Korea Fair Trade Commission issued a decision in a matter involving a vertically integrated firm that had refused to deal with one of its downstream competitors.<sup>110</sup> POSCO, the defendant, was dominant in the upstream market for hot-rolled steel coil with nearly 80 percent of the South Korean market. Its only competitors in the upstream market were foreign firms who imported hot-rolled coil into South Korea. POSCO also participated in the downstream market for cold steel plate. When Hyundai Hysco entered the downstream market it asked POSCO several times to supply it with hot-rolled coil, but POSCO always refused. Hyundai Hysco was able to obtain hot-rolled coil from foreign firms and it soon attained a market share of 11 percent, but its costs were higher than they would otherwise have been because it had to import its raw materials. In particular, it experienced higher freight, customs, and loading/unloading fees. In addition, foreign firms were aware that Hyundai Hysco was unable to procure raw material from POSCO, which decreased Hyundai Hysco's bargaining power. The facts of this case conform well to Figure 1 above.

The KFTC decided that POSCO had violated the Monopoly Regulation and Fair Trade Act because POSCO interrupted its downstream competitor's business by refusing to supply it with hot-rolled coil – an indispensable input – with the intent to maintain its dominant position. Not only did POSCO's RTD raise Hyundai Hysco's costs, it destabilised the latter's business by making it more difficult to secure raw materials and made it harder for Hyundai Hysco to adapt promptly to market changes due to the lengthy shipping times required for importing hot-rolled coil. The KFTC also found no objective justification for POSCO's conduct.

An interesting exercise is to analyse the facts of this according to the European and American precedents that have just been discussed. Beginning with the European decisions, the standards used in

<sup>108</sup> For an interesting argument that the conduct in *Trinko* was actually more harmful than that in *Aspen Skiing*, see Fox, *supra* n.53 at 162-67. For an opposing argument, see John Lopatka & William Page, "Bargaining and Monopolization: In Search of the 'Boundary of Section 2 Liability' Between *Aspen* and *Trinko*," 73 Antitrust Law Journal 115 (2005).

<sup>109</sup> OECD, Remedies and Sanctions in Abuse of Dominance Cases, Executive Summary at p. 9, DAF/COMP(2006)19.

<sup>110</sup> Korea Fair Trade Commission, "Abuse of Market-Dominant Power by POSCO," (12 April 2001). The KFTC's decision was affirmed by the Seoul High Court and is currently on appeal to South Korea's Supreme Court.

*Commercial Solvents* are much closer to those used in POSCO than the standards used in *Bronner* and *Magill* are. Nevertheless, POSCO would not have been found liable even under the harsher *Commercial Solvents* standard because POSCO's RTD did not eliminate all competition from Hyundai Hysco, which had managed to gain over ten percent of the downstream market in a relatively short amount of time despite the RTD. Furthermore, under *Bronner*, the case against POSCO would have faced the problem that there were actual substitutes (imports) for POSCO's hot-rolled coil. It is certainly possible, however, that POSCO could have been held liable for discriminating against Hyundai Hysco because POSCO was willing to deal with its other downstream rivals.

Analysis under US law is more difficult because, as we have seen, American jurisprudence on RTDs is somewhat unclear. First, it is difficult to say, without more facts, how POSCO would have fared under the PS or NES tests. It is possible that POSCO was irrationally sacrificing profit by refusing to sell to Hyundai Hysco. On the other hand, it is also possible that the downstream opportunity cost that POSCO would have experienced if it had supplied Hyundai Hysco would have been higher than the revenue POSCO could have earned from such sales in the upstream market. Second, unlike the parties in *Aspen Skiing*, the parties in POSCO had no history of dealing with each other, so it is more difficult to infer that POSCO was sacrificing profit by refusing to deal. Third, the outcome under the EEF test may depend on precisely what is meant by "equally efficient." If that term refers to a hypothetical firm that is equally efficient in both the upstream and downstream markets, *i.e.*, a vertically integrated firm, then such a firm could obviously not be excluded by POSCO's conduct and POSCO would not be liable. Conversely, if the term refers to a hypothetical firm that is equally efficient only in the downstream market, then it is possible that POSCO's conduct was likely to exclude an equally efficient firm. It must be noted, though, that Hyundai Hysco had not been eliminated and, in fact, that it had made at least a modestly successful entry in the downstream market. That fact makes it harder to establish that competition has been harmed. A fourth point, however, is that POSCO was willing to sell to its other downstream rivals, a fact that might support a finding of liability even under the tougher *Trinko* standards.

### 3.4.2 Portugal

A very recent Portuguese case illustrates how imposing monetary sanctions instead of behavioural remedies may help agencies and/or courts to avoid the benchmarking and "central planning" problems that have been discussed above. On 2 August 2007, Portugal's competition authority, the Autoridade da Concorrência, issued a press release announcing that the largest fine in the agency's history had been imposed on Portugal Telecom (PT) for abusing its dominant position by refusing to deal.<sup>111</sup> PT is dominant in both the upstream markets for access to cable-laying and electronic network infrastructure and the downstream markets for cable television, broadband internet access, and fixed-line telephone service. PT denied its downstream rivals Tvtel and Cabovisão access to PT's underground cable network, thereby preventing them from cabling some 73,000 homes throughout Portugal. As a result, residents in those homes were unable to choose a cable TV service provider other than TV Cabo Portugal, of which PT is a majority owner.

The agency found that PT's RTD had the object and effect of preventing, restricting, or distorting competition because it left competitors unable to provide cable TV, broadband internet, and fixed-line telephone service. It therefore imposed a fine of 38 million euros. There was no behavioural component to the order other than a requirement for PT to publish portions of the ruling.

One may quibble about various liability issues in this case, such as whether the facts comport with *Bronner*'s requirement that the RTD eliminate all competition on the part of the victims, an issue that

<sup>111</sup> Autoridade da Concorrência, Press Release No. 13/2007, "Competition Authority Imposes a Fine of EUR 38 Million on PT Comunicações for Abuse of a Dominant Position," (2 August 2007).

depends in part on the geographic market definition. But if we put liability considerations aside and focus on what the authority did after it determined that there was a violation, we can see that there is a certain beauty in the simplicity of its solution. There was no messy, error-prone process of trying to determine exactly what price PT should be allowed to charge. There was not even an order formally requiring PT to deal with its rivals. Consequently, there was no need – not immediately, at least – for continuing oversight by the agency. Instead, the onus was placed squarely on PT to stop abusing its dominant position. If PT does not voluntarily start to deal with its rivals and do so in a way that cannot be interpreted as a constructive RTD, then PT will run the risk that its rivals will submit another complaint to the Autoridade da Concorrência, which could respond by imposing an even larger fine on PT.

Of course it is possible that lengthy arguments will ensue between PT and its rivals regarding the terms of access, but PT will have to be more careful about how difficult it chooses to make access if it wishes to avoid a larger sanction. Thus, although sanctions may not be a solution in every case, they probably are in at least some cases.

#### **4. Conclusion**

The review of theoretical issues surrounding RTDs has shown that they are not easy to analyse. The challenges inherent in identifying and remedying problematic RTDs are so formidable, in fact, that some prominent commentators have given up on the idea that imposing liability on most types of RTDs is ever advisable. The review of legal decisions, meanwhile, has shown that courts in two major jurisdictions, at least, have begun to move in the same direction as the commentators. It has become harder and harder for defendants to lose an RTD case in the US and the EU. On the other hand, RTDs continue to be dealt with on fairly strict terms in some OECD countries. So far there seems to be a dearth of cases in which any jurisdiction's highest court has had to face the difficult scenario of a dominant firm that has not refused to deal outright but has imposed terms of trade that might constitute a constructive RTD. It will be interesting to see how the courts approach the challenges of determining whether such a firm is liable for abuse of dominance and, if so, how to find an appropriate, effective remedy.

## NOTE DE RÉFÉRENCE

### du Secrétariat\*

#### 1. Introduction

Les refus de vente opposés unilatéralement par des entreprises dominantes ne sont nullement exceptionnels.<sup>1</sup> Ils peuvent revêtir de nombreuses formes depuis celle de rejets purs et simples à celle de refus qui ne sont opposés que dans certaines circonstances, ou de l'application de conditions commerciales qui ont pour effet de décourager les acheteurs plutôt que de leur opposer un refus catégorique. Les refus de vente peuvent être verticaux, horizontaux ou complémentaires. Quand ils sont pratiqués par des entreprises dominantes, ils peuvent nuire à la concurrence en empêchant une entrée sur le marché qui aurait érodé ou supprimé la position dominante. Ils peuvent aussi restreindre la concurrence sur les marchés sur lesquels le produit de l'entreprise dominante constitue un moyen de production essentiel ou complémentaire. Ils peuvent enfin être un moyen de mettre en œuvre d'autres pratiques potentiellement anticoncurrentielles comme les ventes liées, les prix de vente imposés et les distributions exclusives.

Il est peut-être justifié que les normes juridiques et les approches analytiques varient selon les types de refus de vente. Mais on observe aussi des différences dans la façon dont les diverses juridictions abordent les mêmes types de refus de vente. La présente note examine les questions que les autorités de la concurrence doivent généralement considérer lorsqu'elles analysent les refus de vente, quelles que soient les normes particulières applicables en vertu de leur législation de la concurrence. Comme on le verra, si les refus unilatéraux de vente sont dans l'ensemble plus faciles à constater que certains autres comportements unilatéraux, comme la fixation de prix d'éviction, ils ne sont guère plus faciles à analyser de façon rigoureuse. La raison en est que leur analyse se heurte à la même difficulté fondamentale que celle qui gêne l'analyse de la plupart des autres comportements unilatéraux: les refus de vente anticoncurrentiels peuvent être difficiles à distinguer de comportements concurrentiels sains. En fait, certains refus de vente peuvent être considérés à juste titre comme nuisant à la concurrence à court terme mais comme lui étant bénéfiques à long terme.

Dans certaines juridictions, la jurisprudence montre que l'on est passé, au fil du temps, d'un scepticisme à l'égard des refus de vente opposés par des entreprises dominantes à un scepticisme encore plus marqué à l'égard de ceux qui affirment que ces refus sont illicites. Chemin faisant, certains tribunaux ont élaboré des normes assez claires. Les spécialistes de la question ne sont toutefois pas encore certains que ces normes sont suffisamment limpides ni même qu'elles sont bien fondées du point de vue économique. Dans d'autres juridictions, les tribunaux ont malheureusement brouillé les choses en

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<sup>1</sup> Les refus de vente sont aussi connus sous le nom de refus d'approvisionnement. Les deux expressions sont interchangeables. En outre, dans la présente note, l'adjectif « dominant/e » couvre toute la gamme des seuils de pouvoir de marché utilisés dans les textes législatifs qui régissent les comportements unilatéraux dans les pays membres de l'OCDE. La définition de la domination, du pouvoir de marché substantiel, etc. constitue une autre question qui ne sera pas abordée ici. L'objet de la présente note est en effet d'établir comment on peut déterminer si les refus de vente pratiqués par des entreprises déjà considérées comme dominantes doivent être jugés préjudiciables à la concurrence.

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appuyant leurs décisions sur un ensemble mouvant de critères et de principes. Cela a conduit les observateurs à s'interroger sur les raisons précises de juger illicite un refus de vente et à se demander quelles devraient être ces raisons. La plupart des discussions menées entre spécialistes sur l'analyse des refus de vente ont eu tendance à se perdre dans le débat plus général, et non moins important, visant à établir les façons d'analyser les comportements unilatéraux en général. En d'autres termes, les propos théoriques sur les refus de vente utilisent souvent ceux-ci simplement comme un moyen d'examiner la question qui retient actuellement l'attention des principes sur la base desquels on pourrait faire la part entre la « concurrence au mérite » et un comportement préjudiciable à la concurrence.

La présente note ne s'intéresse qu'aux refus de vente unilatéraux – elle ne couvre en effet pas les refus concertés. Elle ne s'appesantit pas non plus sur les refus d'accorder des licences ou de vendre des droits de propriété intellectuelle car plusieurs tables rondes effleurant les questions liées à la propriété intellectuelle ont été organisées au cours des dernières années. De même, bien que les questions concernant les installations essentielles constituent un aspect inextricable de l'analyse, elles ne retiendront pas l'attention outre mesure du fait que de précédentes tables rondes leur ont été directement consacrées. Enfin, les refus de vente qui sont utilisés à d'autres fins telles que les distributions exclusives, les ventes liées et les prix imposés ne sont pas pris en considération.

La deuxième partie du document examine les questions théoriques liées à l'analyse des refus de vente telles que l'importance des différences entre, par exemple, les refus conditionnels et les refus inconditionnels et entre les refus purs et simples et les refus implicites. Elle analyse aussi des normes et des critères qui peuvent être utilisés pour mettre en évidence des refus de vente préjudiciables à la concurrence. La troisième partie suit l'évolution de la jurisprudence relative aux refus de vente unilatéraux dans deux grandes juridictions et compare ces précédents à deux affaires assez récentes qui ont concerné d'autres juridictions.

Les principaux points du document sont les suivants:

- On peut classer les refus de vente de différentes façons. Les points de vue divergent sur la signification des qualificatifs « verticaux » et « horizontaux » dans le contexte des refus de vente. D'autres distinctions opposant, par exemple, les refus « purs et simples » aux refus « implicites » et les refus « conditionnels » aux refus « inconditionnels » sont interprétées avec plus de cohérence. Il est toutefois moins important d'accorder les points de vue sur les façons de cataloguer les refus de vente que de considérer tous les faits et de comprendre toutes les forces qui sont à l'œuvre dans chaque cas.
- Il est, par exemple, crucial de ne pas perdre de vue les effets observés en amont et en aval lorsqu'on analyse les refus de vente. Ceux-ci peuvent avoir des effets sur les marchés adjacents qui peuvent être surprenants, voire aller à l'encontre de l'intuition première. Il existe, en outre, une contradiction potentielle entre les effets à court et à long terme des refus de vente (et des mesures qui peuvent être imposées pour remédier à des refus de vente jugés illégitimes). On peut, par exemple, augmenter rapidement le nombre de concurrents viables sur un marché ayant fait l'objet d'un refus de vente de la part d'une entreprise dominante en obligeant celle-ci à vendre. Mais la situation à plus long terme est plus complexe. Ce type d'intervention peut aussi avoir des effets sur les incitations des entreprises à investir, innover et entrer en concurrence.
- Certains observateurs jugent si difficile d'analyser les refus de vente inconditionnels verticaux, et d'y remédier, qu'ils préconisent de les considérer comme intrinsèquement licites. La difficulté réside principalement dans la fixation d'un prix plafond approprié pour déterminer si un prix donné est tellement élevé qu'il doit être assimilé à un refus de

vente illicite. On se heurte à la même difficulté au niveau de la mesure correctrice si le tribunal ou l'autorité de la concurrence vise à imposer une mesure tendant à modifier le comportement du contrevenant parce qu'obliger simplement celui-ci à approvisionner des clients n'a de sens que si l'on exerce aussi un contrôle sur le prix qu'il est autorisé à appliquer. D'autres observateurs (et de nombreux tribunaux) ne sont pas aussi sceptiques bien qu'ils reconnaissent qu'il est difficile de fixer un prix de référence.

- Intuitivement, les refus de vente conditionnels peuvent sembler plus faciles à analyser et à corriger parce que tant que l'entreprise dominante vend à quelqu'un, le prix auquel ces transactions sont effectuées constitue une référence possible. Certains économistes hésitent néanmoins encore à préconiser d'intervenir dans de tels cas parce qu'ils n'aiment pas l'idée d'utiliser cette référence. Si les conditions fixées défavorisent les concurrents en aval d'un contrevenant intégré verticalement, par exemple, elles peuvent être imposées pour des raisons légitimes. Le point capital est qu'il n'est peut-être pas rentable pour ce type de contrevenant d'approvisionner ses concurrents en aval au même prix que celui qui est acquitté par d'autres acheteurs: le faire entraîne un manque à gagner pour l'entreprise dominante sous la forme d'une perte de ventes et de profits en aval. De plus, si les entreprises dominantes ne sont pas autorisées à faire une distinction entre les entreprises concurrentes et non concurrentes en aval, elles peuvent réagir en relevant le prix qu'elles appliquent aux entreprises non concurrentes. Il est toutefois difficile de prédire leur comportement.
- La doctrine des installations essentielles, qui fait partie du corps de jurisprudence relatif aux refus de vente, est née aux États-Unis. Bien que, techniquement, elle ne soit pas encore révolue, elle y a été sérieusement ébranlée par une décision récente de la Cour suprême. Des observateurs des deux côtés de l'Atlantique ainsi que des juges l'ont également très fortement critiquée en la jugeant superflue et peu judicieuse. Elle survit partiellement bien néanmoins, semble-t-il, dans la jurisprudence de l'UE relative aux refus de vente qui veut que le produit concerné soit « indispensable ».
- De nombreux critères et normes peuvent être potentiellement utilisés pour déterminer si les refus de vente sont illicites. Si aucun d'eux n'est parfait, certains laissent plus à désirer que d'autres.
- Des décisions de justice sont prises depuis assez longtemps sur les refus de vente au sein de l'UE et aux États-Unis pour que l'on puisse étudier l'évolution de la jurisprudence sur une période assez longue. Bien que les normes d'évaluation des refus de vente diffèrent dans ces deux juridictions, la tendance fondamentale des attitudes judiciaires à l'égard de ces comportements est la même: les plus hautes instances juridiques des deux juridictions sont devenues beaucoup moins enclines, au fil du temps, à trouver les entreprises dominantes coupables de refus de vente. Il est aujourd'hui assez difficile de gagner un procès d'abus de position dominante sur la base d'un refus de vente au sein de l'UE comme aux États-Unis. D'autres pays de l'OCDE traitent par comparaison assez durement les refus de vente.

## **2. Refus de vente unilatéraux: questions théoriques**

Cette partie de la note examine les questions théoriques liées aux refus de vente ainsi que les différentes façons de caractériser ceux-ci, les implications économiques de ces caractérisations, les facteurs à prendre généralement en compte dans les évaluations des refus de vente et un certain nombre de normes

et critères qui peuvent permettre de déterminer si un refus de vente donné est préjudiciable à la concurrence.

## 2.1 *Les divers types de refus de vente*

Les refus de vente peuvent varier de différentes façons. La présente section cherche à établir la signification d'un certain nombre de qualificatifs qui peuvent être utilisés pour décrire différentes catégories de refus de vente.

### 2.1.1 *Refus de vente verticaux et refus de vente horizontaux*<sup>2</sup>

Les adjectifs « verticaux » et « horizontaux » peuvent être utilisés de plusieurs façons pour qualifier différents types de refus de vente. On pourrait par exemple suggérer que l'expression « refus de vente vertical » renvoie à une situation dans laquelle le fournisseur d'un moyen de production, intégré verticalement, refuse de vendre à ses concurrents en aval qui ne sont pas intégrés. Cette acception du terme pourrait aussi couvrir des situations dans lesquelles une entreprise intégrée refuse de vendre à des clients en aval qui ne sont pas des concurrents. (Ce faisant, elle pourrait nuire à ces clients et par voie de conséquence, indirectement, à ses concurrents en amont en limitant ou même en éliminant complètement la demande en aval pour leurs produits.)

On pourrait aussi soutenir qu'il est impropre de qualifier ces types de refus de vente de « verticaux » parce qu'un refus de vente purement vertical impliquerait une entreprise qui n'intervient que sur un seul marché dans la chaîne de production (c'est-à-dire une entreprise non intégrée contrairement à celle de l'exemple précédent) et qui refuse de vendre à une ou plusieurs entreprises non concurrentes intervenant à un niveau adjacent de la chaîne. Ce pourrait être le cas, par exemple, si le refus de vente était utilisé comme un moyen d'assurer une distribution exclusive ou l'application d'un prix imposé. Ces types de refus de vente ont été en grande partie exclus de l'analyse du fait que leur examen élargirait considérablement le champ couvert par la présente table ronde.

De toute façon, si l'on accepte la définition du « refus de vente vertical » donnée au paragraphe précédent, l'expression « refus de vente horizontal » ne peut que renvoyer à des situations dans lesquelles l'entreprise exclue est à la fois un client effectif ou potentiel *et* un concurrent effectif ou potentiel. Dans le cadre de cette approche, la distinction entre les deux qualificatifs est liée au sens dans lequel s'exerce l'effet du refus de vente, c'est-à-dire en direction d'un concurrent ou d'un non-concurrent.

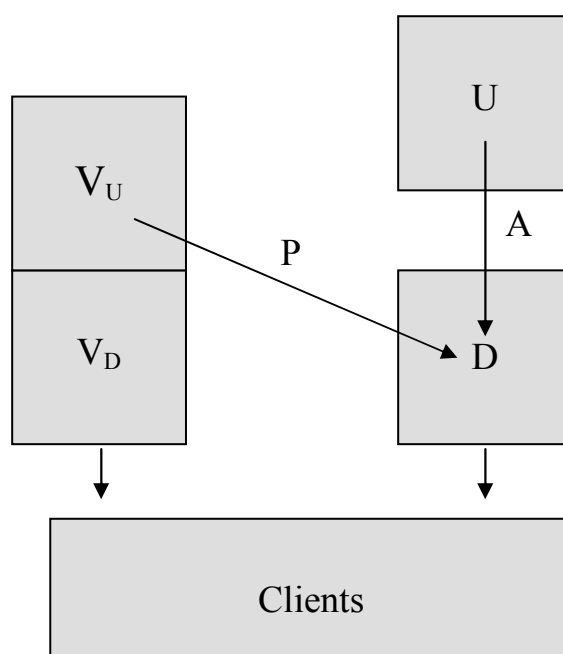
En définitive, les étiquettes « vertical » et « horizontal » ne semblent pas beaucoup importer parce qu'elles ne permettent pas vraiment elles-mêmes de mieux comprendre comment on peut déterminer si un refus de vente est préjudiciable à la concurrence. Il est certes nécessaire de tenir compte du fait que les entreprises sont intégrées verticalement ainsi que du/des marché(s) affecté(s) par le refus de vente opposé par l'entreprise dominante mais la façon dont on choisit de distinguer les refus de vente verticaux des refus de vente horizontaux n'est pas cruciale.

Qu'on le qualifie de vertical ou d'horizontal, un type très fréquent de refus de vente unilatéral est représenté schématiquement dans le graphique 1.<sup>3</sup> Une entreprise intégrée verticalement V, exploite une

<sup>2</sup> Cette section aurait pu aussi inclure une autre catégorie: celle des refus de vente « complémentaires ». On parle de refus de vente complémentaire lorsque le fournisseur dominant d'un produit vend celui-ci à ses clients en liaison avec un produit apparenté mais refuse de le vendre seul à un concurrent lui-même désireux de le revendre en liaison avec un autre de ses produits. Les ventes subordonnées et les ventes liées sortant du champ de la présente note, elles ne sont pas examinées ici.

division en amont,  $V_u$ , et une division en aval,  $V_d$ . La division  $V_u$  produit un moyen de production que la division  $V_d$  utilise pour produire quelque chose d'autre, qui est ensuite vendu aux clients. Une entreprise non intégrée en aval, l'entreprise D, essaie de concurrencer la division  $V_d$ . L'entreprise D a besoin du moyen de production et elle essaie de l'acheter à la division  $V_u$  mais pour une raison ou une autre, les deux entreprises ne parviennent pas à s'entendre sur les conditions de l'opération. P est le prix que la division  $V_u$  propose à l'entreprise D. Un refus pur et simple d'approvisionner l'entreprise D reviendrait simplement à donner une valeur très élevée au prix P. L'autre meilleure source possible d'approvisionnement applique le prix A, indépendamment du fait a) qu'il n'existe pas d'autre source d'approvisionnement que la division  $V_u$ , auquel cas le prix A est très élevé; b) l'entreprise D peut s'intégrer en amont et produire elle-même le moyen de production au prix de revient A ou c) l'entreprise D peut acheter le moyen de production à un autre fournisseur, U, au prix A.

Graphique 1. Un type fréquent de refus de vente unilatéral

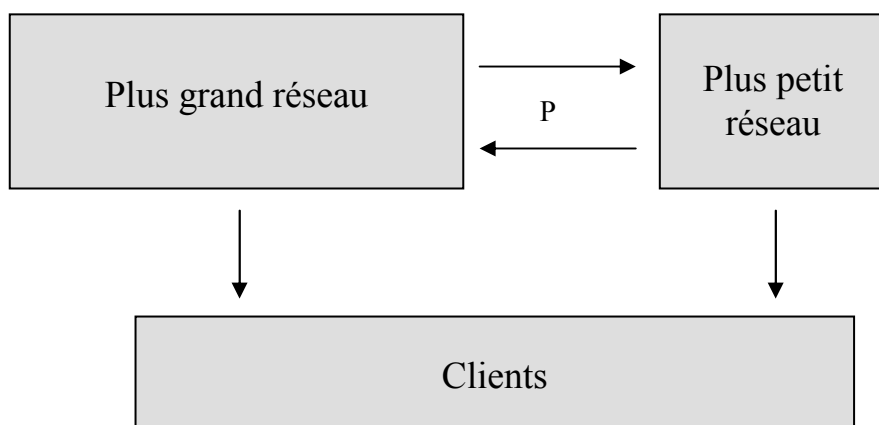


Un autre graphique est nécessaire pour représenter un scénario différent qui se fait plus fréquent dans l'économie moderne. Ce cas de figure implique au moins deux entreprises dont l'une est plus grande que l'autre/les autres et qui entrent en concurrence sur un marché à effets de réseau. Voir le graphique 2.<sup>4</sup> Le problème dans ce cas est que le plus grand réseau risque de devenir monopoleur si les membres ou les produits des plus petits réseaux ne peuvent communiquer ou interagir avec les membres ou les produits du plus grand réseau. L'affaire *Aspen Skiing*, examinée plus loin, illustre ce cas de figure qui pourrait toutefois être aussi observé dans des secteurs comme ceux du génie logiciel et des technologies de communication sans fil.

<sup>3</sup> Le graphique 1 et le scénario qu'il représente reposent sur le document de Carl Shapiro intitulé: « 'Exclusionary Conduct', Testimony Before the Antitrust Modernization Commission, 29 September 2005 », page 6.

<sup>4</sup> Le graphique 2 repose sur la page 9 du document précédemment cité.

Graphique 2. Refus de vente sur un marché à effets de réseau



### 2.1.2 Refus purs et simples et refus implicites

Si la législation voulait qu'il y ait un refus pur et simple dans les affaires de refus de vente, il serait facile pour les entreprises dominantes d'éviter d'être mises en cause en rendant leurs conditions de vente si prohibitives qu'aucun acheteur ne jugerait intéressant d'acheter. Une façon évidente de dissuader les acheteurs serait de fixer un prix excessivement élevé mais il existe un nombre infini d'autres solutions pour une entreprise désireuse de repousser les acheteurs. Elle pourrait, par exemple, accepter en principe une offre mais différer de façon inadmissible la livraison du produit ou imposer des conditions gênantes en obligeant notamment l'acheteur à suivre des procédures de « certification » complexes, coûteuses et fastidieuses. Pour empêcher de tels subterfuges, les tribunaux et les organismes publics reconnaissent depuis longtemps que des entreprises peuvent en fait refuser de vendre même si elles ne le font pas ouvertement. On parle dans ce cas de refus de vente « implicites » et une fois qu'ils sont reconnus comme tels, ils sont traités de la même manière que les refus de vente purs et simples.

Une implication intéressante et importante de la reconnaissance des refus de vente implicites est qu'une simple injonction de vendre ne peut constituer une façon efficace de remédier à ces pratiques. Logiquement, l'injonction devrait au minimum fixer un plafond pour le prix appliqué et prévoir une forme de surveillance. Sinon, rien n'empêcherait le contrevenant de « se conformer » techniquement à l'injonction en acceptant de vendre mais uniquement en appliquant aux acheteurs un prix si élevé et/ou des conditions si peu intéressantes que cela équivaldrait à un refus de vente implicite. Comme on le verra dans la troisième partie, l'idée que les tribunaux fixent les prix et jouent le rôle d'organismes chargés de la réglementation n'a pas rallié tous les suffrages.

Naturellement, tout tourne autour de la question suivante: « Quand considère-t-on qu'il y a refus de vente implicite ? ». En d'autres termes, comment fait-on la distinction entre des prix simplement « élevés » et des prix qui sont fixés à un niveau si haut qu'ils constituent implicitement un refus de vente? Cette question est examinée à la section 2.2.

### *2.1.3 Refus de vente conditionnels et refus de vente inconditionnels*

Il peut sembler, à première vue, que les refus de vente inconditionnels et les refus de vente purs et simples constituent une seule et même chose mais, en fait, tant les refus purs et simples que les refus implicites peuvent être conditionnels ou inconditionnels. La distinction entre un refus pur et simple et un refus implicite porte sur le point de savoir si le refus est expressément formulé alors que la distinction entre un refus conditionnel et un refus inconditionnel porte sur le point de savoir si le refus s'applique en toutes circonstances ou dans certaines circonstances seulement. Par exemple, une entreprise dominante pourrait absolument refuser de vendre à certains acheteurs, disons des concurrents en aval, mais pas à d'autres (refus de vente pur et simple, conditionnel). Elle pourrait aussi refuser catégoriquement d'approvisionner n'importe qui d'autre que sa propre division en aval (refus de vente pur et simple, inconditionnel).

Une autre possibilité serait que l'entreprise refuse de donner aux petits acheteurs la garantie que son produit satisfera à certaines exigences techniques mais offre cette garantie aux gros acheteurs. S'il s'agissait d'un marché sur lequel cette garantie était essentielle pour tout acheteur, on serait en présence d'un refus implicite de vente, conditionnel. En revanche, si l'entreprise refusait de donner une garantie à tous les acheteurs potentiels sur ce type de marché, cela constituerait un refus de vente implicite, inconditionnel.

L'importance pratique de la distinction entre un refus conditionnel et un refus inconditionnel est examinée de manière plus approfondie à la section 2.2.3.

## **2.2 Aspects à considérer dans l'analyse des refus de vente**

La présente section examine un certain nombre de facteurs qu'il peut être utile de considérer lorsqu'on évalue les refus de vente.

### *2.2.1 Considérations préliminaires: examiner tous les aspects*

Les refus de vente sont comme de nombreux autres types de comportement unilatéral en ce sens qu'il peut être très difficile de distinguer un comportement favorable à la concurrence (ou au moins anodin pour elle) d'un comportement anticoncurrentiel. Si les tribunaux et les organismes publics ne considèrent pas toutes les forces à l'œuvre dans un refus de vente, ils risquent de faire plus de mal que de bien à la concurrence. Certaines de ces forces sont moins évidentes que d'autres. Pour n'ignorer aucune d'elles, il faut résolument prendre en compte tous les marchés susceptibles d'être affectés.

Se soucier des effets en amont et en aval

Considérons le scénario décrit dans le graphique 1. Si le refus de vente de l'entreprise intégrée provoque la sortie du marché de son concurrent non intégré en aval, non seulement un concurrent est éliminé mais tous les autres concurrents effectifs ou potentiels, non intégrés en aval, seront probablement plus conscients du fait qu'ils risquent de se voir infliger le même traitement. Cela peut les inciter davantage à agir comme l'entreprise intégrée souhaite qu'ils agissent (ou à rester en dehors de ce marché en premier lieu). Il faut alors évidemment considérer les effets du refus de vente sur le marché en aval. Il peut être toutefois moins évident que le refus de vente peut aussi réduire la concurrence sur le marché en amont. Cela peut être le cas, par exemple, si le refus de vente persuade les entrants potentiels en amont de la

nécessité de pénétrer sur le marché à la fois en amont et en aval pour survivre. Après tout, il y aura peut-être moins d'entreprises indépendantes en aval auxquelles elles pourront vendre une fois que le refus de vente aura produit son effet. Pour la même raison, les éventuels concurrents indépendants, non intégrés, sur le marché en amont devront s'en retirer (ou s'intégrer en aval) s'il ne reste pas assez d'acheteurs en aval avec lesquels ils pourront commercer. Il faut, par conséquent, considérer aussi les effets du refus de vente sur le marché en amont.

En outre, lorsque l'on envisage de remédier à la situation en obligeant, par exemple, l'entreprise dominante en amont à vendre à ses concurrents en aval en leur appliquant un prix plus bas, on doit aussi considérer les effets de cette action. Elle peut, à l'évidence, renforcer la concurrence sur le marché en aval. Mais elle peut également rendre l'entrée sur le marché en amont moins faisable et réduire, de ce fait, les chances que la position dominante sur ce marché soit érodée par les forces qui s'y exercent naturellement. Pourquoi? Parce que les entrants en amont devraient entrer en concurrence avec une entreprise dominante qui est contrainte d'appliquer des prix plus bas. L'entreprise dominante n'aurait pas d'autre choix que de vendre aux acheteurs en aval à un prix qu'ils trouvent acceptable (voire avantageux) au lieu de ne pas leur vendre ou de leur vendre à des conditions que les acheteurs trouvent inintéressantes. Il serait, de plus, évident que toute entreprise qui devient un jour dominante risque d'être contrainte de vendre à des acheteurs contre son gré ou à des conditions qui lui sont imposées par les pouvoirs publics.<sup>5</sup> Ce facteur réduit aussi l'attrait du marché pour les entrants potentiels en amont.

C'est un autre type de vigilance qu'appellent les cas dans lesquels l'entreprise intégrée jouit d'une position inattaquable en amont, c'est-à-dire dans lesquels il n'existe aucune possibilité de concurrence sur le marché en amont. C'est ce qui peut arriver, par exemple, si l'entreprise jouit d'un contrôle exclusif sur un atout qui ne peut être reproduit, comme une propriété intellectuelle cruciale ou une ressource naturelle essentielle. Les concurrents sur le marché en aval dépendent inéluctablement du monopoleur en amont. Cela veut dire aussi qu'ils ne sont pas des concurrents en aval vraiment indépendants. En d'autres termes, si l'entreprise intégrée est autorisée à refuser de vendre, elle peut éliminer ses concurrents en aval et donc se retrouver seule sur les marchés en amont et en aval. Si elle est contrainte de vendre son moyen de production au prix de monopole qu'appliquerait une entreprise non intégrée, on peut alors être en présence d'un monopole en amont et d'un marché concurrentiel en aval. Mais créer une certaine concurrence sur le marché en aval peut présenter au mieux un intérêt limité tant que le marché en amont est contrôlé par un monopoleur. (C'est le scénario du profit de monopole unique qui est examiné de manière plus approfondie à la section 2.3.1.). Shapiro implique que le recours à des mesures coercitives ne doit être envisagé qu'avec réticence quand il n'existe pas de possibilité de concurrence sur le marché en amont.<sup>6</sup>

Les risques de contradiction entre les effets à court et à long terme sur la concurrence

On peut rapidement augmenter le nombre de concurrents viables sur un marché qui a fait l'objet d'un refus de vente de la part d'une entreprise dominante en obligeant celle-ci, d'une façon ou d'une autre, à vendre aux entreprises qu'elle refusait d'approvisionner. Les acheteurs deviennent alors brusquement des concurrents plus réels parce qu'ils ont désormais accès à un important moyen de production, à de meilleures conditions. Si le problème ne tenait qu'à cela, la meilleure politique de la concurrence à suivre à l'égard des refus de vente opposés par des entreprises dominantes pourrait être assez simple et évidente: les interdire tous.

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<sup>5</sup> *Idem*, page 11.

<sup>6</sup> *Idem*, page 12 (« Cette observation suggère qu'il faut agir avec circonspection dans les cas de refus de vente verticaux et complémentaires lorsque la force du monopole en jeu n'est pas contestée. ») Shapiro fait aussi observer qu'imposer une obligation de vente dans les cas purement horizontaux, comme celui-ci qui est illustré plus haut dans le graphique 2, ébranlerait directement le monopole existant. *Idem*, note 10.

Mais le problème est plus compliqué que cela. Si les interventions qui obligent les entreprises dominantes à approvisionner les acheteurs à des conditions différentes de celles qu'elles souhaiteraient appliquer peuvent avoir des effets purement bénéfiques à court terme pour les consommateurs, la situation à plus long terme est plus complexe. Ces interventions auront aussi des effets sur les incitations des entreprises à investir, innover et entrer en concurrence. Or c'est généralement grâce à ces trois actions que les entreprises dominantes dominent le marché (si l'on exclut les monopoles d'État déréglementés et privatisés). Quand les pouvoirs publics indiquent qu'ils obligeront les entreprises dominantes à partager les fruits de leurs investissements, de leurs innovations et/ou de leurs autres efforts concurrentiels avec d'autres entreprises dont certaines peuvent être, ou peuvent devenir, des concurrents, acquérir une position dominante perd une partie de son intérêt, de même en conséquence qu'investir, innover et entrer en concurrence. Or ces trois actions servent à long terme les intérêts des consommateurs.

De plus, le partage forcé réduit les incitations des petites entreprises à investir et innover, d'une autre façon. Si elles sont légalement autorisées à obtenir le produit ou le service de l'entreprise dominante à des conditions plus favorables que ne le souhaitait l'entreprise dominante, elles seront moins incitées à mettre au point leur propre produit ou service équivalent.<sup>7</sup>

Une tension inévitable existe donc entre l'efficacité à court et à long terme dans la politique de la concurrence à l'égard des refus de vente. Une tension du même ordre pourrait aussi être décrite entre l'efficacité statique et l'efficacité dynamique.<sup>8</sup> Le bien-être des consommateurs peut être améliorée en favorisant la concurrence sur les prix à court terme mais la mise au point de nouveaux produits et de meilleures méthodes de production sous l'effet d'une plus grande innovation peut améliorer encore davantage le bien-être des consommateurs à plus long terme.

C'est pour ces raisons que les pouvoirs publics accordent des droits de propriété intellectuelle aux innovateurs, par exemple, bien que, ce faisant, ils risquent de soumettre les consommateurs à un pouvoir de marché pendant de nombreuses années. Les droits de propriété intellectuelle sont le résultat d'un arbitrage entre les inconvénients d'un éventuel pouvoir de marché temporaire et les avantages de l'encouragement de l'innovation. Le même genre d'arbitrage intervient lorsque les pouvoirs publics décident l'attitude à adopter à l'égard des refus de vente.<sup>9</sup>

### 2.2.2 Réglementation

Si le refus de vente est observé dans un secteur réglementé, la réglementation peut supplanter la législation de la concurrence et l'analyse du refus de vente relever, de ce fait, d'un organisme chargé de la réglementation plutôt que de l'autorité de la concurrence. En fait, même si les règlements applicables ne supplantent pas la législation de la concurrence, les tribunaux peuvent décider de confier la question à l'organisme chargé de la réglementation. C'est ce qui s'est produit, par exemple, dans l'affaire *Trinko* aux États-Unis. Cette décision donne fortement à penser que les refus de vente ne peuvent jamais être contestés au titre de la législation antitrust chaque fois que l'on peut s'en remettre à la réglementation. La

<sup>7</sup> *US Antitrust Modernization Commission, Report and Recommendations* (avril 2007), pages 101-102.

<sup>8</sup> Les efficacités dynamiques dans le contexte des fusions ont été examinées lors d'une table ronde récente du Comité de la concurrence. Voir OCDE, « Les gains d'efficacité dynamique dans l'analyse des fusions » (à paraître en 2007).

<sup>9</sup> Voir Shapiro, *supra* note 3, à la page 12 (lorsqu'il considère le système juridique américain et s'inquiète du fait « que la force des avantages à court terme pour les clients (et les concurrents) aux yeux des juges et des jurés entraînera une érosion des revenus nécessaires pour financer la prise de risque et l'innovation »).

raison donnée par la Cour suprême est que les tribunaux sont moins bien placés que les organismes chargés de la réglementation pour gérer les opérations imposées entre entreprises.<sup>10</sup>

### 2.2.3 *Le refus de vente est-il conditionnel ou inconditionnel ?*

Comme on l'a indiqué plus haut, les refus de vente inconditionnels peuvent avoir des effets économiques différents de ceux des refus conditionnels. Certains observateurs estiment, de ce fait, qu'ils doivent être traités différemment.

#### Refus de vente inconditionnels

La position de Shapiro à l'égard des refus de vente inconditionnels est parfaitement claire, au moins quand ils sont en outre verticaux: « Je suis favorable à une approche selon laquelle les refus de vente inconditionnels, verticaux, ne déclenchent jamais une mise en cause au regard de la législation antitrust, que le moyen de production du monopole soit particulièrement précieux ou non[.]»<sup>11</sup> Il explique sa position en faisant observer que les refus de vente inconditionnels sont plus difficiles à corriger par des mesures visant les comportements que les refus de vente conditionnels. On peut remédier à ce dernier type de refus en empêchant simplement que les conditions qui déclenchent le refus continuent d'être appliquées. Mais si le refus de vente est inconditionnel, il est plus difficile de concevoir une mesure correctrice visant le comportement parce qu'il n'y a pas de conditions à éliminer et pas d'autre acheteur générant des opérations qui peuvent servir de références. Au lieu de cela, le tribunal ou l'organisme concerné devra calculer un prix plafond (et/ou réglementer certains facteurs transactionnels autres que les prix). Bien que Shapiro reconnaisse qu'une surveillance sera probablement nécessaire même dans le cas de refus de vente conditionnels illicites pour s'assurer que le vendeur ne contourne pas la mesure correctrice, il souligne qu'« il est beaucoup plus facile d'enjoindre l'application de certaines conditions ou de prohiber diverses bases de discrimination par les prix que de fixer un plafond général pour les prix. »<sup>12</sup> De ce point de vue, l'expérience de la réglementation sectorielle permet largement de douter que les tribunaux aient les qualités requises pour remédier à des refus de vente inconditionnels en plafonnant les prix et en fixant les conditions de vente. Shapiro fait en outre observer que les avantages d'une intervention dans ces cas ne sont pas évidents du fait des risques existants de provoquer des effets préjudiciables et indésirables sur les marchés adjacents et/ou à plus long terme.<sup>13</sup>

Il est peut-être plus facile pour les organismes et/ou les tribunaux des juridictions qui autorisent les sanctions monétaires contre les abus de position dominante de trouver une mesure correctrice efficace que pour ceux qui doivent faire face au problème de fixer des prix et autres conditions à faire respecter. Au lieu de fixer un prix plafond, les premiers ont la possibilité d'imposer simplement une amende et de laisser au contrevenant la responsabilité de mettre un terme au refus illicite de vente et de vendre à des conditions qui ne peuvent être assimilées à un refus de vente implicite. Si l'entreprise ne met pas un terme à son refus de vente illicite ou si elle cherche à obtenir les mêmes résultats en imposant différentes conditions difficiles, elle court le risque de se voir imposer une autre amende (probablement plus lourde). Un problème peut néanmoins continuer de se poser, sur le plan analytique, au niveau de la définition de la responsabilité juridique. Si le refus de vente conditionnel est aussi un refus implicite qui se traduit par la

<sup>10</sup> *Verizon Communications Inc. v. Trinko*, 540 U.S. 398, 414-15 (2004).

<sup>11</sup> Shapiro, *supra* note 3, page 13. Shapiro définit un refus de vente vertical comme ce qui « se produit lorsqu'un fournisseur dominant d'un moyen de production refuse de le vendre à ses concurrents en aval », *idem*, page 1. C'est le scénario illustré dans le graphique 1.

<sup>12</sup> *Idem*, page 11.

<sup>13</sup> *Idem*, page 12.

fixation de prix « trop élevés » ayant pour effet de décourager les acheteurs, un prix plafond devra aussi être fixé pour déterminer où commence l'infraction et où le prix cesse d'être légitime.

Elhaug adopte une position analogue mais non identique à celle de Shapiro. Le critère qu'il propose d'utiliser pour établir si le comportement unilatéral d'une entreprise dominante est préjudiciable ne condamne le refus de vente que s'il exerce une discrimination à l'encontre des concurrents de l'entreprise en question.<sup>14</sup> (Un refus de vente discriminatoire est un refus de vente conditionnel). Elhaug estimerait donc lui aussi que les refus de vente inconditionnels ne devraient jamais engager la responsabilité des entreprises au regard de la législation relative à la concurrence.

En tout état de cause, tout le monde n'estime pas qu'intervenir contre les refus de vente inconditionnels est une mauvaise idée, comme le montrent plusieurs grandes décisions de tribunaux. Plusieurs de ces affaires sont examinées plus loin dans la troisième partie du document. Certains économistes ne sont pas particulièrement troublés par cette idée non plus, même s'ils reconnaissent la validité de l'argument avancé par Shapiro sur la difficulté de fixer un prix de référence. Salop, par exemple, n'est pas rebuté par la perspective de voir les tribunaux et les organismes publics obligés de fixer ce qu'il appelle des « références n'entraînant pas d'exclusion », c'est-à-dire des prix plafonds qui sont suffisamment bas pour ne pas constituer des refus de vente implicites ou nuire à la concurrence. Il considère plusieurs façons possibles de fixer ces références. Elles sont examinées dans la partie 2.2.3.3.

#### Refus de vente conditionnels

Logiquement, la première chose à faire quand on s'occupe des refus de vente conditionnels, c'est de comprendre ce qui provoque le refus. La deuxième serait normalement de déterminer pourquoi l'entreprise dominante fixe ces conditions. Comprendre ne serait-ce que ces deux choses peut fournir bon nombre d'informations sur les implications concurrentielles du refus de vente. Par exemple, un vendeur pourrait refuser d'approvisionner un détaillant qui ne dispose pas d'une équipe de vendeurs formés. La raison pourrait en être que le produit concerné est complexe et qu'il ne serait pas bien compris par la plupart des clients sans l'aide d'un spécialiste. Dans un autre cas, une entreprise dominante pourrait être disposée à vendre son produit à n'importe quel client qui ne l'achète pas aussi à ses concurrents mais refuser de vendre à tous ceux qui commercent avec ses concurrents. Le premier exemple semble n'avoir guère d'effet sur la concurrence, voire lui être plutôt favorable. Le deuxième exemple pourrait, par contre, susciter de sérieuses inquiétudes.

Une autre chose utile à faire est de distinguer les cas dans lesquels les conditions imposées exercent une discrimination en aval à l'encontre de tous les concurrents mais pas des non-concurrents des cas dans lesquels ces conditions exercent une discrimination en aval à l'encontre de certains seulement des concurrents. Prenons un exemple correspondant au premier type de cas: un producteur de cuir intégré verticalement, LB, vend aussi des ballons de rugby sur le marché en aval. Il est disposé à vendre du cuir, au prix R, aux entreprises en aval qui interviennent sur des marchés non liés à celui des ballons de rugby, comme celui des vestes en cuir. Mais le prix qu'il applique aux autres fabricants de ballons de rugby est plus élevé que R. R peut utilement servir de référence pour plafonner le prix applicable aux ventes de LB aux autres fabricants de ballons de rugby. Mais ne serait-il pas plus profitable à long terme pour les consommateurs que LB ne soit pas autorisé à faire une distinction entre ses concurrents et ses non-concurrents en aval?

Shapiro répond par la négative à cette question, pour deux raisons.<sup>15</sup> Premièrement, il soutient que le prix appliqué aux entreprises en aval sur des marchés indépendants n'est pas lié de façon fiable au prix

<sup>14</sup> Einer Elhaug, « Defining Better Monopolization Standards », 56 Stanford Law Review 253 (2003).

<sup>15</sup> Shapiro, *supra* note 3, page 14.

plafond qui devrait être fixé pour les concurrents en aval. Si l'on suppose que ce prix doit être celui qu'un monopoleur non intégré en amont désireux de maximiser ses profits appliquerait à des concurrents en aval, il n'y a aucune raison de penser que R approcherait même ce prix parce qu'un monopoleur, fournisseur d'un moyen de production, qui ne refuserait pas de vendre pourrait néanmoins appliquer des prix différents aux entreprises en aval qui interviennent sur des marchés différents. Il faut considérer que les ventes aux concurrents en aval créent un manque à gagner pour LB sous la forme d'une perte de marges bénéficiaires en aval. Deuxièmement, s'il n'était pas autorisé à faire une distinction entre les entreprises concurrentes et les entreprises non concurrentes en aval, LB pourrait réagir en augmentant le prix qu'il applique sur des marchés non liés en aval et porter ainsi préjudice aux clients concernés. Il pourrait aussi ne pas réagir de la sorte. Les effets attendus sont ambigus.

Glazer partage ce point de vue en faisant observer que même si vendre à des clients qui ne sont pas des concurrents est faisable et économique, cela ne veut pas nécessairement dire qu'il est rentable de vendre à des concurrents ni que l'obligation de leur vendre créerait des incitations favorables. Certes, l'obligation de vendre peut être profitable aux consommateurs à court terme mais elle peut aussi réduire l'incitation à investir et innover, ce qui leur sera préjudiciable à long terme.<sup>16</sup>

Dans le deuxième type de cas, qui implique l'application de conditions discriminatoires à l'encontre de certains concurrents en aval seulement, Shapiro fait observer que l'on ne peut tirer aucune indication utile de la théorie économique. Les effets d'une discrimination par les prix sur les consommateurs et l'efficacité sont indéterminés. Pour essayer de s'en faire une idée précise, il faudrait comprendre pourquoi l'entreprise intégrée traite différemment certains de ses concurrents en aval. Certains d'entre eux pourraient être des concurrents plus efficaces que d'autres, par exemple, ce qui veut dire qu'approvisionner certains clients coûterait à l'entreprise intégrée relativement plus en termes de pertes de ventes en aval qu'approvisionner les concurrents moins efficaces. « Je ne vois aucune raison de penser, d'une manière générale, que ces différences de prix lèsent les clients », déclare Shapiro. « Les tribunaux et les organismes chargés de faire respecter la réglementation doivent se montrer prudents dans ce domaine puisque imposer des conditions de vente uniformes risque d'avoir un effet négatif sur la prise de risques et l'innovation, et même se traduire par des prix plus élevés pour au moins certaines entreprises en aval ».<sup>17</sup> Shapiro est apparemment réticent à prendre des mesures coercitives contre *n'importe quel* type de refus de vente unilatéral dans lequel le fait que le contrevenant est intégré verticalement entre en ligne de compte.

Les refus de vente conditionnels n'impliquent pas tous nécessairement, bien sûr, des entreprises intégrées verticalement. On peut, par exemple, citer le cas d'une entreprise dominante prête à vendre à n'importe quel client, à condition qu'il ne commerce pas avec ses concurrents à elle. Il est communément admis que ce type de refus de vente nuit à la concurrence et devrait être considéré comme illicite car il n'apporte rien aux consommateurs mais empêche les concurrents de prendre pied sur le marché et d'y exercer une concurrence. En poussant plus loin l'analyse dans ce domaine, on aborderait la question de la distribution exclusive qui sort du cadre de la présente table ronde.

#### Digression: Fixation des prix de référence

Pourquoi certains observateurs soutiennent-ils qu'il est difficile de fixer un prix de référence (ou « prix plafond ») ? Shapiro examine trois méthodes possibles et il les trouve toutes non satisfaisantes. Premièrement, on pourrait essayer d'utiliser le prix de transfert intérieur de l'entreprise dominante comme limite maximale du prix pour les ventes extérieures. (Le prix de transfert est le prix auquel un moyen de production est transféré de la division en amont à la division en aval d'une entreprise intégrée). Mais le

<sup>16</sup> Kenneth Glazer, « Three Key Distinctions Under Section 2 », Testimony Before the Antitrust Modernization Commission, 29 September 2005 », page 5.

<sup>17</sup> Shapiro, *supra* note 3, page 14.

prix de transfert a davantage à voir avec les méthodes comptables et l'organisation interne d'une entreprise qu'avec un prix économique réel appliqué dans le cadre d'une transaction entre entreprises indépendantes. Cela rend problématique l'utilisation du prix de transfert interne comme prix de référence ou indicateur du coût. Deuxièmement, on pourrait plafonner le prix au niveau du prix de monopole auquel une entreprise en amont vendrait son moyen de production – si ce prix était connu. Ce prix ne fait pas l'objet d'observations en pratique et il n'est pas facile à calculer. Ce serait néanmoins possible mais il serait plus difficile de le faire si le monopoleur en amont se livrait à une discrimination par les prix. Enfin, on pourrait essayer de fixer le prix plafond sur la base de la théorie du sacrifice du profit à court terme. Le prix plafond serait alors le prix le plus bas auquel une entreprise intégrée verticalement pourrait vendre le moyen de production en ne gagnant pas moins à court terme que ce qu'elle aurait gagné en refusant de vendre. Le raisonnement sur lequel repose ce concept peut être difficile à comprendre mais le point essentiel est que même si on en comprend les principes, il serait probablement encore plus difficile de déterminer quel devrait être ce prix plafond dans un cas réel.<sup>18</sup>

Comme on l'a déjà dit, Salop est moins pessimiste que Shapiro quant à la possibilité de fixer des prix de référence. Il examine plusieurs approches possibles.<sup>19</sup> Premièrement, il écarte l'idée d'utiliser comme référence le coût marginal de production de l'intrant pour le contrevenant (sauf dans de rares circonstances qu'il ne précise pas). Il fait observer qu'une référence fondée sur le coût marginal empêcherait le contrevenant de pouvoir tirer de ses ventes du moyen de production un revenu correspondant au pouvoir de marché qu'il a légitimement acquis sur le marché en question. Il note aussi qu'un prix d'un niveau plus élevé que le coût marginal peut s'avérer nécessaire pour maintenir des incitations suffisantes à investir. Cela est peut-être évident mais Salop ne mentionne pas un autre problème, à savoir qu'il est extrêmement difficile de calculer le coût marginal en pratique.

Deuxièmement, Salop fait remarquer que dans les cas où le refus de vente met un point final à des relations commerciales, le prix appliqué antérieurement peut servir de référence. De même, si le refus de vente est conditionnel de sorte que l'entreprise mise en cause approvisionne certains clients mais pas d'autres, le prix pratiqué dans les transactions qui sont effectuées pourrait constituer une référence. Salop reconnaît que ni l'une ni l'autre de ces références ne seraient parfaites, les conditions pouvant évoluer ou varier selon les marchés. Il aurait pu ajouter que l'entreprise mise en cause pourrait avoir des raisons parfaitement légitimes de vouloir exercer une discrimination par les prix entre ses clients et que l'obliger à ne pas le faire pourrait être un choix mal avisé. Il pensait peut-être que ce type d'erreur serait évité au stade de l'examen des justifications objectives.

Salop s'intéresse ensuite à la question de la fixation d'une référence dans les cas où aucune transaction n'a été effectuée antérieurement entre l'entreprise mise en cause et un autre établissement. Il suggère d'utiliser le prix qu'un monopoleur hypothétique, non intégré en amont appliquerait s'il jouissait du même pouvoir de marché (acquis de façon légitime) que celui dont jouit l'entreprise mise en cause sur le marché en amont. C'est essentiellement la même idée que celle que Shapiro a considérée en deuxième lieu et qu'il a jugée dans l'ensemble non satisfaisante.

Enfin, Salop considère l'idée de fixer la référence au niveau du prix, quel qu'il soit, qui permettrait à l'entreprise intégrée mise en cause de préserver ses profits. Il entend par là le prix qui produirait le même profit total, en amont et en aval, pour l'entreprise intégrée que celui qu'elle enregistrerait en refusant de vendre. Bien que Salop mentionne ces idées presque incidemment, comme si elles étaient faciles à mettre

<sup>18</sup> Shapiro « doute fort que ce prix puisse être mesuré en pratique avec la moindre exactitude même si un accord de principe pouvait être obtenu sur le cadre temporel 'à court terme' approprié. » *Idem*, page 13.

<sup>19</sup> Steven Salop, « Avoiding Error in the Antitrust Analysis of Refusals to Deal », déclaration écrite soumise à la commission pour la modernisation de la législation antitrust (*Antitrust Modernization Commission*) (21 septembre 2005), pages 7 à 11.

en œuvre, le scepticisme exprimé par Shapiro est peut-être plus approprié. Il n'est peut-être pas sans importance de déterminer, par exemple, le prix qui permettra à l'entreprise mise en cause de maintenir ses profits. La disponibilité de l'information peut poser problème et de nombreuses autres variables ont des chances d'influer sur l'analyse. En outre, du point de vue des entreprises qui sont à la recherche de régimes de protection, ces références ne constitueront pas des indicateurs souhaitables de leur responsabilité si elles ne sont pas très faciles à anticiper et à calculer.

#### 2.2.4 Installations essentielles

Un sous-ensemble d'affaires concernant des refus de vente a évolué dans certaines juridictions sur la base de la notion d'« installations essentielles ». La doctrine des installations essentielles trouve son origine dans les commentaires de la jurisprudence des États-Unis et elle a maintenant diverses significations qui concernent toutes l'obligation de permettre à des entreprises qui n'y auraient autrement pas accès, d'accéder à une ressource ou un moyen de production donné. La notion d'installations essentielles n'est applicable que si deux marchés sont en jeu: un marché en amont et un marché en aval, généralement. Le plus souvent, une entreprise est active sur ces deux marchés tandis que d'autres entreprises sont actives, ou souhaitent devenir actives, sur le marché en aval. Quand un concurrent en aval souhaite acheter le moyen de production à l'entreprise intégrée verticalement mais se heurte à un refus, la doctrine des installations essentielles définit les conditions auxquelles l'entreprise intégrée sera légalement contrainte de vendre le moyen de production en question.

Bien que la doctrine des installations essentielles découle de la jurisprudence américaine, elle n'a jamais été expressément reconnue ou rejetée par la Cour suprême des États-Unis. L'affaire déterminante aux États-Unis a été celle qui a opposé la *MCI Communications Corporation* à *AT&T*.<sup>20</sup> Dans la décision par laquelle elle s'est soldée, une cour d'appel a établi les quatre conditions qui doivent être réunies pour que la doctrine des installations essentielles soit applicable:

1. Contrôle de l'installation essentielle par une entreprise en situation de monopole;
2. incapacité des concurrents de reproduire pratiquement ou raisonnablement les installations essentielles;
3. refus opposé aux concurrents d'accéder aux installations essentielles; et
4. possibilité pratique de permettre l'accès aux installations essentielles.<sup>21</sup>

D'une manière générale, une installation est « essentielle » si aucune concurrence n'est possible sans elle. La deuxième condition, celle de l'incapacité de reproduire pratiquement ou raisonnablement les installations, ne peut être remplie en montrant simplement que l'accès aux installations de l'entreprise mise en cause constitue la solution la plus économique. « Comme l'indique l'adjectif 'essentielle', un plaignant doit faire valoir davantage qu'un inconvénient ou même une perte économique; il doit prouver qu'il n'y a pas d'autre solution possible. »<sup>22</sup> La troisième condition, le refus d'accès peut être un refus pur et simple ou un refus implicite revêtant, par exemple, la forme de l'imposition de prix ou de modifications du service

<sup>20</sup> 708 F.2d, page 1081 (7th Cir. 1983).

<sup>21</sup> 708 F.2d, pages 1132-33.

<sup>22</sup> *Twin Laboratories v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990).

fourni, déraisonnables.<sup>23</sup> La quatrième condition nécessite de réunir de très nombreux éléments factuels et il ne semble pas exister de critères généraux pour l'évaluer.

Une caractéristique importante de la doctrine des installations essentielles est, qu'au moins selon la définition qui en a été donnée dans l'affaire *MCI*, elle n'exige pas que soit apportée la preuve de l'existence d'un préjudice à la concurrence. Elle n'exige même pas l'existence d'un risque de préjudice. Cette observation a conduit plus d'un observateur à dénigrer la doctrine. Hovenkamp, par exemple, fait observer qu'en n'exigeant pas la preuve de l'existence d'un préjudice à la concurrence, la doctrine des installations essentielles « perd son ancrage dans le paragraphe 2 du *Sherman Act*. Elle commence à agir comme une loi régissant un 'accès équitable' qui contraint une série d'entreprises privées à composer avec une autre série d'entreprises même lorsque la concurrence ne s'en trouve pas améliorée. De ce fait, la doctrine est superflue voire incompatible avec les principes de base de la législation antitrust. »<sup>24</sup>

D'autres observateurs ont également jugé superflue la doctrine des installations essentielles. Shapiro ne voit pas de différence économique entre le scénario du refus de vente type, illustré dans le graphique 1, dans lequel le moyen de production est crucial pour les entreprises en aval, et les cas qui impliquent une installation essentielle.<sup>25</sup> Pate a affirmé que « l'idée que 'les installations essentielles' constituent à elles seules la base d'une infraction est totalement discréditée. » Au plus, a-t-il poursuivi, « la doctrine des installations essentielles est 'une étiquette qui peut être utile dans l'analyse d'une plainte contre un monopole et non l'affirmation d'une violation distincte de la loi.' »<sup>26</sup> Dans l'affaire *Trinko* (examinée plus loin), même si la Cour suprême n'a pas choisi de rejeter formellement la doctrine, elle l'a presque fait en allant jusqu'à citer, en les approuvant, certains articles qui l'attaquent.<sup>27</sup>

La doctrine des installations essentielles a aussi été attaquée en Europe. Comme aux États-Unis, des observateurs l'ont critiquée à maintes reprises et préconisé que son application soit limitée.<sup>28</sup> Une critique fréquemment émise est que cette doctrine n'est simplement pas nécessaire. Doherty, par exemple, fait observer qu'« attacher l'étiquette des 'installations essentielles' à une situation donnée n'ajoute rien à son analyse juridique: il faut toujours mettre en évidence une infraction au droit communautaire ». <sup>29</sup> En outre, l'avocat général M. Jacobs de la Cour de justice des Communautés européennes a considéré la doctrine des

<sup>23</sup> Voir, par exemple, *Laurel Sand & Gravel, Inc. v. CSX Transportation*, 924 F.2d 539, pages 544-45 (4<sup>th</sup> Cir. 1991) (affaire dans laquelle il a été soutenu qu'une modification déraisonnable des services fournis ou des prix appliqués peut constituer un refus d'accès à une installation).

<sup>24</sup> Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 310 (2<sup>e</sup> éd. 1999), cité dans Alison Jones, « A Dominant Firm's Duty to Deal: EC and US Antitrust Law Compared », dans *Handbook of Research in Transatlantic Antitrust* (Philip Marsden, éd. 2006), note 197.

<sup>25</sup> Shapiro, *supra* note 3, page 7.

<sup>26</sup> R. Hewitt Pate, « 'Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts', Testimony Before the Antitrust Modernization Commission, 29 September 2005 », page 13 (citant *Viacom International v. Time Inc.*, 785 F. Supp. 371, 376 n.12 (S.D.N.Y. 1992).

<sup>27</sup> Voir *Trinko*, 540 U.S., pages 410-411 (citant Phillip Areeda, « Essential Facilities: An Epithet in Need of Limiting Principles », 58 *Antitrust Law Journal* 841 (1989)). Voir aussi James Keyte, « The Changing Face of Class Action Litigation: The Class Action Fairness Act », 20 *Antitrust* 44, 45 (2005) (soutenant que dans l'affaire *Trinko*, la Cour suprême « n'a pas carrément tué la théorie mais elle a nettement laissé entendre qu'elle le ferait probablement si l'occasion appropriée se présentait. »)

<sup>28</sup> Par exemple, Alan Overd et Bill Bishop, « Essential Facilities: The Rising Tide », 4 *European Competition Law Review* 183 (1998); Derek Ridyard, « Essential Facilities and the Obligation to Supply Competitors », 8 *European Competition Law Review* 438 (1996).

<sup>29</sup> Barry Doherty, « Just What Are Essential Facilities? » 38 *Common Market Law Review* 397, 404-05 (2001).

installations essentielles sous ses divers aspects dans l'avis qu'il a émis sur l'affaire *Bronner*. Il l'a critiquée pour trois principales raisons: elle décourage l'investissement, un marché concurrentiel en aval régulera de toute façon la concurrence et il serait impraticable de donner une large application à cette doctrine.<sup>30</sup>

Toutefois, certains observateurs ne sont pas d'accord avec les critiques formulées à l'encontre de la doctrine des installations essentielles. Stothers, par exemple, estime que les critiques de l'avocat général Jacobs sont « très fallacieuses ». S'agissant de la critique selon laquelle permettre l'accès à des installations essentielles au titre de cette doctrine découragerait l'investissement, il affirme que tant que l'entreprise dominante obtiendra un rendement concurrentiel de l'octroi de l'accès, les incitations normales à créer l'installation persisteront. Il ajoute que « cela devrait avoir des effets dynamiques bénéfiques sur l'économie en encourageant une répartition des ressources non faussée par les attraits des rentes de monopole tirées d' 'installations essentielles' ». <sup>31</sup> Bien que Stothers ait, bien sûr, raison de dire que même des rendements normaux incitent à investir, ce que l'avocat général Jacobs voulait dire, semble-t-il, c'est que cette incitation peut être encore plus forte lorsque l'obtention de rendements de monopole est envisageable. Supprimer totalement la possibilité d'obtenir de tels rendements réduirait aussi l'incitation à investir, innover et faire vigoureusement concurrence.

De plus, en donnant aux concurrents le droit d'utiliser, à des conditions concurrentielles, des installations qui, au mieux, leur seraient autrement accessibles à un prix majoré, la doctrine des installations essentielles réduit chez les concurrents l'incitation à se passer à long terme des installations en question par une innovation technologique. Il est probablement inexact de considérer ce type d'investissement dans l'innovation comme une « distorsion de ressources ». Stothers considère aussi toutefois cet argument comme fallacieux: « L'existence de la position dominante est établie en déterminant si des produits de remplacement potentiels permettent de limiter le pouvoir de marché de l'entreprise qui détient la ressource sur le 'marché concerné'. Par conséquent, le refus d'approvisionner ne constitue pas un comportement abusif s'il est établi qu'il y a peu de chances que ces produits de remplacement empêchent la domination du marché. » Mais cette domination est déterminée dans une perspective à assez court terme. Ce que l'avocat général Jacobs veut dire, semble-t-il, c'est que si tout le monde sait que l'entreprise dominante va être contrainte de partager l'accès à ses installations, il y a moins de chances que ses concurrents investissent dans la mise au point de produits de remplacement même à plus long terme, c'est-à-dire au-delà de l'horizon temporel considéré pour déterminer la domination du marché. Il y a deux raisons à cela: 1) Pourquoi un concurrent se préoccuperait-il d'investir pour avoir sa propre installation quand il peut prendre moins de risques et utiliser, à un prix concurrentiel, l'installation que quelqu'un d'autre a déjà construite? 2) Si les tribunaux ont laissé entendre qu'ils appliqueront la doctrine des installations essentielles, même si une entreprise investit dans l'innovation et réussit à supplanter la technologie du moment, la possibilité de profits de monopole sera exclue. Il est dans ce cas moins intéressant d'investir.

### **2.3 Normes et critères qui peuvent être utilisés pour évaluer les refus de vente**

Cette section décrit un certain nombre de normes et de critères qui peuvent être utilisés pour aider à déterminer si un refus de vente doit être considéré ou non comme un abus de position dominante.

<sup>30</sup> Case 7/97, *Oscar Bronner v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791, [1999] 4 Common Market Law Review 112, paragraphes 57,58 et 69.

<sup>31</sup> Christopher Stothers, « Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union », [2001] European Competition Law Review 256, 260.

### 2.3.1 *Droit absolu au refus de vente (légalité intrinsèque)*

Il existe une école de pensée qui estime que les vendeurs devraient avoir toujours le droit de choisir les parties avec lesquelles ils sont disposés à traiter. On peut, en fait, trouver une version de ce principe dans des décisions du droit coutumier anglais qui remontent au Moyen Âge et les tribunaux américains continuent de l'inclure dans leurs décisions. Mais alors que ces derniers ont toujours édulcoré ce principe par des exceptions et que des juridictions comme l'UE sont toujours parties du principe que les entreprises dominantes ont en fait le devoir de vendre, l'idée que des refus de vente unilatéraux ne devraient jamais donner lieu à une mise en cause au regard du droit de la concurrence est encore parfois exprimée.

Il a semblé, pendant un certain nombre d'années que l'on pourrait asseoir sur une base théorique solide une règle tendant à considérer comme intrinsèquement légaux tous les refus de vente opposés par des monopoleurs intégrés verticalement. Les travaux de l'économiste Joseph Spengler ont montré que la situation des consommateurs n'était pas aggravée – et qu'elle pouvait même être améliorée – quand une entreprise intégrée verticalement jouissant déjà d'un monopole sur l'un au moins de ses marchés acquérait un monopole sur un marché adjacent en amont ou en aval.<sup>32</sup> Cette théorie du « profit de monopole unique » impliquait que, dans ce type de situation, les refus de vente devaient être efficaces du fait que l'entreprise opposant le refus aurait déjà tiré tout le profit de monopole que pouvait lui procurer son premier monopole et qu'en conséquence le refus de vente devait avoir visé un autre objectif que celui d'augmenter le pouvoir de monopole.

Salop fait partie de ceux qui sont opposés à appliquer aux refus de vente une règle de légalité absolue. Il estime que si elle était adoptée, cette règle serait utilisée pour excuser un autre comportement pouvant être qualifié de refus de vente tout en n'en constituant clairement pas un et en ne devant pas être considéré comme intrinsèquement légal (comme les achats liés).<sup>33</sup> Salop fait en outre observer que les économistes ont constaté que la théorie de Spengler n'est applicable que dans « certaines conditions théoriques restreintes et bien précises qui ne s'appliquent pas à la plupart des marchés mondiaux réels. »<sup>34</sup> Lorsqu'on l'énonce de façon négative, la théorie ne tient pas si l'une quelconque des conditions suivantes prévaut :

- *Le marché du moyen de production est réglementé mais pas celui du ou des produit(s).* L'entreprise intégrée pourrait refuser de vendre le moyen de production au prix réglementé pour pouvoir tirer des profits de monopole sur le marché du/des produit(s) non réglementé(s).
- *Une certaine concurrence s'exerce ou pourrait s'exercer sur le marché du moyen de production, c'est-à-dire que l'entreprise intégrée ne jouit pas d'un pouvoir de monopole sur ce marché.* Si l'entreprise intégrée est « simplement » dominante ou si elle fait partie d'un oligopole au lieu d'être un monopoleur, son refus de traiter avec des concurrents non intégrés peut avoir pour effet d'adoucir la concurrence sur le marché du moyen de production. En d'autres termes, l'entreprise qui oppose le refus peut essayer ainsi de laisser ses concurrents en amont remporter des affaires sans avoir à appliquer des prix aussi concurrentiels que ceux qu'ils devaient pratiquer avant le refus de vente. L'effet qui en résulte sur les prix du marché du moyen de production peut se traduire par une hausse de prix sur le marché du/des produit(s) (auquel participe aussi l'entreprise qui oppose le refus). Ou bien, si la concurrence sur le marché du moyen de production est seulement

<sup>32</sup> Joseph Spengler, « Vertical Integration and Antitrust Policy », 68 *Journal of Political Economy* 347 (1950).

<sup>33</sup> Steven Salop, *Opening Statement to the US Antitrust Modernization Commission* (29 septembre 2005), consultable sur le site: [www.amc.gov/commission\\_hearings/pdf/Salop\\_Opening\\_Statement.pdf](http://www.amc.gov/commission_hearings/pdf/Salop_Opening_Statement.pdf).

<sup>34</sup> Salop, *supra* note 19, page 3.

potentielle, l'entreprise en question peut opposer un refus de vente pour élever des barrières à l'entrée sur ce marché afin de préserver sa position dominante. Ce que Salop semble dire c'est que le monopoleur en amont pourrait simplement refuser d'approvisionner toute autre entreprise en aval. Sans ce moyen de production, ces autres entreprises devraient quitter le marché, laissant ainsi des entrants potentiels en amont sans clients en aval à approvisionner. L'entreprise dominante obligerait donc ces entrants potentiels soit à renoncer à leur projet d'entrée soit à entrer à la fois sur le marché en amont et sur le marché en aval.

- *L'entreprise intégrée est un concurrent réel ou potentiel de la victime du refus de vente (ou de ses clients ou partenaires) sur un marché apparenté.* C'est une situation de vente liée ou subordonnée. L'entreprise intégrée refuse de vendre le bien lié aux concurrents réels et potentiels sur le marché de ce bien afin d'essayer d'y établir ou d'y maintenir un pouvoir de marché.
- *L'entreprise mise en cause ne peut exercer de discrimination par les prix.* Si l'entreprise intégrée ne peut exercer de discrimination par les prix à l'encontre de ses concurrents non intégrés en raison des restrictions imposées par la réglementation, par exemple, ou du risque d'*arbitrage*, elle peut recourir à un refus de vente, faute de mieux. Cela peut entraîner une hausse des prix et, par conséquent, léser les consommateurs.
- *La technologie de production n'utilise pas tous les moyens de production dans des proportions fixes.* À la différence des autres facteurs, la possibilité de faire varier les proportions des moyens de production utilisés ne constitue pas en soi une incitation directe à recourir à des refus de vente anticoncurrentiels. Elle implique cependant que si un refus de vente (ou une autre stratégie) *anticoncurrentiel* est utilisé pour entraver la concurrence sur le marché en aval, la théorie du profit de monopole unique ne s'appliquera pas et il en résultera un certain préjudice pour les consommateurs.<sup>35</sup>

### 2.3.2 *Illicéité absolue*

Cette règle imposerait aux entreprises en position dominante une obligation absolue et inconditionnelle de vente. Pour que cela ait un sens au niveau pratique, il faudrait que cette obligation s'accompagne d'indications de prix et autres termes de l'échange. On pourrait exiger par exemple que les entreprises dominantes vendent à leur coût variable moyen ou à un prix bien défini fixé au coût de revient plus marge. Il faudrait en outre prévoir des dispositions organisant la surveillance par un tribunal, une administration ou un organisme réglementaire. L'imposition d'une norme absolue risquerait d'affaiblir les motivations des entreprises à investir et innover.

### 2.3.3 *Critère de la renonciation à bénéfice*

Selon le critère de la renonciation à bénéfice, lorsqu'une entreprise dominante a une pratique qui l'oblige à renoncer au profit à court terme, cette pratique doit être réputée illicite si elle aurait été irrationnelle en l'absence de la volonté de cette entreprise d'éliminer ou de restreindre la concurrence à plus long terme. Ce critère a apparemment un certain intérêt parce qu'il semble distinguer la pratique délibérément préjudiciable à la concurrence de la réaction saine à la concurrence. Nous avons discuté en

<sup>35</sup>

La raison en est que lorsque le marché (du moyen de production) en amont est le seul à être monopolisé, les entreprises en aval peuvent réagir en modifiant la composition de l'ensemble des moyens de production qu'elles utilisent de façon à réduire au minimum la quantité du bien monopolisé dont elles ont besoin pour leur production.

détail du critère de la renonciation à bénéfice dans un précédent document. Nous en parlerons donc ici plus brièvement<sup>36</sup>.

Dans le cadre du refus de vente, le critère de la renonciation à bénéfice pose la question de savoir si le refus de vente de l'entreprise dominante oblige cette entreprise à sacrifier le profit à court terme qui ne se conçoit rationnellement que si ce refus de vente tend aussi à éliminer ou affaiblir la concurrence à plus long terme. Si tel est le cas, ce refus, selon le critère de la renonciation à bénéfice, doit être considéré comme illicite.

À première vue, il semble que le critère de la renonciation à bénéfice ait une trop grande portée dans le cadre du refus de vente car il condamne apparemment tout refus de vente par une entreprise dominante. Après tout, une entreprise sacrifie de toute évidence son profit lorsqu'elle refuse de vendre, n'est-ce pas ? Cela n'émeut pas ceux qui estiment qu'au départ, lorsque l'on examine un refus de vente, il faut commencer par énoncer que les entreprises dominantes ont l'obligation de vendre et qu'elles ne peuvent être autorisées à refuser de vendre que si elles ont une justification objective. Pour les autres observateurs, la portée apparemment large du critère de la renonciation à bénéfice est peut-être plus perturbante, notamment si une entreprise verticalement intégrée refuse de vendre simplement parce qu'elle veut se réserver autant de volume d'activités que possible. Dans ce cas, l'entreprise n'est pas nécessairement en train de s'efforcer d'éliminer la concurrence en aval. Elle veut simplement ne pas vendre à quiconque d'autre qu'elle même et ne pas être obligée d'aider les autres qui seraient alors mieux à même de vendre leurs propres produits sur le marché aval. Ce scénario est l'un des plus intéressants lorsque l'on parle du refus de vente. Ce refus devrait-il être illicite dans un tel cas de figure ?

Le critère de la renonciation à bénéfice a des implications claires – du moins en théorie – pour tous les cas où une entreprise verticalement intégrée et dominante sur un marché d'amont décide de ne pas vendre à ses rivaux d'aval (et à ses rivaux potentiels). Pour appliquer correctement le critère, il faut prendre en compte le fait qu'une entreprise intégrée perd du chiffre d'affaires en aval toutes les fois qu'elle permet à un rival d'aval de procéder à une vente en lui fournissant sur le marché amont les biens intermédiaires nécessaires. Par conséquent, si le coût d'opportunité, pour une entreprise intégrée, des ventes qu'elle perdra sur le marché aval en fournissant à ses rivaux les biens intermédiaires nécessaires, compense les bénéfices tirés de la vente à ces rivaux desdits biens intermédiaires sur le marché amont, le refus de vente n'implique pas renonciation à bénéfice à court terme et, d'après le critère de la renonciation à bénéfice, l'entreprise intégrée n'est pas coupable d'une pratique anticoncurrentielle<sup>37</sup>. On notera d'ailleurs qu'il en est ainsi, alors même que les intentions de l'entreprise dominante seraient contraires au libre jeu de la concurrence.

L'une des faiblesses du critère de la renonciation à bénéfice appliqué au refus de vente est qu'il ne fait pas nécessairement apparaître les pratiques opportunistes, comme par exemple le fait pour une entreprise d'encourager d'autres entreprises à se connecter à son réseau ou à assurer la compatibilité de leur réseau avec le sien, jusqu'à obtenir une position dominante et imposer ensuite des termes de l'échange moins favorables. Nous discutons de ce scénario plus en détail à la section 2.3.8. On ne voit pas pour quelle raison une telle pratique impliquerait une renonciation à bénéfice par l'entreprise dominante. En fait, la pratique opportuniste est probablement la plus tentante lorsqu'une entreprise dominante estime qu'il est rentable de changer les termes de l'échange une fois sa position dominante acquise.

<sup>36</sup> OCDE, « La Concurrence par les mérites », Note de référence, DAF/COMP(2005)17 (juin 2005).

<sup>37</sup> On peut penser que le critère prend en compte les prix d'aval qui s'appliqueraient si les entreprises rivales restaient sur le marché, sinon ce critère permettrait à l'entreprise qui refuse de bénéficier d'une restriction de la concurrence. Salop est d'accord avec ce point de vue. Salop, *supra* n. 19 page 12.

### 2.3.4 Le critère de l'irrationalité économique

Selon le critère de l'irrationalité économique, une pratique devrait être illicite si elle est irrationnelle du point de vue économique, mis à part le fait qu'elle élimine ou restreint la concurrence. Ce critère diffère de celui de la renonciation à bénéfice étant donné que ce dernier n'est ni une condition nécessaire, ni une condition suffisante pour que le critère de l'irrationalité économique ne soit pas satisfait. Ce critère échappe donc aux critiques adressées au critère de la renonciation à bénéfice. Le ministère américain de la Justice est favorable au critère de l'irrationalité économique et a préconisé son utilisation dans plusieurs affaires récentes plaidées en application de l'article 2 de la Loi Sherman<sup>38</sup>. En 2005, M. Pate, ancien Assistant Attorney General, a déclaré lors de son audition par la Commission américaine de modernisation de la législation antitrust que le critère de l'irrationalité économique est la norme qui doit être utilisée pour l'examen des refus de vente<sup>39</sup>.

Face à un refus de vente, le critère de l'irrationalité économique pose fondamentalement la question suivante : le refus de l'entreprise dominante est-il rationnel du point de vue économique ou commercial, hormis le fait qu'il tend à porter préjudice à la concurrence ? Si la réponse est positive, alors, d'après ce critère, le refus de vente ne doit pas être considéré comme illicite. En termes clairs, la responsabilité de l'entreprise selon le critère de l'irrationalité économique est engagée si la preuve est apportée que, pour les quatre éléments suivants :

l'entreprise détient un pouvoir sur le marché des biens intermédiaires

l'entreprise refuse effectivement ou implicitement de vendre ces biens intermédiaires

ce refus n'a pas de justification économique, hormis sa pratique qui tend à maintenir, renforcer ou acquérir un pouvoir de marché

et l'entreprise maintient, renforce ou acquiert un pouvoir de marché en raison du refus de vente<sup>40</sup>.

Comme pour le critère de la renonciation à bénéfice, le critère de l'irrationalité économique a des implications théoriques assez claires dans les situations où une entreprise verticalement intégrée et dominante sur un marché d'amont décide de ne pas vendre à ses rivaux d'aval (et rivaux potentiels). Si, pour l'entreprise intégrée, le coût d'opportunité de la perte de ventes en aval résultant de la fourniture par cette entreprise à ses rivaux des biens intermédiaires nécessaires, compense les bénéfices tirés de la vente à ces rivaux desdits biens intermédiaires sur le marché amont, le refus de vente se justifie au niveau commercial et selon le critère, l'entreprise n'est pas fautive et ce, ici encore, même si l'entreprise dominante est animée d'intentions anticoncurrentielles.

<sup>38</sup> Voir, par exemple, Conclusions pour les États-Unis et la Commission fédérale du commerce en tant que tiers intervenant à l'instance à l'appui du requérant, page 15, *Verizon Communications Inc. contre Trinko*, 540 U.S. 398 (2004), disponible à l'adresse [www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682\\_mer\\_ami.pdf](http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682_mer_ami.pdf) ; Conclusion des plaignants intimés en appel États-Unis et États des États-Unis, page 48, *United States contre Microsoft Corp.*, 253 F.3d 34 (Circuit District of Columbia. 2001), disponible à l'adresse [www.usdoj.gov/atr/cases/f7200/7230.htm](http://www.usdoj.gov/atr/cases/f7200/7230.htm) ; Conclusion pour les États-Unis page 26 (version rédigée), *United States contre Dentsply International, Inc.*, 399 F.3d 181 (3<sup>e</sup> Circuit 2005), disponible à l'adresse [www.usdoj.gov/atr/cases/f202100/202141.htm](http://www.usdoj.gov/atr/cases/f202100/202141.htm).

<sup>39</sup> Nous avons longuement parlé du critère de l'irrationalité économique dans un document précédent. OCDE, « La Concurrence par les mérites », Note de référence, DAF/COMP(2005)17 (juin 2005).

<sup>40</sup> Commission américaine de modernisation de la législation antitrust, *supra* n. 7, 103.

Salop – qui critique les critères de la renonciation à bénéfice et de l'irrationalité économique – fait observer que la comparaison du coût d'opportunité en aval avec les gains en amont n'est facile à faire que lorsque les produits vendus par l'entreprise intégrée et son concurrent non intégré sont identiques et la demande des consommateurs n'est pas sensible aux prix<sup>41</sup>. Dans cette situation, si l'entreprise intégrée refuse de vendre à une entreprise concurrente X unités du bien intermédiaire, elle est donc en mesure de vendre X unités supplémentaires de ce bien aux consommateurs. Cette analyse se complique si les produits sont différenciés et si la demande des consommateurs est sensible aux prix. Il n'y a alors plus substitution d'un bien par un autre. Certes, face au refus de vente, certains consommateurs pourraient réagir en achetant davantage auprès de la division aval de l'entreprise dominante, mais d'autres consommateurs pourraient changer et s'approvisionner auprès d'un tiers. Pour utiliser les critères de la renonciation à bénéfice ou de l'irrationalité économique dans une telle situation, il faudrait évaluer l'effet de substitution, ce qui, selon les propres mots de Salop, « n'est pas une tâche facile »<sup>42</sup>.

### 2.3.5 *Le critère de l'entreprise aussi efficiente.*

Le critère de l'entreprise aussi efficiente a pour but d'identifier les pratiques des entreprises dominantes qui portent préjudice à la concurrence. On se pose la question suivante : ces pratiques sont-elles susceptibles d'évincer des entreprises rivales au moins aussi efficaces que l'entreprise dominante ? Si la réponse est que les entreprises aussi efficaces seraient probablement évincées, on considère alors que cette pratique est préjudiciable à la concurrence, sinon les pratiques sont considérées comme licites. Ce critère évite l'écueil qui consiste à protéger les concurrents plutôt la concurrence. En effet, dans des conditions normales de concurrence, un marché n'est servi que par les entreprises les plus efficaces. On considère donc que l'éviction des entreprises les moins efficaces n'est pas préjudiciable à la concurrence<sup>43</sup>.

Face à un refus de vente, le critère de l'entreprise aussi efficiente se demande si le refus de l'entreprise dominante risque d'évincer un concurrent aussi efficace. Dans l'affirmative, ce critère permet de considérer que ce refus est illicite. En d'autres termes, le critère de l'entreprise aussi efficiente autorise les refus de vente qui évincent les entreprises rivales moins efficaces que l'entreprise dominante. Ce critère provoque nécessairement un dilemme : que signifie « aussi efficace » ? Si l'entreprise dominante est verticalement intégrée, le terme d'entreprise aussi efficiente s'applique-t-il à une entreprise qui n'est aussi efficace que sur le marché d'aval, ou bien à une entreprise aussi efficace que l'entreprise dominante sur les marchés d'amont et d'aval (donc également intégrée verticalement) ? Dans le premier cas, l'entreprise incriminée aurait beaucoup plus de difficultés à satisfaire au critère. De plus, peut-on prendre en compte une entreprise hypothétique aussi efficace à un certain niveau de production (par exemple, aux faibles niveaux d'activité auxquels de nouveaux entrants opèrent probablement), mais pas à tous les niveaux, ou l'entreprise aussi efficace doit-elle être aussi efficace lorsque son niveau d'activité est de même ampleur que celui de l'entreprise incriminée ? Ici encore, dans le premier cas, l'entreprise incriminée aurait beaucoup plus de difficultés à satisfaire au critère.

### 2.3.6 *Le critère de mise en balance du bien-être du consommateur.*

Selon le critère du bien-être du consommateur dans sa forme la plus générale, une pratique n'est pas illicite, à moins qu'elle ait tendance à diminuer le bien-être du consommateur en augmentant les prix et en

<sup>41</sup> Salop, *supra* n. 19, 13.

<sup>42</sup> *Id.*, 13. Salop formule également des critiques plus complexes des critères de renonciation à bénéfice et d'irrationalité économique en cas de refus de vendre. *Voir idem*, 14-16.

<sup>43</sup> Le critère de l'entreprise aussi efficiente a également été longuement étudié dans un précédent document. OCDE, « La concurrence par les mérites », Note de référence, DAF/COMP(2005)17 (juin 2005).

baissant la production. Ce critère est intéressant à première vue. En effet, à la différence des critères qui reposent sur d'autres éléments comme la renonciation à bénéfices pour prévoir les effets sur le bien-être, le critère du bien-être du consommateur a un rapport direct avec la promotion de ce bien-être. Si les pratiques d'une entreprise dominante diminuent le bien-être sans contribuer à une augmentation de l'efficacité de l'entreprise, ce critère est relativement facile à appliquer. Cela devient bien évidemment plus problématique si les pratiques de l'entreprise dominante sont susceptibles de diminuer le bien-être du consommateur et d'augmenter parallèlement l'efficacité de cette entreprise<sup>44</sup>.

Dans un cas de refus de vente où l'entreprise incriminée détient un pouvoir sur le marché d'un bien intermédiaire utilisé par les rivaux de cette entreprise, l'application du critère de bien-être du consommateur suppose que l'on détermine si le refus de vente de l'entreprise incriminée (refus effectif ou implicite) entraînerait des prix supérieurs à la normale sur un quelconque marché. Pour justifier la responsabilité de l'entreprise, il faudrait démontrer que les rivaux étaient prêts à payer un prix suffisant pour le bien intermédiaire. On entend par prix suffisant un prix suffisamment élevé pour que l'on en déduise qu'à ce prix-là, le refus de vente est anticoncurrentiel. Si l'entreprise rivale (ou les entreprises rivales) était (étaient) prête(s) à payer un prix suffisant, c'est à l'entreprise incriminée de démontrer que le refus de vente était nécessaire pour créer des efficacités et que ces efficacités compensent, et au-delà, les conséquences préjudiciables du refus de vente<sup>45</sup>.

Le principal problème de ce critère est la difficulté de bien mettre en balance les effets positifs et négatifs de la pratique de l'entreprise dominante sur le bien-être du consommateur. On peut douter que les administrations chargées de la concurrence ou les tribunaux puissent quantifier de manière fiable et cohérente les effets anticipés d'une pratique qui augmente l'efficacité et diminue le bien-être du consommateur. Si les tribunaux ne sont guère susceptibles d'avoir des chiffres exacts mais se livrent au lieu de cela à une mise en balance approximative des effets positifs et négatifs anticipés, cela risque de donner lieu à des impressions et un raisonnement subjectifs rendant les résultats moins prévisibles. Selon Gavil, comparer des évolutions du bien-être des consommateurs avec des évolutions d'efficacité productive des entreprises revient à comparer des pommes avec des oranges. D'après Gavil, il n'y a pas d'arbitrage évident entre les deux à titre individuel<sup>46</sup>.

### 2.3.7 Intention anticoncurrentielle

Les partisans de la prise en compte de l'intention dans les cas d'abus de position dominante expliquent leur position en faisant remarquer que les dirigeants d'entreprises sont mieux placés que les pouvoirs publics ou les juges pour savoir si leur pratique est susceptible d'évincer la concurrence. Étant donné que ces dirigeants sont des acteurs expérimentés et rationnels, toute preuve que ces acteurs ont l'intention de porter préjudice à un concurrent ou à la concurrence elle-même est plus fiable qu'une supputation par des personnes extérieures au marché de la probabilité d'un abus de position dominante.

Cependant, le recours à la preuve d'une intention anticoncurrentielle en général pour distinguer une pratique légitime, propice à la concurrence d'une pratique préjudiciable aux consommateurs, n'est pas tellement prisé par les économistes. Cela ne veut pas dire que la preuve d'une telle intention n'a absolument aucune valeur. Si cette preuve est suffisamment précise, elle peut contribuer à la conclusion

<sup>44</sup> Le critère du bien-être du consommateur a également été longuement étudié dans un précédent document. OCDE, « La Concurrence par les mérites », Note de référence, DAF/COMP(2005) 17 (juin 2005). On débat aussi longuement dans ce document d'un autre critère : le critère d'efficacité de Einer Elhauge. Il est relativement complexe et nous ne l'abordons donc pas ici.

<sup>45</sup> Salop, *supra* n. 19, 2, 5-7.

<sup>46</sup> Andrew Gavil, « Stratégies de diffusion des entreprises dominantes aux fins d'éviction de la concurrence : pour un meilleur équilibre », 72 *Antitrust Law Journal* 3, 71-72 (2004).

qu'il y aura probablement des effets anticoncurrentiels. Les commentaires de Carl Shapiro sont significatifs à cet égard :

La question centrale en matière de concurrence, s'agissant d'une pratique d'éviction, est celle-ci : cette pratique est-elle susceptible de porter préjudice aux consommateurs ? En d'autres termes, nous nous soucions des effets probables de la pratique en question. Les preuves d'une *intention* ne sont pertinentes que dans la mesure où elles donnent des informations sur les effets probables de cette intention. Des preuves selon lesquelles les dirigeants d'une entreprise dominante essayaient de « battre la concurrence », « dominer le marché » ou même « tuer la concurrence » ne donnent normalement pas beaucoup d'informations pour distinguer la concurrence légitime d'une pratique d'éviction . . . Cependant, les dirigeants d'entreprises sont censés bien mieux appréhender le fonctionnement des marchés où ils opèrent que ne peuvent le faire des juges ou des jurys. Par conséquent, les expressions plus précises qu'ils sont susceptibles d'employer pour parler de leurs objectifs, comme « affaiblir le concurrent X en lui bloquant l'accès à la clientèle » peuvent avoir un contenu informatif très explicite quant aux effets probables de leur pratique sur la concurrence et la clientèle<sup>47</sup>.

Les juristes et même les juges s'accordent parfois à dire que les preuves d'intention anticoncurrentielle en générale, sans plus, ne sont pas très informatives. Glazer, paraphrasant le juge John Paul Stevens de la Cour suprême américaine, écrit qu'il « est bien trop tard dans l'histoire de la jurisprudence en matière de concurrence pour être choqué par une entreprise qui veut avoir le marché pour elle toute seule »<sup>48</sup>.

De plus, si la présence d'une intention anticoncurrentielle est un élément du critère de l'abus de position dominante, l'absence de preuve d'une telle intention devrait alors exonérer l'entreprise incriminée de toute responsabilité. Cela risque de donner des résultats indésirables pour la concurrence et le bien-être des consommateurs. En effet, une entreprise suffisamment prévoyante peut abuser de sa position dominante sans laisser de preuve de son intention en ce sens<sup>49</sup>.

### 2.3.8 *Existence ou non de relations commerciales antérieures.*

Il y a des arguments pour et contre ce critère. Il s'agit de savoir si l'entreprise dominante refuse de vendre à des clients auxquels elle a déjà vendu ou à des clients auxquels elle n'a jamais vendu. Si l'entreprise dominante a déjà traité avec les entreprises visées par son refus de vente, et si ces entreprises ont fait des investissements en rapport avec leurs relations avec l'entreprise dominante, comme par exemple faire de la publicité pour un produit qui ne peut être fabriqué qu'avec un bien intermédiaire produit en amont par l'entreprise dominante, le refus de vente de cette dernière tend à causer un plus grand préjudice parce qu'il annihile la valeur de ces investissements. En outre, le fait que l'entreprise d'amont avait auparavant vendu à ces clients est une certaine preuve que, du moins à cette période-là, ces ventes

<sup>47</sup> Shapiro, *supra* n. 3, 4-5 (les mots en italique le sont dans l'original).

<sup>48</sup> Glazer, *supra* n. 16 à 5 ; voir aussi l'arrêt *A. A. Poultry Farms, Inc. contre Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7<sup>e</sup> Circuit 1989) (Easterbrook, J.) (« Presque tous les éléments de preuve relatifs à l'intention tendent à établir à la fois un désir de réussite alimenté par l'appât du gain et la jubilation devant les malheurs des rivaux (...) Les entreprises n'ont pas à aimer leurs concurrents ; elles n'ont pas à les encourager. Le désir d'éliminer ses rivaux est tout à fait compatible avec la concurrence et en constitue même souvent le moteur. »)

<sup>49</sup> Voir *Barry Wright Corp. contre ITT Grinnell Corp.*, 724 F.2d 227, 232 (1<sup>er</sup> Cir. 1983) (Juge Breyer) (qui fait remarquer que, dans le cadre du critère de l'intention anticoncurrentielle, les entreprises peuvent s'abstenir de décrire les motifs et les conséquences de leurs actions, mettant ainsi ce critère en échec).

étaient rentables. À moins que les conditions aient changé de telle sorte que la vente dans les conditions antérieures ne soit plus rentable, le refus de vente risque alors de ne pas satisfaire aux critères de renonciation à bénéfices et/ou d'irrationalité économique.

L'existence ou non de changements justifiant le refus de vente est un élément essentiel de ce critère. Si les coûts de l'entreprise dominante ont augmenté pour une raison ou pour une autre ou si cette entreprise a amélioré son produit, un prix plus élevé peut se justifier, même si au départ cette hausse peut sembler être un refus de vente implicite. Par contre, si le refus de vente fait partie d'une nouvelle stratégie commerciale, cela peut poser des questions difficiles. Qu'en est-il, par exemple, si une entreprise verticalement intégrée décide qu'elle doit augmenter les prix de vente qu'elle pratique avec ses rivaux d'aval parce que le prix courant n'intègre pas le coût d'opportunité de la perte de ventes en aval<sup>50</sup>? Si le changement résulte simplement de la reconnaissance que l'ancien prix ne mesurait pas correctement le coût économique, on pourrait alors arguer que la rectification de cette erreur ne doit pas être considérée comme anticoncurrentielle, même si l'augmentation du prix du bien intermédiaire est répercutée sur le consommateur final. Il peut être difficile de prouver, dans un sens comme dans l'autre, que cette erreur est la véritable raison de l'augmentation de prix et non pas juste un prétexte.

L'une des rares situations pour lesquelles Shapiro a moins d'hésitation à imposer une responsabilité en termes de droit de la concurrence, s'agissant de refus unilatéral de vendre, est celle de l'opportunisme des bases installées<sup>51</sup>. Cette situation peut se produire sur des marchés à effet de réseau lorsqu'une entreprise atteint une position dominante en pratiquant notamment des politiques « ouvertes » qui encouragent la coopération entre entreprises complémentaires. Une fois que les entreprises complémentaires se sont engagées, l'entreprise dominante peut exploiter cet engagement en imposant des conditions d'interconnexion moins favorables ou en refusant carrément toute interconnexion. Shapiro fait remarquer qu'il est courant pour des entreprises du secteur informatique qui exploitent des « plateformes », d'accueillir des entreprises fabriquant des produits complémentaires, même si ces entreprises fabriquent aussi des produits en concurrence directe avec certains des produits de la première entreprise. Ce type « d'ouverture » peut être vital pour le succès initial de la plateforme. Si l'entreprise devient dominante, elle peut être tentée de cesser d'être aussi coopérative.

Shapiro a deux raisons d'être moins préoccupé de poursuivre en justice les cas d'opportunisme des bases installées<sup>52</sup>. En premier lieu, à la différence du droit de garder pour soi-même les fruits de son investissement ou de changer les termes de l'échange avec les partenaires commerciaux, le droit de refuser de vendre pour des raisons d'opportunisme n'est pas nécessaire pour encourager l'innovation. En fait, la crainte d'être victimes de pratiques opportunistes peut éteindre les motivations des autres entreprises à investir. En second lieu, il y aura toujours un ensemble de conditions de ventes appliquées par le passé et que l'on peut utiliser lorsque l'on impose une obligation de vendre. Shapiro, bien qu'il reconnaisse que des difficultés puissent subsister en raison d'une évolution possible des conditions économiques, estime importante l'existence « d'une référence applicable et réelle fondée sur des transactions antérieures [...] » Il est intéressant de noter que la seconde raison semble s'appliquer dans tous les cas de refus de vente où il y a eu une transaction antérieure mais selon Shapiro, il ne faut certainement agir que lorsque l'entreprise incriminée s'est comportée de manière opportuniste.

D'un autre côté, imposer à une entreprise une obligation générale de continuer à vendre à d'autres entreprises une fois qu'elles sont devenues clientes peut rendre les entreprises d'amont réticentes à commencer à vendre leurs biens intermédiaires à des rivaux en aval. Cela freinerait le développement des

<sup>50</sup> Cet exemple est discuté dans Shapiro, *supra* n. 3, 15.

<sup>51</sup> *Id.*, 16.

<sup>52</sup> *Id.*, 16.

capacités et de nouveaux produits et services, ce qui serait aussi préjudiciable aux consommateurs. Elhauge convient qu'une telle obligation n'est pas souhaitable car elle découragerait les entreprises dominantes de traiter avec leurs rivaux, « incitant ainsi précisément au genre de discrimination à l'encontre des entreprises rivales qui ne motive pas les entreprises à investir ex ante<sup>53</sup>. Glazer ajoute qu'une obligation de continuer à coopérer avec des rivaux risque de porter préjudice aux consommateurs de façon plus fondamentale, en facilitant les collusions<sup>54</sup>.

Même si un tribunal ou une administration publique ne sont pas à l'aise juger de la responsabilité d'une entreprise sur la base de l'historique des relations commerciales, s'il existe suffisamment d'éléments de preuve par ailleurs pour engager la responsabilité de l'entreprise, on peut estimer que l'historique des relations commerciales peut malgré tout contribuer à fixer un prix plafond (si l'on doit en imposer un). Le prix que l'entreprise dominante avait pratiqué auparavant est un choix évident. Par contre, exiger des entreprises qu'elles continuent à traiter avec leurs rivales dans les mêmes conditions qu'auparavant n'est pas réaliste dans un monde qui évolue. Il faut donc introduire une certaine souplesse afin de prendre en compte l'évolution des coûts du vendeur et les éventuelles améliorations qualitatives de ses produits. Il n'en reste pas moins que l'ancien prix peut au moins donner une idée approximative de ce que peut être un juste prix, ce dont on ne peut avoir aucune idée en l'absence d'un historique de relations commerciales.

### 2.3.9 *Justifications objectives*

Dans un certain sens, cette question a un rapport avec l'intention, mais on se sert des justifications objectives pour exonérer des entreprises incriminées plutôt que pour prouver leur responsabilité. Appliquée à un cas de refus de vente, une justification objective est en fait une circonstance spéciale qui excuse un refus qui serait sinon illégal. Quel que soit le critère ou la norme utilisé pour juger que le refus de vente devrait être illicite, l'analyse n'est pas complète si l'on ne tient pas compte de justifications objectives plausibles. Il existe en effet parfois des raisons valables, et même favorables à la concurrence, pour lesquelles des entreprises dominantes refusent de vendre.

Il appartient généralement à l'entreprise incriminée d'apporter la preuve d'une justification objective. Cette entreprise doit prouver que le refus de vente était une mesure nécessaire, ou du moins rationnelle et ce, pour une raison autre que de porter préjudice à la concurrence. Elle doit donc être en mesure de montrer qu'elle aurait refusé de vendre, même si, ce faisant, cela n'avait pas affecté la concurrence. Si l'entreprise apporte cette preuve, les critiques du critère de l'intention anticoncurrentielle eux-mêmes seraient probablement d'accord pour dire qu'un organisme chargé de la concurrence peut utiliser toute preuve qu'il détient pour réfuter la justification présentée par l'entreprise.

Prenons un exemple : une entreprise acheteuse présente sur un marché aval et dont la production est de qualité médiocre, risque de nuire à la réputation de l'entreprise d'amont si cette entreprise d'aval peut se servir du produit de l'entreprise d'amont pour son propre produit ou service. Autre exemple : un fabricant peut avoir besoin d'imposer un système de quotas pour rationner l'approvisionnement en médicament vital ou en autre produit essentiel à la santé ou à la sécurité publique. Hormis la question de savoir si le système de quotas est biaisé d'une certaine manière, lorsque le quota d'une partie est atteint, le fabricant peut être

<sup>53</sup> Einer Elhauge, « Définition de meilleures normes de monopolisation », 56 *Stanford Law Review* 253, 314 (2003). Voir aussi Glazer, *supra* n. 16, 4 (qui estime que l'obligation de continuer à vendre « aboutit à l'effet pervers qu'un monopoleur s'en sort mieux en ne commençant pas à coopérer afin de ne pas se retrouver piégé par un mauvais mariage ») ; Eleanor Fox, « Y a-t-il une vie avec l'arrêt *Aspen* après l'arrêt *Trinko* ? La révolution silencieuse de l'article 2 de la Loi Sherman », 73 *Antitrust Law Journal* 153, 160 (2005) (« Les entreprises monopolistiques hésiteraient à commencer à coopérer ; la loi avantagerait les anciennes manières de faire »).

<sup>54</sup> Glazer, *supra* n. 16, 5.

justifié à refuser de continuer de vendre lesdits médicaments ou produits à cette partie. Il existe de nombreux autres exemples de justifications objectives, potentiellement légitimes. Nous en donnons quelques-uns :

- l'entreprise dominante subit des augmentations de coûts ou apporte des améliorations à ses produits qui justifient une hausse des prix, même si ces hausses peuvent au départ sembler être un refus de vente implicite
- une entreprise verticalement intégrée peut estimer que la vente de son bien intermédiaire à d'autres entreprises sur le marché amont est infaisable pour une raison ou pour une autre, comme le fait par exemple que l'entreprise intégrée n'a pas les capacités suffisantes pour adapter la conception ou la production du bien intermédiaire à la demande des acheteurs, ou que cette adaptation coûte trop cher
- l'acheteur n'a pas payé par le passé les marchandises qu'il a reçues de l'entreprise dominante et cette dernière n'est pas désireuse de vendre à nouveau à cet acheteur ou de lui faire crédit.

### 3. Évolution du droit sur le refus unilatéral de vendre

La présente section décrit l'évolution de la jurisprudence concernant le refus de vente dans deux zones et pays, l'Union européenne et les États-Unis. Ces deux zones et pays ont une jurisprudence riche et une position relativement claire de leurs tribunaux sur la question du refus de vente. On parle aussi de deux affaires relativement récentes d'autres pays. On compare ensuite les approches et les résultats de ces affaires avec ce qu'ils auraient été si ces instances avaient été introduites auprès des tribunaux de l'Union européenne ou des États-Unis.

#### 3.1 Union européenne

L'article 82 faisant partie du Traité CE, il a été interprété à la lumière des objectifs généraux du Traité. L'article 82 et les décisions de justice fondées sur cet article concernent les pratiques qui nuisent aux consommateurs, mais les décisions ont parfois accordé à d'autres considérations une attention égale ou même supérieure. Certaines décisions importantes, par exemple, ont exprimé la préoccupation du tribunal face aux pratiques des entreprises dominantes qui manipulent ou arrêtent les échanges commerciaux entre États membres de l'UE, pratiques qui empêchent l'accès aux marchés et qui, du moins pour les affaires les plus anciennes, portent préjudice aux entreprises plus petites<sup>55</sup>. Dans l'ensemble, les cas récents jugés en vertu de l'article 82 n'ont pas tous exigé que la preuve d'effets anticoncurrentiels soit rapportée<sup>56</sup>. Toutefois, comme nous allons le voir bientôt, les cas de refus de vente dans cette jurisprudence sont l'exception.

Le principe de base en Europe est que les entreprises dominantes ont une obligation générale de vendre. L'adjectif « général » est important. En effet, ce principe n'a jamais été jusqu'à créer une obligation absolue de vendre<sup>57</sup>. Quoi qu'il en soit, la décision de la Cour de Justice des communautés européennes (CJCE) dans l'affaire *Bronner* en 1998 semble avoir supprimé cette obligation générale, ou du

<sup>55</sup> Voir l'affaire C-27/76 *United Brands contre Commission* [1978] Recueil de jurisprudence 207, [1978] 1 CMLR 429 ; affaires 6 et 7/73 *Commercial Solvents Corp contre Commission* [1974] Recueil de jurisprudence 223, [1974] 1 CMLR 309.

<sup>56</sup> OCDE, « La concurrence par les mérites », Note de référence DAF/COMP(2005)17 (juin 2005).

<sup>57</sup> Jones, *supra* n. 24, 245-46.

moins l'avoir affaiblie. *Bronner* et d'autres décisions plus récentes comme *Magill* et *IMS* ont fait pencher la balance en faveur des entreprises dominantes qui refusent de traiter. Toutefois, pour avoir un certain recul sur la position actuelle de la Cour, il faut d'abord parler de l'approche plus stricte adoptée par les tribunaux dans les premiers cas de refus de vente.

*Commercial Solvents Corporation contre Commission* est la première affaire de refus de vente tranchée par la CJCE<sup>58</sup>. La défenderesse, une entreprise dominante sur le marché de l'aminobutanol, avait arrêté de livrer ce produit chimique à une petite entreprise italienne qui l'utilisait dans la production de l'éthambutol. La défenderesse indiquait que son refus de vente avait pour motif qu'elle avait décidé d'entrer sur le marché de l'éthambutol pour son propre compte et qu'elle n'était plus en mesure de livrer de l'aminobutanol. La CJCE a tranché en faveur de la Commission. Elle a estimé que les faits de la cause ne confirmaient pas l'affirmation de Commercial Solvents selon laquelle cette dernière n'était pas en mesure de continuer à vendre à d'autres entreprises. Le tribunal a également jugé qu'une entreprise dominante sur un marché d'amont ne pouvait pas évincer ses anciens clients de la concurrence, ce qui « équivaldrait à éliminer l'un des principaux fabricants d'éthambutol dans le Marché Commun », juste parce qu'il avait décidé d'entrer sur le marché de ces anciens clients<sup>59</sup>. Cette partie de la décision fait supposer que la Cour a davantage privilégié le préjudice à un concurrent que le préjudice à la concurrence, fixant ainsi un seuil plus bas au déclenchement de la responsabilité de l'entreprise dominante. Ce passage le confirme :

« le détenteur d'une position dominante sur le marché des matières premières qui, dans le but de les réserver à sa propre production des dérivés, refuse de fournir ces matières à un client qui, lui-même, produit ces dérivés, au risque d'éliminer toute concurrence *de la part de celui-ci*, exploite sa position dominante d'une façon abusive »<sup>60</sup>.

Il convient aussi de noter que la Cour n'a pas pris en compte une quelconque efficience qui aurait pu avoir été provoquée par l'intégration verticale de la défenderesse.

Le principal arrêt suivant de la CJCE à propos d'un refus de vente est *United Brands Company contre Commission des Communautés européennes*<sup>61</sup>. Dans ce cas, le refus conditionnel de vendre n'avait pas été opposé directement à un concurrent de l'entreprise défenderesse, mais à un client qui avait coopéré avec l'un des concurrents de l'entreprise défenderesse. Plus précisément, United Brands ("UB") avait interrompu ses livraisons de bananes Chiquita à un distributeur danois parce que ce distributeur avait participé à une campagne publicitaire avec l'un des rivaux de UB. En raison de cette participation, le distributeur avait vendu moins de bananes Chiquita de UB. Cette pratique est une forme d'exclusivité qui ne rentre donc pas dans le cadre du présent document, mais il est néanmoins utile d'étudier le raisonnement de la Cour et de le comparer avec l'analyse faite par la Cour dans les arrêts suivants.

La Commission européenne avait décidé que la pratique de UB constituait un abus de position dominante. La CJCE en a jugé de même, sur le fondement que le refus de vente « limiterait les débouchés au préjudice des consommateurs » et « dissuaderait les autres distributeurs [] d'appuyer la publicité pour d'autres marques et que l'effet dissuasif [du refus de vente] opposé à l'un d'entre eux conforterait encore puissamment sa position de force sur le marché en cause»<sup>62</sup>. La CJCE a aussi jugé qu'une

<sup>58</sup> Affaires 6 et 7/73, [1974] Recueil de jurisprudence 223, [1974] 1 CMLR 309.

<sup>59</sup> *Id.* para. 25.

<sup>60</sup> *Id.* para. 25 (mots en italique ajoutés)

<sup>61</sup> [1978] Recueil de jurisprudence 207, [1978] 1 CMLR 429.

<sup>62</sup> *Id.* paras. 183, 192.

entreprise dominante ne pouvait pas cesser ses relations commerciales de longue date avec un client respectant les usages commerciaux. Arrêter les approvisionnements dans ces circonstances établirait une discrimination pouvant aller jusqu'à l'élimination d'un partenaire commercial du marché en cause<sup>63</sup>. En outre, tout en faisant remarquer que même les entreprises dominantes ont le droit de protéger leurs intérêts commerciaux, la Cour a aussi limité ce droit, déclarant que les pratiques d'une entreprise dominante doivent être « proportionnées » à la menace et ne doivent pas avoir pour but de renforcer sa position dominante ou d'en abuser.

Dans l'arrêt *United Brands*, la Cour a été attentive aux effets potentiels de la pratique de l'entreprise dominante sur la concurrence (par opposition aux effets potentiels sur les concurrents). Néanmoins, elle n'a pas expliqué très en détail ce que seraient ces effets ou dans quelles circonstances ils se produiraient. Elle n'a pas non plus exigé de démontrer que ces effets s'étaient déjà produits ou se produiraient probablement<sup>64</sup>. Le droit d'une entreprise dominante de se protéger a aussi été décrit de façon relativement vague. L'adjectif « proportionnées » est une norme subjective qui manque donc de prévisibilité. La Cour a accordé plus d'importance à l'intention de l'entreprise qu'aux effets réels de son comportement. De plus, on peut se poser des questions sur l'opportunité de décourager les entreprises dominantes de renforcer leur position. La jurisprudence *United Brands* est vieille de presque 30 ans et certaines vues de la Cour ont évolué.

La principale décision de jurisprudence suivante concerne le droit d'auteur, mais nous en parlons ici parce que son influence s'est peut-être étendue – ou pourrait finir par s'étendre – au-delà des cas de refus de licence de droit d'auteur. Dans l'arrêt *Magill* de 1995, trois chaînes de télévision avaient argué des droits d'auteur qu'ils détenaient sur leurs programmes TV pour empêcher l'éditeur d'un guide hebdomadaire des programmes de faire figurer les programmes de ces trois chaînes dans ce guide. À ce moment-là, il n'existait pas d'autre programme TV hebdomadaire couvrant les trois chaînes disponibles sur le marché en cause. La CJCE dans cette affaire s'est montrée beaucoup plus sceptique vis-à-vis de l'argument des plaignants fondé sur le refus de licence, que ce n'avait été le cas pour les affaires *Commercial Solvents* ou *United Brands*, surtout parce que la Cour voulait assurer une défense appropriée au droit d'auteur. La Cour a jugé qu'un refus de licence ne pouvait constituer un abus de position dominante que dans des « circonstances exceptionnelles » répondant à trois conditions : i) le produit concerné par le refus est un élément indispensable à la commercialisation d'un nouveau produit ; ii) le refus n'est pas justifié ; iii) et l'entreprise dominante se réserve pour elle-même le marché des produits dérivés. En passant en revue les éléments d'un refus illicite de licence, la Cour en a ajouté un nouveau (que le bien intermédiaire soit nécessaire pour la commercialisation d'un nouveau produit) et a relevé d'un cran l'exigence exposée dans l'affaire *Commercial Solvents* (que le refus de vente « risque d'évincer toute concurrence de la part de ce client ») pour fixer une nouvelle norme (que le refus, non seulement élimine toute concurrence de la part du client, mais que le défendeur détienne un monopole sur le marché aval). Malgré le renforcement de ces exigences, la Cour a jugé qu'elles étaient toutes satisfaites dans l'espèce *Magill* et a donc obligé les trois chaînes de télévision à accorder des licences de publication de leurs programmes<sup>65</sup>.

<sup>63</sup> *Id.* paras. 182-183.

<sup>64</sup> Jones fait remarquer qu'il ne semblait pas y avoir de la part du défendeur une intention d'empêcher ses distributeurs de commercialiser de la marchandise rivale. Le refus paraissait avoir pour objet de décourager toute poursuite de la participation aux programmes publicitaires des entreprises rivales. Elle en conclut que l'analyse de la Cour aurait dû se porter sur le point de savoir si, et dans quelle mesure, le refus augmentait les coûts des rivaux de UB ou restreignait leur accès au marché. Jones, *supra* n. 24, 247 n. 103.

<sup>65</sup> *Magill*, affaires jointes C-241 et 242/91P, [1995] Recueil de jurisprudence. I-743, 4 C.M.L.R., 718, 799-800.

En 1998, le jugement dans l'arrêt *Oscar Bronner contre Mediaprint*<sup>66</sup> a confirmé que la position de la CJCE sur le refus de traiter avait évolué, même dans les cas qui n'étaient pas relatifs au droit d'auteur. Tout comme l'arrêt *Magill*, *Bronner* a placé la barre de la responsabilité plus haut que ne l'avaient fait *Commercial Solvents* ou *United Brands*. *Bronner* publiait un journal régional autrichien et voulait avoir accès au système de portage à domicile d'un éditeur national de journaux plus important. L'entreprise plus importante, qui détenait une part dominante du marché des quotidiens, rejeta la demande de *Bronner*. La Cour jugea que, pour être illicite, le refus doit i) porter sur un produit ou un service indispensable à l'exercice de l'activité de l'entreprise sollicitant l'accès, en ce qu'il n'existe aucun substitut réel ou potentiel ; ii) éliminer toute concurrence de la part de l'entreprise sollicitant l'accès ; iii) et être objectivement injustifiable<sup>67</sup>.

La Cour a clairement indiqué que le caractère « indispensable » ne pouvait pas être satisfait en montrant simplement qu'il ne serait pas viable économiquement pour l'entreprise demandant l'accès de créer son propre système de portage. Il faudrait au moins prouver qu'il n'était pas économiquement viable pour une entreprise dans une position semblable à celle de la *défenderesse* (et non pas de la victime) de créer son propre système de portage. Il est intéressant de noter que dans l'affaire *Bronner*, la Cour utilise l'ancienne définition de « l'éviction de la concurrence » par l'affaire *Commercial Solvents* (le refus doit évincer toute concurrence de la part de la victime), et non pas la définition plus récente et plus sélective donnée par l'affaire *Magill* (le refus doit évincer toute concurrence sur le marché des produits dérivés). La Cour a estimé qu'elle n'avait pas besoin pour le moment de statuer sur le point de savoir si la jurisprudence *Magill* s'appliquerait à des affaires n'ayant pas trait au droit d'auteur étant donné que les faits dans l'espèce *Bronner* ne satisfaisaient même pas aux normes moins exigeantes fixées par l'arrêt *Commercial Solvents*, sans parler de celles de l'arrêt *Magill*. Le raisonnement de la Cour a consisté à dire que la concurrence de *Bronner* ne serait pas éliminée parce que plusieurs substituts au service de diffusion de *Mediaprint* seraient disponibles, dont le courrier postal ou les kiosques à journaux. D'autre part, il n'y avait pas d'obstacles techniques, réglementaires ou même économiques empêchant *Bronner* de créer son propre système de portage à domicile ou de le rendre déraisonnablement difficile. La Cour a donc jugé en faveur de l'entreprise *défenderesse*<sup>68</sup>.

Il peut apparaître étrange que l'affaire *Bronner* fasse le lien entre l'évaluation d'une position dominante et les critères établissant l'existence d'un abus de position dominante. En premier lieu, le caractère nécessairement indispensable, qui exige expressément qu'il n'y ait pas de substitut réel ou potentiel, n'est que la reconsidération des facteurs amenant au jugement que le défendeur détient une position dominante. Certes, le critère minimum est relevé au niveau du monopole plutôt que de la position dominante, mais ce critère concerne le pouvoir de marché et non pas une pratique abusive. En second lieu, l'exigence « d'éviction de toute concurrence de la part de la victime » n'est qu'une simple reformulation de la question suivante : la victime peut-elle exercer une concurrence sans l'accès au bien ou au service intermédiaire du défendeur<sup>69</sup>? En d'autres termes, ce n'est qu'une autre manière de demander s'il existe d'autres substituts.

Dans ses conclusions, le Juge Avocat Général Jacobs a saisi l'occasion pour faire plusieurs remarques auxquelles semble avoir acquiescé l'ensemble de la Cour. Il a d'abord déclaré que « le droit de choisir ses partenaires contractuels et de disposer librement de sa propriété sont des principes universellement consacrés dans les systèmes juridiques des États membres, en revêtant parfois un caractère

<sup>66</sup> Affaire 7/97, *Oscar Bronner contre Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] Recueil de jurisprudence I-7791, [1999] 4 CMLR 112.

<sup>67</sup> *Id.* para. 41.

<sup>68</sup> *Id.* paras. 43-46.

<sup>69</sup> *Stothers*, *supra* n. 31, 259.

constitutionnel »<sup>70</sup>. Il est intéressant de noter que ces principes semblent davantage tenir de la présomption appliquée par la jurisprudence aux États-Unis que de la présomption classique qui prévaut en Europe, selon laquelle les entreprises dominantes ont une obligation générale de vendre. En outre, le Juge Avocat Général Jacobs a précisé que les motivations des entreprises dominantes et leurs concurrents d'investir dans des installations de production efficaces ne doivent pas être affaiblies, ce qui serait le cas si les concurrents pouvaient partager ces installations sur demande<sup>71</sup>.

Très récemment, la CJCE a confirmé dans un autre cas ayant trait au droit d'auteur que le refus par une entreprise dominante d'accorder une licence peut être illicite dans certaines circonstances<sup>72</sup>. Dans l'arrêt IMS de 2004, la Cour a jugé que :

« Il ressort de cette jurisprudence que, pour que le refus d'une entreprise titulaire d'un droit d'auteur de donner accès à un produit ou à un service indispensable pour exercer une activité déterminée puisse être qualifié d'abusif, il suffit que trois conditions cumulatives soient remplies, à savoir que ce refus fasse obstacle à l'apparition d'un produit nouveau pour lequel il existe une demande potentielle des consommateurs, qu'il soit dépourvu de justification et de nature à exclure toute concurrence sur un marché dérivé. »

Il s'agit des mêmes critères que ceux de la jurisprudence *Magill*.

Cette fois-ci, le tribunal a expliqué ce que l'on entendait par « marché dérivé ». Ce terme ne fait pas référence à un marché concurrentiel séparé. Pour qu'il y ait marché dérivé, il suffit que l'on puisse identifier deux étapes différentes et interconnectées de production, pour lesquelles le produit amont est un bien intermédiaire nécessaire à la production du produit d'aval que le concurrent cherche à produire et à vendre. L'exigence selon laquelle le refus d'accorder une licence doit évincer toute concurrence sur le marché dit dérivé semble néanmoins constituer un net resserrement de l'ancien critère de l'affaire *Commercial Solvents* qui n'exigeait que l'éviction de la concurrence de l'entreprise demandant l'accès au marché. En outre, l'exigence que la partie à laquelle l'accès a été refusé doit avoir eu pour objectif de fabriquer un nouveau produit élève encore plus haut la barre de la responsabilité. Enfin, et cela est dommage, la Cour s'est abstenue d'expliquer pourquoi un refus d'accorder une licence peut être justifié, laissant ainsi sans réponse une question importante.

Si elles ne sont pas aussi claires qu'elles pourraient l'être, les décisions de la CJCE en matière de refus de vente ou de traiter témoignent d'une nette évolution vers la prise en compte des effets sur la concurrence et les consommateurs plutôt que sur un concurrent individuel, ainsi qu'une volonté de prise en compte de facteurs susceptibles de justifier un tel refus.

### 3.2 États-Unis

Contrairement à l'état de la jurisprudence dans l'Union européenne avant l'affaire *Bronner*, la présomption habituelle aux États-Unis a toujours été que les entreprises dominantes n'ont pas d'obligation générale de vendre, même si ce sont des monopoleurs et que leur refus restreint la concurrence. La valeur de cette présomption a fluctué au cours du temps, mais elle a été réitérée par la jurisprudence depuis la décision de la Cour suprême dans l'affaire *United States contre Colgate* en 1919. La Cour a jugé « qu'en

<sup>70</sup> *Bronner*, [1998] Recueil de jurisprudence I-7791, paragraphe 56.

<sup>71</sup> *Id.*, paras. 56-58.

<sup>72</sup> Affaire C-418/01, *IMS Health Care GmbH & Co. KG contre NDC Health GmbH & Co. KG*, Jugement du 29 avril 2004, alinéa 38.

l'absence de toute intention de créer ou de maintenir un monopole, la [Loi Sherman] ne restreint pas le droit reconnu de longue date à un commerçant ou fabricant engagé dans une activité entièrement privée, d'exercer en toute indépendance son propre jugement quant aux parties avec lesquelles il traite.»<sup>73</sup> Il fut une période entre les décisions *Aspen Skiing* et *Trinko* (1985-2004), où il est apparu que la présomption avait fini par disparaître et que les entreprises détenant un pouvoir de marché substantiel ne pouvaient refuser de vendre ou de traiter que si elles avaient une « raison commerciale légitime »<sup>74</sup>. Sans cette justification, les tribunaux américains présumeraient que le but et l'effet probable du refus étaient d'éliminer un concurrent. L'arrêt *Trinko* semble avoir ramené le pendule dans l'autre direction – et même au-delà de la position du tribunal dans la jurisprudence *Colgate*. Nous discutons ci-après de ces deux affaires.

L'importance relative du critère de l'intention anticoncurrentielle dans la jurisprudence américaine en matière de refus de vente a aussi beaucoup diminué ces dernières années, bien que ce critère reste un élément indispensable pour les tribunaux lorsqu'il s'agit de juger s'il y a tentative de monopolisation. Cette tendance a culminé avec la rebuffade du tribunal dans l'affaire *Trinko* qui a délibérément omis la phrase « en l'absence de toute intention de créer ou maintenir un monopole » dans sa citation de la jurisprudence *Colgate* ci-dessus. Pourtant, pendant de nombreuses années, l'intention a été un facteur important<sup>75</sup>.

La jurisprudence *Lorain Journal Co. contre United States* du milieu du XX<sup>e</sup> siècle est peut-être le seul cas américain de monopolisation où quasiment tous les commentateurs conviennent que la responsabilité du défendeur était engagée<sup>76</sup>. L'affaire *Lorain Journal* concernait une entreprise dominante qui refusait de traiter avec tout client en relation d'affaires avec l'entreprise rivale de l'entreprise dominante. Se fondant sur la conclusion que l'intention de l'entreprise défenderesse était d'abattre son concurrent et que, ce faisant, l'entreprise dominante maintiendrait son monopole, la Cour suprême a jugé que ce cas était une exception à la présomption établie par la jurisprudence *Colgate* et a confirmé que la responsabilité de la défenderesse était engagée pour tentative de monopolisation. La pratique incriminée dans *Lorain Journal* était, par essence, une forme d'exclusivité. Nous n'avons pas à nous appesantir sur ce point ici. Ce qui nous intéresse surtout, c'est simplement la confirmation par la décision dans *Lorain Journal* qu'il y a des exceptions au droit général pour une entreprise de refuser de vendre.

La décision de la Cour suprême de 1985 dans *Aspen Skiing Co. contre Aspen Highlands Skiing Corporation* est immédiatement devenue le cas faisant autorité aux États-Unis en matière de refus

<sup>73</sup> 250 U.S. 300, 307 (1919).

<sup>74</sup> *Aspen Skiing Co. contre Aspen Highlands Skiing Corporation*, 472 U.S. 585, 597 (1985).

<sup>75</sup> Voir par exemple *Eastman Kodak Co. contre Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927) (confirmant la responsabilité pour monopolisation alors que Kodak tentait une intégration en aval et avait refusé de vendre à un prix de gros des fournitures à un détaillant qui avait refusé d'être racheté par Kodak. Le tribunal avait notamment fondé sa décision sur le fait que, selon lui, le refus de vendre de Kodak « avait un objectif de monopole ». D'après Fox, le fait que la partie de phrase omise de la citation du jugement *Colgate* a servi pour la décision dans des arrêts tels *Lorain Journal* et *Aspen Skiing* montre que, « avant *Trinko*, il n'existait pas de prime abord un principe général selon lequel un monopoleur avait le droit de refuser de vendre ». Fox, *supra* n. 53, 157, 15 (italiques dans le document original). Cela n'est pas exact. Même les monopoleurs détenaient ce droit en vertu de l'arrêt *Colgate*. Ce qu'ils n'étaient pas autorisés à faire, c'était de refuser de vendre dans le but de conserver leur monopole. Quoiqu'il en soit, il ne semble pas avisé de recourir à l'intention pour maintenir un monopole en tant que critère de responsabilité puisque, logiquement, on peut penser que les monopoleurs essaieront de conserver leurs monopoles (par des moyens allant dans le sens de la concurrence, bien sûr). S'ils n'essayaient pas de conserver leur monopole et on peut même aller jusqu'à dire, s'ils n'essayaient pas de le renforcer, ils n'agiraient pas au mieux de leurs capacités dans un environnement concurrentiel.

<sup>76</sup> 342 U.S. 243 (1951) ; Glazer, *supra* n. 16, 7.

unilatéral de vendre et l'est restée pendant près de 20 ans<sup>77</sup>. Dans ce cas, on demandait à la Cour de fixer les conditions dans lesquelles une entreprise dominante doit poursuivre un accord commun de marketing avec une entreprise rivale. L'entreprise défenderesse (« Ski Co. ») possédait trois des quatre stations de ski du marché concerné. L'entreprise plaignante (« Highlands ») était propriétaire de la seule autre station. Pendant des années, les deux entreprises avaient coopéré et proposaient un forfait commun permettant aux skieurs d'utiliser les remontées sur l'ensemble des quatre sites. Les entreprises partageaient le chiffre d'affaires de la vente des forfaits communs sur la base de l'utilisation des remontées dans chaque station. À un certain moment, Ski Co. a exigé que Highlands accepte un pourcentage fixe du chiffre d'affaires nettement inférieur à la moyenne historique du chiffre d'affaires revenant à Highlands en fonction de l'utilisation des remontées. Les entreprises ne se sont pas mises d'accord sur les modalités de partage du chiffre d'affaires entre elles et Ski Co. a finalement résilié l'accord. Highlands a cherché diverses solutions pour sortir de l'impasse, y compris d'offrir des bons pour l'utilisation des remontées sur les trois stations de Ski Co. Ces bons auraient remboursé à Ski Co. l'intégralité du prix des forfaits de remontée, mais Ski Co. a refusé cette solution<sup>78</sup>.

La Cour suprême a reconnu que « même une entreprise détenant un pouvoir de monopole n'a aucune obligation de s'engager dans un accord commun de marketing avec un concurrent »<sup>79</sup>. Elle a néanmoins estimé que Ski Co. avait une telle obligation, la reformulant comme étant un droit non absolu de refuser de traiter : « L'importance que nous avons conférée au droit de refuser de traiter avec d'autres entreprises ne veut pas dire que ce droit ne souffre aucune nuance »<sup>80</sup>. On a beaucoup commenté sur le point de savoir pourquoi la Cour considère que le comportement de Ski Co. avait franchi la ligne rouge, notamment parce que le raisonnement de la Cour n'est pas tout à fait clair.

La décision en l'espèce est fondée sur un ensemble de normes dont l'importance relative des unes par rapport aux autres n'est pas spécifiée. La Cour a peut-être considéré que ces normes étaient toutes aussi importantes, ou elle a pu estimer que certaines sont plus essentielles que d'autres. En outre, on ne peut pas savoir d'après le jugement si l'une quelconque de ces normes, si elles sont satisfaites, suffisent individuellement d'après la Cour à engager la responsabilité de la défenderesse, ou s'il faut que plusieurs ou l'ensemble de ces normes soient satisfaites.

Ce que l'on peut dire du jugement, c'est qu'en premier lieu, la Cour a considéré les conséquences du comportement de Ski Co. sur la concurrence et les consommateurs ainsi que sur les parties au procès elles-mêmes :

Il convient d'envisager les conséquences de ce comportement sur les consommateurs et de déterminer si ce comportement a nui à la concurrence de façon inutilement restrictive. Si une entreprise a « essayé d'évincer des rivaux sur un fondement autre que l'efficacité », on peut à juste titre qualifier ce comportement de prédateur. Il est donc justifié d'étudier les effets du type de comportement incriminé sur les consommateurs, sur le rival de plus petite taille de Ski Co. et sur Ski Co. elle-même<sup>81</sup>.

Ce passage du jugement renferme au moins trois critères : 1) le comportement de l'entreprise défenderesse

<sup>77</sup> 472 U.S. 585 (1985).

<sup>78</sup> *Aspen Skiing*, 472 U.S. 592-94.

<sup>79</sup> *Id.* 600.

<sup>80</sup> *Id.* 601.

<sup>81</sup> *Id.* 605.

ne peut pas inutilement restreindre la concurrence (il resterait à définir précisément ce que cela veut dire) ; 2) la défenderesse ne peut pas chercher à éliminer des rivaux autrement que sur le fondement de l'efficacité (en fait, le test de l'entreprise aussi efficace) ; 3) d'une manière ou d'une autre, il faut prendre en compte les conséquences du comportement incriminé sur les consommateurs, la victime du refus et le défendeur lui-même. La Cour a jugé que les consommateurs subissaient un préjudice parce qu'ils préféreraient bénéficier du forfait multi-stations et Ski Co. l'avait arrêté. Highlands subissait un préjudice du fait du refus puisque Highlands perdait des parts de marché. L'entreprise défenderesse n'avait pas de justification plausible à son refus<sup>82</sup>.

Le jugement met aussi en exergue le fait que Ski Co. avait mis un terme à un historique bien établi de coopération avec Highlands, ce qui n'est pas la même chose que de refuser une nouvelle proposition de coopération. En outre, Ski Co. refusait de vendre des forfaits à Highlands, même au prix de détail. Ces éléments avaient une importance car ils avaient conduit la Cour à conclure que les précédents rapports commerciaux avec Highlands avaient été rentables pour Ski Co. et que le désir de ce dernier de nuire à Highlands était si fort que Ski Co. était prêt à renoncer à du chiffre d'affaires, même aux termes identiques à ceux auxquels il traitait alors avec ses clients. Le raisonnement de la Cour a donc consisté à dire que « d'après les faits, on peut en conclure que Ski Co. n'était pas motivée par des questions d'efficacité et que l'entreprise était prête à renoncer à des bénéfices à court terme et à perdre de la clientèle, en échange d'un effet négatif supposé pour son rival plus petit »<sup>83</sup>. On peut encore dégager de ce passage un autre critère : 4) l'entreprise défenderesse ne peut pas renoncer à des bénéfices à court terme pour nuire à un rival.

Il pourrait y avoir eu d'autres raisons, du moins en principe, pour lesquelles Ski Co. voulait mettre un terme à sa coopération avec Highlands<sup>84</sup>. L'accord n'était peut-être plus rentable en raison d'un changement de circonstances ou Ski Co. s'était simplement dit qu'il serait préférable pour elle de garder l'intégralité du chiffre d'affaires de ses trois stations de ski plutôt qu'un certain pourcentage du chiffre d'affaires des quatre stations. Malheureusement, la Cour dans son jugement ne dit pas si la seconde alternative aurait pu constituer une justification commerciale légitime.

Les juridictions inférieures éprouvent parfois des difficultés à trouver des lignes directrices utiles dans l'arrêt *Aspen Skiing*. Parlant de cette décision, une cour d'appel dit que si le jugement « émet des principes qui s'appliquent au-delà des faits inhabituels de l'espèce, cela veut dire qu'un monopoleur peut se rendre coupable de monopolisation s'il refuse de coopérer avec un concurrent dans des circonstances où une coopération est indispensable pour assurer une concurrence effective »<sup>85</sup>. L'utilisation du mot « peut » montre que le principe que la cour d'appel pensait pouvoir tirer avec suffisamment de confiance de l'arrêt *Aspen Skiing* n'était pas du tout déterminant. Même s'il en avait été ainsi, il aurait peut-être mieux valu que la cour d'appel soit plus prudente puisque le jugement suivant de la Cour suprême en matière de refus de traiter ne mentionnait même pas ce principe.

Dans *Verizon Communications, Inc. contre Trinko*<sup>86</sup>, la Cour suprême des États-Unis a clarifié l'état du droit relatif à l'obligation d'un monopoleur d'aider ses rivaux, mais ici encore, la Cour a appliqué une panoplie de critères qui laissent de grandes incertitudes, non seulement sur le refus de traiter ou de vendre,

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<sup>82</sup> *Id.* 608.

<sup>83</sup> *Id.* 610-11.

<sup>84</sup> George Hay, « *Trinko* : Going All the Way, » 50 Antitrust Bulletin 527 (2005) 527, 533 n. 27.

<sup>85</sup> *Olympia Equipment Leasing Co. contre Western Union Telegraph Co.*, 797 F.2d 370, 379 (7<sup>e</sup> Circuit 1986).

<sup>86</sup> 540 U.S. 398 (2004).

mais aussi pour ce qui concerne l'état du droit en matière de monopolisation en général. L'affaire *Verizon* vient de ce que la loi américaine sur les télécommunications de 1996 avait pour objet d'instiller une concurrence sur les marchés de la téléphonie locale en obligeant les opérateurs historiques locaux à partager leurs réseaux avec les concurrents. L'un de ces opérateurs locaux (par la suite intégré à Verizon) a donc signé des accords d'interconnexion avec ses rivaux, permettant ainsi à ces derniers d'accéder au système de traitement des commandes des clients. Suite à des plaintes selon lesquelles cet opérateur local n'en avait pas moins failli à traiter de manière équitable les commandes des entreprises rivales, les parties se sont mises d'accord devant le tribunal avec la sanction de celui-ci, en vertu de la loi sur les télécommunications. Le lendemain de la formalisation de l'accord, Trinko – client de l'une des entreprises rivales – a introduit une instance sur la base de la violation du droit de la concurrence. Selon Trinko, la pratique qui avait amené l'accord des parties consacré par le tribunal violait aussi l'article 2 de la Loi Sherman en décourageant les clients de recourir aux services des concurrents et en entravant ainsi les capacités des rivaux à participer à la concurrence<sup>87</sup>.

La Cour suprême a expliqué que la Loi Sherman n'impose pas aux monopoleurs d'obligation générale de partager la source de leur avantage avec des concurrents parce que cela serait contraire au but qui sous-tend le droit de la concurrence. En premier lieu, cela pourrait en particulier affaiblir les motivations du monopoleur, de l'entreprise rivale ou des deux, pour investir dans les installations économiquement rentables. De plus, pour faire respecter cette obligation, les tribunaux devraient « agir comme des organismes centraux de planification, déterminant le prix, la quantité et les autres termes adéquats de l'opération, rôle pour lequel ils sont mal adaptés ». Enfin, la Cour a fait observer que l'obligation faite aux concurrents de négocier risquait de favoriser une collusion<sup>88</sup>.

La Cour suprême a reconnu que l'on avait par le passé fait certaines exceptions à la règle générale selon laquelle il n'existe pas d'obligation d'aider un rival, mais elle a aussi fait remarquer que ces exceptions sont limitées « en raison de la vertu incertaine d'un partage forcé et de la difficulté de repérer une pratique anticoncurrentielle par une entreprise précise, puis d'y remédier »<sup>89</sup>. L'une des exceptions les plus notables est celle de *Aspen Skiing*. Interprétant le raisonnement qui sous-tend cette décision, la Cour a d'abord souligné qu'il existait déjà un historique de coopération entre les deux entreprises concernées dans cette affaire. Ensuite, la Cour a noté que l'entreprise défenderesse dans *Aspen Skiing* refusait de traiter avec la plaignante, même selon des termes identiques à ceux qu'elle pratiquait avec les clients particuliers. Ces deux faits amènent à conclure que la défenderesse avait « la volonté de renoncer à des bénéfices à court terme pour obtenir un résultat contraire au libre jeu de la concurrence »<sup>90</sup>. Enfin, la Cour a noté que l'entreprise défenderesse dans *Aspen* avait refusé de fournir à son rival des services qu'elle fournissait volontiers au public.

La Cour a alors observé qu'aucun des facteurs ne s'appliquait à *Trinko*. Il n'y avait en effet pas d'historique de relations commerciales entre Verizon et ses rivaux. On ne pouvait donc pas en déduire que Verizon renonçait à des bénéfices en ne coopérant pas complètement parce que le prix que Verizon aurait perçu n'était pas un prix que l'entreprise aurait elle-même fixé, mais un prix fixé par la réglementation, sur la base des coûts. Enfin, le service concerné dans l'affaire *Trinko* n'avait jamais été à la disposition du

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<sup>87</sup> La loi stipule : « rien dans la présente loi .... ne peut être interprété comme modifiant, portant atteinte à, ou annulant l'applicabilité des lois. . . relatives à la concurrence. » *Id.* 406 (qui cite le § 601(b)(1) de la loi sur les télécommunications).

<sup>88</sup> *Id.* 407-08.

<sup>89</sup> *Id.* 408.

<sup>90</sup> *Id.* 409.

grand public<sup>91</sup>. En fait, la seule raison pour laquelle Verizon l'avait mis à la disposition de ses rivaux est que la loi sur les télécommunications l'obligeait à le faire. Par conséquent, étant donné que les circonstances ne rentraient pas dans l'exception énoncée par *Aspen Skiing*, la Cour a confirmé le rejet de la plainte de Trinko étant donné qu'elle ne rentrait pas dans le cadre des plaintes recevables en vertu de la Loi Sherman.

Le jugement dans l'affaire *Trinko* met en jeu plusieurs critères, notamment dans la description par la Cour de la jurisprudence *Aspen Skiing*. Le premier critère, qui concerne les relations commerciales préexistantes entre l'entreprise défenderesse et sa rivale, a été largement critiqué pour deux raisons : en premier lieu parce qu'il est susceptible de décourager les monopoleurs de jamais traiter avec des rivaux s'ils ne sont pas obligés de le faire à perpétuité<sup>92</sup>, et en second lieu parce qu'il pourrait encourager les monopoleurs à une collusion avec leurs rivaux. En fait, on peut se demander tout d'abord pour quelle raison les deux rivaux dans l'affaire *Aspen Skiing* ont pu être autorisés à s'associer. De toute manière, la Cour a consacré en quelque sorte le critère de l'existence de relations antérieures en s'en servant pour faire la distinction avec les faits dans l'affaire *Trinko*.

La deuxième norme est formulée d'une façon qui paraît approuver le critère de la renonciation à bénéfices. Toutefois, l'un des problèmes de ce critère n'est pas résolu : le fait que la Cour n'a pas donné de ligne directrice utile quant à la signification de l'expression « résultat contraire au libre jeu de la concurrence ». On ne peut pas toujours considérer que porter préjudice à un rival est un « résultat contraire au libre jeu de la concurrence », même si cela ne nécessite pas de renoncer à des bénéfices, dans la mesure où une telle pratique augmente parfois le bien-être du public.

Dans l'arrêt *Trinko*, et cela est significatif, la Cour dit également que la jurisprudence *Aspen* se situe « à la limite ou proche de la limite » des cas où un refus de coopérer avec des rivaux peut constituer une violation de l'article 2<sup>93</sup>. La Cour suprême dans *Trinko* a envisagé trois critères dont deux au moins présentent de sérieuses faiblesses, puis les a tous révoqués en disant que le cas sur lequel ils sont fondés ne s'applique pas en l'espèce. Ce faisant, la Cour laisse une impression de flou sur la manière de déterminer les cas rentrant dans les limites de la responsabilité visée par l'article 2. Comme Lopatka et Page le font ironiquement remarquer : « Nous nous retrouvons avec une règle claire : les monopoleurs n'ont pas d'obligation d'aider leurs concurrents, sauf lorsqu'ils le font. Les limites de la responsabilité en vertu de l'article 2 de la Loi Sherman restent floues. »<sup>94</sup> Reconnaisant la confusion qui subsiste après la jurisprudence *Trinko*, la Commission américaine de modernisation de la loi antitrust a publié cette année un rapport où il est dit : « Il est souhaitable de clarifier et d'améliorer les critères fixés à l'article 2 de la Loi Sherman, notamment pour ce qui concerne les domaines où subsiste actuellement un manque de normes claires et logiques, comme par exemple . . . l'obligation ou non d'un monopoleur de traiter avec ses rivaux et les circonstances dans lesquelles cette obligation peut exister. »<sup>95</sup>

<sup>91</sup> Hay note qu'en Australie, le jugement qui fait jurisprudence concerne exactement le même type de situation mais le résultat est différent de celui de *Trinko*. Voir Hay, *supra* n. 84, 535 n. 32 [citant *Queensland Wire Industries Pty. Ltd. contre Broken Hill Proprietary Co. Ltd.*, 167 C.L.R. 177 (1989)].

<sup>92</sup> Elhauge, *supra* n. 14, 314 ; Glazer, *supra* n. 16, 4-5.

<sup>93</sup> *Trinko*, 540 U.S., 409.

<sup>94</sup> John Lopatka et William Page, « Relations commerciales et situation de monopole : à la recherche de la limite de la responsabilité au titre de l'article 2 » entre *Aspen* et *Trinko*, 73 *Antitrust Law Journal* 115, 152 (2005).

<sup>95</sup> Commission américaine de modernisation de la loi antitrust, *supra* n. 7, 12 ; voir aussi *idem* à 101 (« Bien que la décision de la Cour dans l'arrêt *Trinko* ait fourni quelques lignes directrices sur les facteurs qui pourraient laisser supposer l'existence d'une responsabilité en cas de refus de vendre ou de traiter avec un

On s'attend à ce que *Trinko* ait pour effet de limiter les plaintes en refus de vente aux États-Unis. Jones, par exemple, prédit « qu'en raison du scepticisme affiché par le jugement face à ces plaintes, en cas de refus d'aider un concurrent, seul désormais un contexte très restreint de circonstances pourra constituer une situation illicite de monopole en droit des États-Unis »<sup>96</sup>. Selon Keyte, « *Trinko* n'a pas complètement exonéré de toute responsabilité les monopoleurs ayant refusé de coopérer et qui n'ont pas « volontairement » fourni d'accès à leurs rivaux, mais y ont été contraints par les règlements »<sup>97</sup>. Fox ajoute que les juridictions inférieures « récitent désormais généralement la phrase consacrée selon laquelle les plaignants ne peuvent faire valoir un droit devant les tribunaux qu'à la condition que les faits entrent dans le cas très étroit de l'exception au principe d'absence d'obligation de traiter ou de vendre tel que visé par la jurisprudence Aspen, ou dans la doctrine quasiment obsolète des installations essentielles »<sup>98</sup>.

### 3.3 Évaluation comparative

Suite à l'arrêt *Trinko*, Hay a élaboré un schéma factuel théorique des cas de refus de vente ou de traiter, afin d'expliquer les implications de la décision pour les cas futurs<sup>99</sup>. Ce schéma est aussi utile pour comparer la démarche de la Cour dans *Trinko* et la démarche des tribunaux de l'Union européenne. Le scénario de Hay est celui d'une entreprise défenderesse verticalement intégrée (M), seule productrice d'un bien intermédiaire (I) utilisé pour fabriquer le produit d'aval (D), pour lequel il n'existe pas de substitut approprié. Pour éviter l'immunité implicitement reconnue par *Trinko* concernant les défendeurs qui n'ont jamais mis le bien intermédiaire à la disposition du public, Hay suppose que M a occasionnellement vendu le bien I sur le marché libre (à un prix de monopole). En outre, M ayant la maîtrise totale du bien I, il détient aussi un monopole sur le marché du produit D et pratique des prix de monopole sur ce marché également. L'entreprise C, attirée par les bénéfices de M sur le marché de D, constate que si elle peut être approvisionnée en biens I à un prix « raisonnable », elle peut concurrencer sur le marché de la vente du produit d'aval D. Néanmoins, lorsque C demande à M de lui livrer le bien I à des conditions raisonnables, M refuse. C introduit alors une instance auprès des tribunaux ou des services chargés de la concurrence, arguant que le refus de vendre porte préjudice à la fois à C et à la concurrence sur le marché du produit D.

Lorsque les services chargés de la concurrence demandent à M pour quelle raison il refuse de vendre le bien intermédiaire I à C, M déclare qu'aucune entreprise dans sa situation ne vendrait le bien I à l'entreprise C. L'entreprise M explique qu'elle n'a à l'heure actuelle aucune concurrence pour la vente de D étant donné que M contrôle la vente de I. M peut donc pratiquer un prix de monopole pour D. Si M vendait le bien intermédiaire I à l'entreprise C à un prix « raisonnable » – comme par exemple son coût marginal – C serait alors en mesure de pratiquer des prix inférieurs au prix de monopole de M pour le

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rival, la décision est loin d'être définitive. Les entreprises doivent disposer d'éléments plus précis de la part des tribunaux sur la façon d'éviter des investigations lorsqu'elles refusent de traiter avec un rival »).

<sup>96</sup> Jones, *supra* n. 24, 262 ; voir aussi Hay, *supra* n. 84, 528 (« Si l'on pousse *Trinko* jusqu'à sa conclusion logique, il se peut que l'obligation de traiter ou de vendre ait entièrement disparu ou soit confinée à des cas très restreints de situations exceptionnelles »).

<sup>97</sup> Keyte, *supra* n. 27, 44.

<sup>98</sup> Fox, *supra* n. 53, 154. Voir aussi *Covad Communications contre Bell Atlantic* 407 F.3d 1220 (Circuit du District of Columbia 2005) (rejetant une instance introduite en vertu de l'article 2 de la Loi Sherman, où les parties n'avaient pas auparavant coopéré. Selon les termes de ce jugement, « *Trinko* impose désormais l'existence d'une résiliation unilatérale de la coopération volontaire pour que les tribunaux puissent recevoir une plainte pour refus de traiter ou de vendre selon l'arrêt *Aspen* ») ; *MetroNet Services Corp. contre Qwest Corp.*, 383 F.3d 1124, 1132 (9<sup>e</sup> Circuit, 2004) (d'après cette décision, la résiliation d'une coopération passée ne constitue pas une violation de l'article 2 de la Loi Sherman parce que le défendeur avait l'intention d'augmenter ses bénéfices à court terme)).

<sup>99</sup> Hay, *supra* n. 84, 538-541.

produit D. Par conséquent, M perdrait des parts sur le marché de D ou serait obligé de baisser les prix qu'il pratique pour D, en sorte que la presque totalité ou la totalité des profits de monopole actuellement générés par M à ce propos disparaîtraient.

Par ailleurs, explique l'entreprise M, elle sait qu'elle pourrait faire autant de bénéfices qu'actuellement si elle vendait le bien intermédiaire I à C à un prix de monopole, et les consommateurs paieraient pour l'essentiel le même prix qu'à présent. De toute manière dit M, la raison pour laquelle l'entreprise refuse de vendre à C est que C refuse de payer le prix de monopole pour I. M considère sa position comme étant une justification légitime et objective. En d'autres termes, M tente d'empêcher toute concurrence de la part d'un rival que M subventionnerait s'il lui faisait payer un prix artificiellement bas pour le bien I. Par contre, si M peut faire payer un prix pour I suffisamment élevé pour permettre à M de faire les mêmes bénéfices, même si C prend une part importante du marché de D, M ne verrait alors aucun besoin d'éliminer C (si ce n'est dans ce que Hay décrit comme étant « les quelques situations pathologiques où M garde toujours un intérêt à long terme à éliminer C en tant que concurrent »)<sup>100</sup>.

La question intéressante qu'il faut se poser est la suivante : qu'aurait fait M face aux droits applicables et à la jurisprudence de divers pays, pour éviter de voir sa responsabilité engagée ? Hay envisage quatre possibilités :

- (a) M doit proposer de vendre le bien I à C à un prix raisonnable, c'est-à-dire sur la base des coûts ou à un prix concurrentiel
- (b) M doit proposer de vendre le bien I à C à un prix qui n'oblige pas M à renoncer à tout bénéfice qu'il tire actuellement de la vente du produit D<sup>101</sup>
- (c) M doit proposer de vendre le bien I à C, mais M peut fixer le prix qu'il veut
- (d) ou M peut faire ce qu'il veut, y compris de refuser vendre à C.

D'après Hay, la règle en droit américain telle qu'exposée dans *Trinko* ne semble pas exiger que M aille jusqu'à la possibilité (a) pour éviter la responsabilité. Le jugement reconnaît la difficulté que les tribunaux auraient à déterminer ce qu'est un prix raisonnable mais évite d'y répondre. S'il en était autrement, les tribunaux seraient obligés « d'agir comme des organismes centraux de planification, déterminant le prix, la quantité et les autres termes adéquats de l'opération, rôle pour lequel ils sont mal adaptés. »<sup>102</sup> Autre raison pour laquelle la possibilité (a) risque de ne pas avoir beaucoup d'avenir après *Trinko*, selon Hay : l'analyse des profits de monopole comme étant une importante motivation commerciale, selon le jugement<sup>103</sup>.

<sup>100</sup> *Id*, 541.

<sup>101</sup> Ce concept peut être difficile à comprendre. Il existe une autre manière de le formuler : M doit offrir à vendre le bien I à C à un prix qui ne soit pas supérieur au prix auquel M ne renoncerait à aucun des bénéfices qu'il tire de la vente du produit D. L'idée est de permettre à M de continuer à toucher l'intégralité du profit de monopole qu'il tire de la vente de D au prix de monopole, même s'il vend le bien I à C (ce qui permet à ce dernier d'être un concurrent sur le marché de D et de prendre une partie de l'activité de M sur ce marché) et ce, en pratiquant un prix de vente de I suffisamment élevé – tout en ne permettant pas à M de pratiquer un prix si élevé pour I qu'il puisse constituer un refus implicite de vendre découlant de sa pratique.

<sup>102</sup> *Trinko*, 540 U.S., 408.

<sup>103</sup> Hay, *supra* n. 84, 544 (« la simple détention d'un pouvoir de monopole et la pratique concomitante de prix de monopole est non seulement illicite, c'est aussi un élément important du marché libre », citant *Trinko*, 540 U.S., 406).

La possibilité (d) n'est pas vraiment différente de (c) puisque (c) peut permettre d'aboutir au même résultat que (d) sans qu'il y ait un refus pur et simple. Par conséquent, si nous ne retenons pas le scénario (a), il nous reste (b) et (c), qui ne diffèrent seulement qu'en ce que (b) rend compte des « quelques situations pathologiques où M garde toujours un intérêt à long terme à s'assurer que C n'est pas viable, même si M n'est pas obligé de subventionner la participation de C au marché aval »<sup>104</sup>. Comme le note Hay, cette norme correspond au critère de l'irrationalité économique puisqu'elle interdit les refus de vente qui n'auraient aucun sens économique, si ce n'est qu'ils éliminent C. Hay doute cependant que les tribunaux soient capables de discerner entre les prix entrent et ceux n'entrent pas dans la possibilité (b). En outre, argumente-t-il à juste titre, des défenseurs bien conseillés ne vont pas aider les tribunaux à surmonter cette difficulté en refusant purement et simplement de vendre, ce qui faciliterait la qualification des faits par le tribunal. Au lieu de cela, ils vont au moins proposer de vendre à un certain prix, confrontant les tribunaux à la question complexe de savoir si les défenseurs refusent implicitement de vendre en fixant des prix nettement au-dessus du niveau de maximisation des profits. Hay affirme que la réponse à cette question serait même encore plus difficile que de chercher à savoir si une entreprise fixe des prix en dessous de ses prix de revient dans les cas de prix d'éviction<sup>105</sup>.

Par conséquent, les tribunaux s'attaqueront au problème de la distinction entre les prix qui maximisent les profits et les prix qui sont rationnels uniquement parce qu'ils éliminent un concurrent, ce qui introduit d'importantes possibilités d'erreur et d'incertitude dans le processus analytique, ou bien ils renonceront et retomberont sur la possibilité (c). Ils opteront plus probablement pour (c), étant donné notamment le risque signalé dans *Trinko*, que les tribunaux pourraient agir comme des planificateurs centraux. Lorsqu'ils en viennent à la possibilité (c), les tribunaux peuvent tout aussi bien aller jusqu'à (d). C'est pourquoi Hay conclut : « si l'on suit le cheminement tracé par la décision de justice jusqu'à sa conclusion logique, il n'y aura guère d'exceptions au principe qu'une entreprise, même monopolistique, n'a absolument aucune obligation de vendre à un concurrent potentiel ou de coopérer avec lui ».<sup>106</sup> Si cela est vrai, alors, selon le droit américain, l'entreprise hypothétique M n'engage pas sa responsabilité pour refus de vente, même si son refus est un refus pur et simple.

Dans l'UE, le résultat est plus incertain. En premier lieu, cela dépend de savoir si l'on analyse la pratique de l'entreprise M selon les critères des jurisprudences *Magill* et *IMS*, ou selon les critères de *Bronner*. Dans le premier cas, les résultats seraient exactement les mêmes que ce que Hay prédit en fonction de l'état actuel du droit américain : M ne serait pas responsable, même si son refus est un refus pur et simple. En effet, nous n'avons aucune raison de croire que C utilisera le bien I pour créer un nouveau produit. C veut simplement entrer sur le marché pour vendre le produit D, produit déjà vendu par M.

Toutefois, si l'on applique les critères de la décision dans *Bronner*, le résultat n'est pas évident. Nous savons que le produit I (l'accès au système de portage) est indispensable à l'activité que C veut avoir. Nous savons aussi que si M refuse purement et simplement de fournir I à C, cela permettra à M d'éliminer toute concurrence de C sur le marché de D. Par conséquent, à supposer que les tribunaux européens ne soient pas

<sup>104</sup> Hay, *supra* n. 84, 545.

<sup>105</sup> *Id.*, 545-46.

<sup>106</sup> *Id.*, 547. Il existe une cinquième possibilité que Hay envisage dans une note de bas de page : (e) M doit proposer de vendre le bien I à C au même prix auquel M a vendu le bien I à d'autres clients sur le marché libre. Cela semble avoir le soutien de la Cour Suprême dans *Trinko*, mais présente de sérieux défauts, pour les raisons dont nous avons déjà parlé. En premier lieu, la possibilité (e) ne peut pas rendre compte de tout changement de circonstance après les ventes aux autres clients, telle par exemple la hausse des coûts de production de I. En second lieu, ce scénario ne prend pas en compte le fait que M peut avoir des raisons légitimes de faire une différence entre les prix pratiqués pour les entreprises rivales et ceux pratiqués pour les entreprises non rivales.

réceptifs à l'argument de M selon lequel son désir de toucher des profits de monopole sur les marchés du bien I comme sur les marchés du produit D est une justification objective parce que M détient un monopole légitime pour I, on peut en conclure que M ne peut pas se prévaloir de la possibilité (d)<sup>107</sup>. Par contre, si M décide de fixer un prix conformément à la possibilité (a), les tribunaux ne jugeraient probablement pas que le prix concurrentiel ainsi fixé constitue un refus de vente implicite. En conséquence, M ne serait pas jugé responsable.

Qu'en serait-il si M était plus astucieux et proposait I à un prix correspondant à l'option (b), ou même seulement à l'option (c) ? Nous n'avons pas de moyen de savoir ce que ferait la CJCE dans l'une de ces situations. Les affaires *Commercial Solvents*, *United Brands* et *Bronner* concernent toutes des refus purs et simples de vendre ou de traiter. Il était parfaitement clair que les défendeurs avaient refusé de vendre. La CJCE ne s'est pas encore trouvée confrontée à la situation plus difficile d'avoir à fixer le point auquel un prix proposé cesse d'être licite pour devenir un refus implicite et illicite de vendre. En attendant, les entreprises dominantes peuvent être incitées à plaider le refus implicite plutôt que le refus pur et simple lorsqu'elles ne veulent pas traiter avec une autre entreprise. Néanmoins, il est très possible que, dans un tel cas, les tribunaux européens soient plus stricts que les tribunaux américains. Un tribunal européen, par exemple, peut juger qu'à moins que M ait vendu le bien I à C au même prix qu'à d'autres clients, ce qui a été occasionnellement le cas dans le scénario hypothétique de Hay, M serait tenu responsable pour discrimination illicite. Autre possibilité : le tribunal pourrait considérer que tout prix autre qu'un prix correspondant à la possibilité (a) constituerait une discrimination illicite entre les propres activités de M en aval, et les rivaux de M en aval.

Malgré les différents critères utilisés par les États-Unis et l'Union européenne pour évaluer les refus de vente, la tendance est globalement identique dans ces deux régions. Les plus hautes juridictions supérieures ont été de plus en plus réticentes à forcer les entreprises dominantes à traiter avec leurs concurrents. Dans l'affaire *Magill*, la CJCE a déclaré que le refus de vente ou de traiter ne constituait un abus que dans des circonstances exceptionnelles. De la même façon, dans *Trinko*, la Cour suprême des États-Unis a indiqué qu'elle s'écarterait de la règle générale selon laquelle il n'existe pas d'obligation d'aider un rival sinon dans des circonstances limitées. Elle a aussi transformé ce qui était la décision jurisprudentielle majeure en matière de refus de vente, en une exception « alambiquée » que l'on peut désormais à peine qualifier de violation<sup>108</sup>.

### 3.4 *Jurisprudence d'autres pays*

Les pays de la zone OCDE n'ont pas tous évolué dans la même direction que les États-Unis et l'Union européenne en ce que concerne le refus de vente. Pour certains d'entre eux, on continue de traiter les entreprises dominantes de façon stricte, comme le montre le premier cas ci-après. De plus, les différents pays ont des manières différentes d'aborder les cas d'entreprises dominantes reconnues responsables de refus de vente. Comme nous l'avons vu lors d'une récente table ronde, certains pays sont plus susceptibles

<sup>107</sup> Sur le fondement des décisions de la CJCE, cela paraît correct. La Cour a déjà rejeté des justifications similaires à au moins deux reprises. Voir *Commercial Solvents*, [1974] ECR 223 (l'entreprise défenderesse, dominante sur un marché d'amont, refusait d'approvisionner un ancien client parce que la défenderesse voulait entrer sur le marché aval et être en concurrence avec ce client) ; *Magill*, 1995] E.C.R. I-743 (l'entreprise défenderesse refusait de fournir des renseignements sur les programmes de télévision à un nouveau rival en aval parce qu'elle voulait protéger son activité de magazines en aval).

<sup>108</sup> Pour une discussion intéressante sur le fait que le comportement de l'entreprise dans l'affaire *Trinko* était plus préjudiciable que dans *Aspen Skiing*, voir Fox, *supra* n. 53, 162-67. Pour un argument opposé, voir John Lopatka et William Page, « Relations commerciales et situation de monopole : à la recherche de "la limite de la responsabilité au titre de l'article 2" entre *Aspen* et *Trinko* » 73 *Antitrust Law Journal* 115, 152 (2005).

d'imposer des sanctions monétaires que d'autres, et cette différence a des conséquences intéressantes pour les cas de refus de vente<sup>109</sup>. Le deuxième cas ci-après illustre cette question.

### 3.4.1 Corée du Sud

En 2001, la Commission coréenne de la concurrence a pris une décision dans une affaire concernant une entreprise verticalement intégrée qui avait refusé de vendre à l'un de ses concurrents en aval.<sup>110</sup> POSCO, l'entreprise défenderesse, avait une position dominante sur le marché amont des bobines en acier laminées à chaud, avec près de 80 pour cent du marché de Corée du Sud. Ses concurrents sur le marché amont étaient des entreprises étrangères qui importaient en Corée du Sud les bobines laminées à chaud. POSCO était aussi présent sur le marché aval des tôles en acier laminées à froid. Après son entrée sur le marché aval, Hyundai Hysco demanda plusieurs fois à POSCO de lui livrer des bobines laminées à chaud mais se heurta à chaque fois au refus de POSCO. Hyundai Hysco a pu obtenir des bobines laminées à chaud auprès d'entreprises étrangères et a rapidement atteint une part de marché de 11 pour cent, mais à des coûts supérieurs à ce qu'ils auraient été étant donné que l'entreprise avait été obligée d'importer la matière première. Hyundai Hysco devait notamment acquitter des coûts de fret, de douane, de chargement et déchargement. En outre, les entreprises étrangères fournisseuses étaient informées que Hyundai Hysco n'était pas en mesure de s'approvisionner en matière première auprès de POSCO, ce qui diminuait le pouvoir de négociation de Hyundai Hysco. Les faits de l'affaire sont conformes à la figure 1 en début de document.

La Commission coréenne de la concurrence décida que POSCO avait violé les dispositions de la loi coréenne sur les monopoles et la concurrence parce que POSCO avait interrompu les activités de son concurrent en aval en refusant de l'approvisionner en bobine laminée à chaud – un bien intermédiaire indispensable à la production de Hyundai Hysco en aval – dans l'intention de conserver sa position dominante. Non seulement le refus de vente opposé par POSCO faisant augmenter les coûts de Hyundai Hysco, cela déstabilisait aussi les activités de ce dernier en rendant plus difficile son approvisionnement en matière première et son adaptation rapide aux évolutions du marché en raison des temps d'expédition plus longs nécessaires à l'importation des bobines laminées à chaud. La Commission n'a trouvé aucune justification objective au comportement de POSCO.

Il est intéressant d'analyser les faits de cette affaire à la lumière des précédents européens et américains dont nous venons juste de discuter. Pour ce qui est des décisions européennes, les critères utilisés dans l'affaire *Commercial Solvents* sont bien plus proches de ceux utilisés dans POSCO que les critères de *Bronner* et *Magill*. Toutefois, la responsabilité de POSCO n'aurait pas été engagée, même selon le critère plus strict de *Commercial Solvents*, puisque le refus de vente de POSCO n'éliminait pas toute concurrence de Hyundai Hysco qui avait réussi à gagner plus de dix pour cent du marché aval dans un délai relativement court, malgré le refus de vente. De plus, selon la jurisprudence *Bronner*, les plaignants dans l'affaire POSCO auraient été confrontés au fait qu'il existait des substituts (les importations) à la bobine laminée à chaud de POSCO. Cependant, il se peut que POSCO aurait vu sa responsabilité engagée pour discrimination à l'encontre de Hyundai Hysco parce que POSCO était prêt à vendre à ses autres rivaux en aval.

L'analyse de l'affaire à la lumière du droit américain est plus difficile parce que, comme nous l'avons vu, la position de ce droit sur le refus de vente n'est pas très claire. En premier lieu, il est difficile de dire,

<sup>109</sup> OCDE, « Remedies and Sanctions in Abuse of Dominance Cases », Résumé analytique, p. 9, DAF/COMP(2006)19.

<sup>110</sup> Commission des pratiques commerciales équitables de Corée, « Abuse of Market-Dominant Power by POSCO » (12 avril 2001). La Haute Cour de Séoul a confirmé la décision de la Commission frappée d'appel auprès de la Cour suprême de la Corée du Sud.

sans disposer de plus d'éléments de fait, comment le comportement de POSCO aurait été jugé selon les critères de la renonciation à bénéfices ou de l'irrationalité économique. Peut-être POSCO était-elle en train de renoncer irrrationnellement à des bénéfices en refusant de vendre à Hyundai Hysco. Par contre, il se peut aussi que les coûts d'opportunité en aval qu'aurait connus POSCO s'il avait vendu à Hyundai Hysco auraient été supérieurs au chiffre d'affaires réalisé par POSCO des ventes de bobines à Hyundai Hysco sur le marché amont. En deuxième lieu, contrairement aux parties dans l'affaire *Aspen Skiing*, les parties dans POSCO n'avaient pas d'historique de relations commerciales entre elles. Il est donc plus difficile d'en conclure que POSCO renonçait à des bénéfices en refusant de vendre. En troisième lieu, le résultat du critère de l'entreprise aussi efficiente peut dépendre de ce que l'on entend précisément par « aussi efficiente ». Si ce terme se réfère à une entreprise hypothétique aussi efficiente à la fois sur le marché amont et sur le marché aval, c'est-à-dire à une entreprise verticalement intégrée, le comportement de POSCO ne pouvait manifestement pas avoir d'effet d'éviction sur cette entreprise, ce qui exonère POSCO. Par contre, si l'expression « aussi efficiente » se réfère à une entreprise hypothétique aussi efficiente, mais uniquement sur le marché aval, le comportement de POSCO peut avoir évincé une entreprise aussi efficiente. Il faut toutefois noter que Hyundai Hysco n'avait pas été éliminé et que cette entreprise, en fait, avait réalisé une entrée réussie, même si elle était modeste, sur le marché aval. Cela rend plus difficile la preuve que la concurrence avait subi un préjudice. En quatrième lieu, POSCO était prêt à vendre à ses autres rivaux d'aval, fait qui aurait pu engager la responsabilité de POSCO, même selon les critères plus stricts de la jurisprudence *Trinko*.

### 3.4.2 Portugal

Un cas très récent au Portugal illustre à quel point l'imposition de sanctions monétaires au lieu de l'obligation faite au défendeur de corriger son comportement peut aider les autorités administratives et/ou les tribunaux à éviter les difficultés liées à la fixation de critères de référence et à la « planification centrale » dont nous avons parlé plus haut. Le 2 août 2007, l'autorité portugaise de la concurrence, la Autoridade da Concorrência, a publié un communiqué de presse annonçant l'amende la plus importante de son histoire, infligée à Portugal Telecom (PT) pour abus de position dominante en raison du refus de traiter.<sup>111</sup> PT est en position dominante, à la fois sur les marchés d'amont pour l'accès à la pose des câbles et à l'infrastructure de réseau électronique, et sur les marchés d'aval de la télévision par câble, de l'accès haut débit à Internet et de la téléphonie fixe. PT avait refusé à ses rivaux en aval Tvtel et Cabovisão l'accès à son réseau câblé souterrain, empêchant ainsi ces rivaux de relier par câble quelque 73 000 foyers un peu partout au Portugal. En conséquence, ces foyers ne pouvaient pas choisir un câblo-opérateur pour la télévision, autre que TV Cabo Portugal dont PT est propriétaire majoritaire.

L'Autorité a estimé que le refus de PT avait pour objet et pour effet d'empêcher, de restreindre ou de fausser la concurrence étant donné que les concurrents ne pouvaient pas fournir des services de télévision par câble, de connexion haut débit à Internet et de téléphonie fixe. L'Autorité a donc imposé une amende de 38 millions EUR. Cette décision ne comporte aucun volet concernant le comportement de PT, si ce n'est l'obligation qui lui est faite de publier des extraits de la décision.

On peut ergoter sur les divers aspects de la responsabilité dans cette affaire, comme par exemple la question de savoir si les faits s'accordent avec l'obligation établie par la jurisprudence *Bronner* que le refus de vendre ou de traiter évince toute compétition venant des victimes, question dont la réponse dépend en partie de la définition du marché géographique. Si nous mettons de côté les considérations de responsabilité et nous focalisons sur la décision de l'Autorité de la concurrence après qu'elle ait jugé qu'il y avait violation, nous constatons tout l'intérêt de la simplicité de la solution trouvée. En effet, il n'y a pas eu de tentative embrouillée et susceptible d'erreur, pour déterminer exactement le prix que PT devrait être

<sup>111</sup> Autoridade da Concorrência, communiqué de presse n° 13/2007, « L'Autorité de la concurrence impose une amende de 38 millions EUR à PT Comunicações pour *Abus de position dominante* », (2 août 2007).

autorisé à pratiquer pour permettre l'accès de ses installations aux rivaux. Il n'y a même pas eu d'ordre obligeant formellement PT à traiter avec ses rivaux. En conséquence, l'Autorité de la concurrence n'y avait pas besoin – du moins immédiatement – de continuer son contrôle. Au lieu de cela, il incombait manifestement à PT d'arrêter d'abuser de sa position dominante. Si PT ne commence pas à traiter d'elle-même avec ses rivaux et de manière que l'on ne puisse par l'interpréter comme un refus implicite, l'opérateur historique court le risque que ces rivaux adressent une nouvelle plainte à l'Autoridade da Concorrência, qui pourrait réagir en sanctionnant PT par une amende plus lourde.

Il peut y avoir de longs arguments entre PT et ses rivaux concernant les modalités d'accès, mais PT devra au moins être plus attentif à l'importance des obstacles que l'entreprise met à l'accès à ses installations si elle veut éviter une sanction plus grave. Si les sanctions ne sont peut-être pas la solution dans tous les cas, elles le sont probablement au moins dans certains cas.

#### **4. Conclusion**

L'étude des questions théoriques concernant le refus de vente montre qu'elles ne sont pas faciles à analyser. Les difficultés inhérentes à la détermination et à la résolution des refus de vente problématiques sont si grandes que certains commentateurs de premier rang ont abandonné l'idée d'imposer la responsabilité dans la plupart de types de refus de vente ou de traiter. La jurisprudence montre que les tribunaux, dans deux régions ou pays au moins, ont commencé à prendre la même orientation que les commentateurs. En effet, aux États-Unis et dans l'UE, les contrevenants supposés ont de plus en plus de facilité à se défendre face à une accusation de refus illicite de vente ou de traiter. Par contre, on continue dans certains pays de la zone OCDE à considérer de manière assez stricte les refus de vente ou de traiter. Il semble n'y avoir jusqu'à maintenant quasiment aucun cas où la plus haute instance juridictionnelle d'un pays ait été confrontée à la situation délicate où une entreprise dominante n'a pas refusé purement et simplement de vendre, mais a imposé des conditions commerciales telles que l'on pourrait considérer qu'il s'agit d'un refus implicite. Il sera intéressant de voir comment les tribunaux résolvent la difficulté à déterminer si une telle entreprise peut voir sa responsabilité engagée pour abus de position dominante et, dans l'affirmative, à trouver une solution appropriée et effective.

## BELGIUM

### Observations for Belgium

**1. Defining “refusal.” What constitutes a “refusal”? Does it have to be an absolute unwillingness to deal under any circumstances? Or can there be something like a “constructive refusal,” which would occur if, for example, a seller imposes conditions that are so undesirable that no reasonable buyer would agree to the transaction?**

We consider that the concept “refusal” should encompass “constructive refusals”, or, in other words, that the behaviour of market operators should be assessed in their economic context in order to decide whether the behaviour can be qualified as a refusal to deal<sup>1</sup>.

**2. Refusing to deal with customers versus competitors. In terms of both economics and your jurisdiction’s law, what are the analytical differences between RTD with a customer and RTD with competitors or potential competitors? Note that, for the most part, the question asks what the differences are between vertical and horizontal RTDs.**

Refusals to deal will be assessed in the light of the provisions on abuse of a dominant position (article 82 EC and/or article 3 of the Belgian Competition Act)<sup>2</sup>. Refusals to deal with customers or competitors should in our opinion be assessed in the following context:

- We should first distinguish between a refusal to deal in respect of goods or services the supplier regularly offers on the market and goods or services that are only produced for the suppliers’ own intra-company or intra-group use. **A refusal to deal in respect of goods or services that are only produced for the suppliers’ own intra-company or intra-group use**, should be assessed in the light of the essential facilities doctrine within the context of the relevant provisions in respect of the abuse of a dominant position. We also tend to consider that the essential facilities doctrine (i.e. in the absence of specific regulations such as the various interconnection rules in network industries) should only be concerned with the access to markets that are clearly distinguished from the market on which and for which the facilities are used by the holder of such facilities. A refusal to deal with competitors will in this hypothesis usually be justified even in case a refusal to deal with other potential customers might be qualified as an abuse of dominance.
- With regard to a refusal to deal in respect of goods or services that are regularly offered by the supplier on the market, a distinction should be made between a refusal to honour or

<sup>1</sup> See e.g. Competition Council, 20 March 2003, decision n° 2003-V/M-20, Vlaamse Uitgeversmaatschappij v. Vlaamse Mediamaatschappij, De Persgroep, Aurex and Uitgeverij De Morgen. However, this decision was cancelled by the appeal Court of Brussels.

<sup>2</sup> We may add that refusals to deal are one of the most common types of abusive behaviour dealt with under the Belgian competition act and it was for some time almost the only one. See e. g. P. DE VROEDE, "De stakingsrechter en de Belgische Mededingingswet", *R.W.*, 1995-96, 137. See also Vz. Kh. Brussel, 5 October 1994, ITT Promedia/Belgacom, Nieuwsbrief H.Pr., 1994/10, 279.

continue an existing commercial relationship, and a refusal to enter into a new commercial relationship or to agree to an ad hoc transaction. In respect of a refusal to honour or continue an existing commercial relationship, we see in the context of the provisions on abuse of a dominant position no reason for a fundamental difference in treatment between refusals to deal with competitors and with other customers. The fact that an existing customer is also a competitor may, however, be relevant for the assessment of the specific circumstances that may justify the refusal or on the duration of the notice period that can be imposed.

- With regard to refusals **to enter into a new commercial relationship or to agree to an ad hoc transaction**, we should distinguish between two types of competitors: competitors on the relevant market for the product or service the supplier refuses to sell, and competitors on any other relevant market. It seems highly unlikely that a supplier will have a dominant position for the provision of a specific good or service vis-à-vis **competitors that supply the same relevant market**. And even if the supplier that refuses to deal has a dominant position on the relevant market, a refusal to supply a competing supplier is unlikely to constitute an abuse of that dominant position because the competitor should be able to satisfy his own needs. Firms, even if they have a dominant position, can, e.g. not be expected to supply their competitors if, for whatever reason, these competitors lack the production capacity to supply their potential customers.
- Your question is the most difficult to answer in respect of a **refusal to enter into a new commercial relationship or to agree to an ad hoc transaction with a customer that is a competitor on any other relevant market**. When there are sufficient indications that the supplier uses his dominant position to acquire a dominant position on a neighbouring market, or to strengthen his market position on that other market by means which can not be qualified as normal business practices on a competitive market, the fact that both parties are competitors may be seen as an aggravating circumstance<sup>3</sup>. In all other circumstances it is difficult to predict whether the fact that they are competitors will be seen as an aggravating circumstance or that it will be neutral.
- A **refusal to enter into a new commercial relationship or to agree to an ad hoc transaction with any other customer** will be assessed in the light of its exclusionary effects and the case law in respect of discriminatory conduct. We may expect that the Competition Authority will give increased weight to the economic assessment of the exclusionary effects of a refusal to deal. But we should add that refusal to deal cases are often brought before the Courts (see our response to question 10) which may well be inclined to give equal or greater weight to its discriminatory effects.

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<sup>3</sup> See the aforementioned decision of the Competition Council, 20 March 2003, decision n° 2003-V/M-20, Vlaamse Uitgeversmaatschappij v. Vlaamse Mediamaatschappij, De Persgroep, Aurex and Uitgeverij De Morgen. The President of the Competition Council concluded that there was an abuse of dominant position because the seller granted less favourable terms to one buyer which was a competitor of an affiliated company of the seller on a neighbouring market.

**3. Distinguishing harmful RTDs from efficient ones. If the objective is to protect competition rather than to protect competitors, where is it appropriate to draw the line between “good” interventions against RTDs and interventions that would do more harm than good by disturbing the defendant’s efficiency and/or its incentive to become more efficient?**

The objective is indeed to protect competition rather than competitors. The primary rule is moreover the freedom of commerce and contract<sup>4</sup>.

In line with EU case law, refusals to deal should, without prejudice to our response to the 2<sup>nd</sup> question, only be qualified as an abuse of dominance if, as a consequence of the dominance of the refusing supplier, the potential customer has no realistic alternative source of supply at reasonably equivalent terms and conditions, and provided the customer is also denied a realistic opportunity to adjust his market behaviour to the unavailability of the goods or services that are the object of the refusal and which he could reasonably expect to be available.

**4. Sellers’ right of autonomy versus special responsibility of dominant firms. One school of thought says that sellers have the inherent right to choose the parties with whom they will and will not deal. With that idea in mind, should RTDs ever be prohibited as a competition violation? If so, what should be the necessary elements for proving liability? A quite different school of thought says that dominant firms have a special responsibility not to harm competition. If so, should RTD by dominant firms be a *per se* offence?**

As indicated above, the primary rule in Belgian economic law is the freedom of commerce and contract. But it also follows from Belgium’s Treaty obligations under article 82 EC and from the recent re-enactment of the similarly worded article 3 of the Belgian Competition Act that the prohibition of abuse of a dominant position is laid down in mandatory provisions of public law. Dominant firms therefore do have a special responsibility not to harm competition<sup>5</sup>. And an infringement of the relevant rules of competition is against the public order. We therefore need to interpret the concept of abuse in a way that reconciles the prohibition of abuse with the principle of the freedom of contract. We refer in this respect to our earlier response to the 3<sup>rd</sup> question.

In order to prove a liability of the refusing supplier, it should, from a competition law perspective, be established that a refusal to deal constituted in the given circumstances an infringement of article 82 EC and/or of article 3 of the Belgian Competition Act. It will under the general rules on tort liability (article 1382 Civil Code) moreover be necessary to prove the damage and the causal link between the damage and the infringement.

It follows from the responses to the previous questions that we do not think that a refusal to sell by a dominant firm should be a *per se* offence.

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<sup>4</sup> Décret d’Allarde, 2 and 17 March 1791.

<sup>5</sup> It follows that RTD is not an abuse when the firm which refuses to deal does not have a dominant position (see e.g. Competition Council, yearly Report 2003, p. 40 on the case *Brandini v. Rombouts*).

**5. Same conduct – different analysis? Is it possible to reach a different legal outcome depending on whether the conduct is investigated as an RTD or as some other conduct, such as discrimination or excessive pricing? After all, it is not unusual for an RTD to be disguised by using a high selling price and in some jurisdictions the fact that the price is “too high” could trigger a violation. Intuitively, the outcomes should be consistent – it is the effects of the conduct on competition that matter, rather than the type of restriction – but are they?**

A refusal to deal may at the same time qualify as discrimination or excessive pricing. And market behaviour should, in the light of the rules competition, be assessed with regard to its effect of competition. It does, however, not follow that the assessment of the market behaviour of the refusing supplier in the light of the concepts of a material refusal to deal, of discrimination and of excessive pricing will necessarily lead to identical or even similar conclusions. Terms and conditions may constitute a material refusal to deal without constituting excessive pricing or discrimination in the meaning of the relevant rules of competition, or vice versa.

**6. Influence of the essential facilities doctrine. How has the EF doctrine influenced the law on RTDs over time? Has the EF doctrine restricted the applicability of RTD as an abuse of dominance / monopolization violation, or are they two separate concepts? In other words, is it legally possible for there to be an unlawful RTD if there is no EF? Should it be? On the other hand, if there is an EF, then are all RTDs by the owner of the EF unlawful? Should they be?**

The essential facilities doctrine has, if anything, extended the concept of an abusive refusal to deal to a refusal to deal in respect of goods or services that the refusing supplier does not regularly offer on the market. We refer to the response to the 2<sup>nd</sup> question. The concepts are in our opinion separate but related, in the sense that an abuse in the light of the essential facilities doctrine constitutes a refusal to deal, but most refusals to deal do not need to be assessed in the light of the essential facilities doctrine.

Each refusal to deal should be assessed in the light of its specific economic context. Refusals to deal by the holder of essential facilities should not *per se* be unlawful.

**7. History of dealing. Should RTDs be treated differently depending on whether there is a history of dealing between the parties?**

Yes indeed, we refer to our response to the 2<sup>nd</sup> question.

**8. Reasonable justifications. Are there any circumstances under which otherwise unlawful RTDs should be excused (aside from IPR issues)? For example, what if a downstream buyer has a history of doing substandard work and therefore it may damage the upstream supplier’s reputation if it is allowed to use that supplier’s product in its own product or service? Alternatively, what if a manufacturer imposes a quota system to ration supplies of a vital medicine or some other product that is critical to public health or safety?**

Refusals to deal by dominant suppliers can be justified, e.g. in case the customer has a history of being a bad debtor, of doing substandard work that may damage the reputation of the supplier or entail his liability, etc. The supplier may also invoke a lack of capacity to supply all potential customers and can be justified to give priority to regular customers. Such justifications need to be sufficiently specific<sup>6</sup>. Given the limited number of decisions of the Competition Council, we refer to the EU case law in respect of refusals to deal.

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<sup>6</sup> See e.g. Competition Council, 5 November 2002, decision n° 2002-P/K-80, *NUBELT v. Mechelse Tuinbouwveilingen et al.*

**9. Agency experience. In agencies' experience, under what circumstances have RTDs been the most harmful to competition? Under what circumstances have they been most justified?**

The most harmful refusals to deal are in our experience the refusals that result in the elimination of a competitor in an already highly concentrated market<sup>7</sup>.

**10. Statutory effectiveness. How well do existing competition laws address RTDs? In the views of competition agencies, do their statutes sufficiently enable them to stop RTDs that are harmful to competition? If not, what changes would be necessary for the authorities to be able to prevent such behaviour?**

We consider that the existing legislation adequately addresses refusals to deal and that it offers effective legal remedies.

The most frequently sought civil law remedy is an injunction to cease a practice held to constitute an infringement of Article 2 or 3 of the Act. Such injunction can be sought:

- from the President of the Competition Council under Article 62 of the Act;
- from the President of the Commercial Tribunal (*Rechtbank van Koophandel, Tribunal de Commerce*) under Articles 93-95 of the Unfair Trade Practices Act on injunctions; or
- from the President of the Commercial Tribunal (*Rechtbank van Koophandel, Tribunal de Commerce*) by application of the general provisions of the Code of Civil Procedure on interim relief.

Brussels, 10 September 2007-09-10

Prof. Dr J. Steenbergen  
director general

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<sup>7</sup> See e.g. Competition Council, 25 March 2004, decision n° 2004-V/M-30, *Source Belgium/Febelco*. The decision concerned the market for data in respect of the market for pharmaceutical products.



## CANADA

### Introduction

Freedom of contract, a basic free market principle, permits parties to determine with whom they enter into business relationships. A company is, at law, generally free to establish its distribution channels as it sees fit. There is no obligation to supply all comers. Efficiency, it is argued, is promoted by freedom of contract. Freedom of contract is subject to certain limitations in the public interest (e.g. Human rights legislation, labour legislation etc.).

As a matter of economic public policy, Canada has placed limits on the “freedom to contract” principle by prohibiting certain types of refusals to deal.

Canada has a specific refusal to deal provision in its *Competition Act*. This provision is a civil provision and is subject to Canada’s private access regime.

In addition to this specific, “pure”, refusal to deal provision, refusals to deal may also be addressed civilly by the Competition Tribunal under sections 77 (exclusive dealing, tied selling and market restriction) and 79 (abuse of dominant position). Further, certain refusals to deal may be addressed criminally under section 61 (price maintenance) of the *Competition Act*. In each of these latter cases more than a simple refusal to deal is required there must be an additional anticompetitive purpose (constructive or subjective) that must be found to exist.

This paper addresses how refusals to deal are treated in Canada.<sup>1</sup>

### 1. Refusal to Deal – Overview – s.75

The Economic Council of Canada recognised the concentrated nature of the Canadian economy resulting in fewer suppliers and less competition amongst suppliers which could limit the ability of businesses seeking supply to participate fully in the economy and compete vigorously.<sup>2</sup> Competition at the retail level has historically been more vigorous in Canada tending to involve a larger number of small and medium sized enterprises as compared to the more concentrated wholesale/supply level. This is consistent with the purpose clause of the *Competition Act* to “...ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy...” and to ensure that there is competition amongst suppliers “...in order to provide consumers with competitive prices and product choices”.<sup>3</sup>

Section 75 of the *Competition Act* addresses “pure” refusals to deal.<sup>4</sup> The section is specifically designed to address vertical supply arrangements. There have been only three contested section 75 cases

<sup>1</sup> This paper does not address the exercise of intellectual property rights (IPRs).

<sup>2</sup> Economic Council of Canada, *Interim Report on Competition Policy* (1969), at 73-98. See also Roberts, R.J., *Roberts on Competition/Antitrust: Canada and the United States* (2<sup>nd</sup> Ed.) (Toronto: Butterworths: 1992) at 209-210.

<sup>3</sup> *Canada (Director of Investigation and Research) v. Xerox Canada* (1990) 33 C.P.R. (3d) 83 at 108 [Xerox].

<sup>4</sup> *Competition Act*, R.S.C. 1985, c. C-34, as am., [Competition Act], s.75, provides as follows:

75(1) Where on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that:

brought by the Commissioner of Competition (the “Commissioner”) in the 20 years since the 1986 reforms to the *Competition Act*.<sup>5</sup> Refusal to deal conduct is not illegal (unless it can be characterised as price maintenance); rather it is a reviewable practice. Until the Competition Tribunal (the “Tribunal”) issues an order requiring the supply of a product, a supplier is not obliged to supply.

There is a view that the refusal to deal provision is not designed to address a competition public policy concern, but rather to prevent small firms from being disadvantaged by larger suppliers. This raises criticisms regarding the expenditure of public funds in support of what should be private actions.<sup>6</sup> This issue is now largely resolved as a result of the private access provisions and the “adverse effect on competition” test added in the 2002 amendments.

Upon application of the Commissioner or a person granted leave, the Tribunal may order that one or more suppliers of a product in a market accept the person seeking supply on usual trade terms. The Tribunal must be satisfied that (i) the person denied supply is substantially affected in his business or is precluded from carrying on his business because of his inability to obtain adequate supply of the product any where in the market on usual trade terms; (ii) the person denied supply is unable to obtain adequate supply in the market because of insufficient competition among suppliers in the market; (iii) the person denied supply is willing and able to meet the usual trade terms of the supplier of the product; (iv) the product is in ample supply; and (v) the refusal to deal is having an adverse effect on competition in the market. The applicant bears the onus of proof of each of these constituent elements on a balance of probabilities. The criteria are examined below.

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- (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
  - (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
  - (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
  - (d) the product is in ample supply, and
  - (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
- the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

<sup>5</sup> The section 75 refusal to deal provision changed little since it was first became law in 1976. In 2002 the “adverse effect on competition test was added as a criteria”.

<sup>6</sup> Chen et al., “Refusals to Deal in Aftermarkets” *Review of Industrial Organization* 13: 131-151, 1998 (Netherlands: Kluwer Academic Publishers, 1998).

### 1.1 *Business substantially affected*

It must be established that the person denied supply is substantially affected in his business. This can be proven by showing a significant decline in revenues as compared to pre-refusal revenues. Accounting evidence and financial statements breaking down the sales impact provide strong evidence. In determining whether a person denied supply is substantially affected in his business, it is the effect on the entire business activities that must be considered.<sup>7</sup> In *Chrysler*, the Tribunal noted that it was necessary to go behind over-all sales and profit figures and consider the overall percentage of business accounted for by the product in issue; whether the product is easily replaced by the sale of other products; whether the sale of the product in issue uses up capacity that could be devoted to other activities; and whether the product in issue is used or sold in conjunction with other products and services such that the effect on the business is much greater than indicated by the volume of the product purchased.<sup>8</sup>

### 1.2 *Insufficient competition among suppliers in the relevant market*

In determining the relevant market, the Tribunal has considered the objectives of the refusal to deal provision and has adopted a very narrow product market definition for the purposes of section 75. The Tribunal defines the relevant product market in the context of the effect on the person denied supply, the demand of the person's customers and whether substitutes are acceptable to those customers.<sup>9</sup> The more common hypothetical monopolist and substitutability tests used in a merger context have not been adopted by the Competition Tribunal for a section 75 analysis.

Where vertical integration in an industry is the norm (i.e. the supplier does not deal through any independent distributor / middle man) or where a change in distribution arrangements to vertical integration is dictated by reasons of economic efficiency the Tribunal may not be able to conclude that a product market exists or that there was no supply "...because of insufficient competition among suppliers of the product in the market".<sup>10</sup>

The conduct of the person refused supply as well as any anti-competitive motivation for the refusal to deal by the supplier may be relevant to determining whether the inability to obtain supply was because of insufficient competition among suppliers of the product in the market as opposed to objectively justifiable business reasons.<sup>11</sup> Further, the Tribunal may consider the conduct of the person denied supply in exercising its discretion even if the preconditions for issuance of an order under section 75 are established. Efficiency arguments, the administrative costs and burden of continuing to deal, maintenance of levels and quality of service, or the negative impact on the reputation of the supplier because of performance of the person supplied may constitute relevant justifiable reasons for refusing to deal. However, mere assertions

<sup>7</sup> *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, (2007) Comp. Trib. 6 (CT-2007-001) [*Sears*], where the Tribunal found the applicant not to be substantially affected in its business by a \$16 million loss in sales in the context of its overall \$6 billion business; See also *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 at 18 [*Chrysler*]; *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23 (CT-2004-006).

<sup>8</sup> *Chrysler*, *supra* note 7 at 18.

<sup>9</sup> See *Chrysler*, *supra* note 7 at 10; *Xerox*, *supra* note 3 at 104-113 ("*Xerox*"). The Tribunal in both of these cases was prepared to define the market in the context of proprietary parts for autos and photocopiers.

<sup>10</sup> *Xerox*, *supra* note 3 at 114.

<sup>11</sup> *Ibid.* at 115.

of justifiable business reasons for refusals to deal will not suffice. The burden is on the person denying supply to provide objective evidence to substantiate the justifications relied upon.<sup>12</sup>

Market power of the supplier in the relevant market, unlike the abuse of dominance provisions of the legislation, is not a requirement for obtaining an order to supply – only that the person denied supply cannot obtain supply because of insufficient competition among suppliers of the product.<sup>13</sup> If there are multiple suppliers in a market it is unlikely that the person refused supply could demonstrate that the denial of supply by one supplier would substantially affect his business.<sup>14</sup> Practically, it would be unusual for a supplier to refuse to supply, for anti-competitive reasons, without holding significant market power in the relevant market. Denying supply would be contrary to profit maximising behaviour if the person denied supply could find a substitute for supply without difficulty.

In each of the three cases brought by the Commissioner, there was only a single supplier of the relevant product in the relevant product market – in effect the supplier was a dominant firm.

Other factors relevant to the exercise of the Tribunal's residual discretion to make an order, in addition to the reasons for the refusal to supply, include: the market position of the supplier and nature of the changes it was making to its distribution system; the long association between the supplier and the person now denied supply; the encouragement by the supplier such that the person denied supply expanded its business in reliance on the continued supply; and the manner in which supply arrangement was terminated.<sup>15</sup>

To date very few cases have been successfully brought under section 75. In each of those cases, the facts involved a refusal to supply in the context of an existing supply arrangement. The Tribunal has not awarded any remedy for start-ups or situations that would have required the establishment of new supply arrangements.

In both *Chrysler* and *Xerox* there were strong elements of a horizontal competitive interest (the supply of OEM parts by the suppliers themselves (or their exclusive dealers) to end customers).

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<sup>12</sup> *B-Filer Inc. v. The Bank of Nova Scotia* (2005) Comp. Trib. 52 (CT-2005-006) at paras 147 – 148 [*B-Filer*]. The Tribunal found that breach of contractual, legal or regulatory obligations constituted justifiable business reasons for terminating supply and rebutted the allegation that supply was terminated "...because of insufficient competition among suppliers in the market."

<sup>13</sup> *Xerox*, *supra* note 3 at 116.

<sup>14</sup> *Ibid.* at 116.

<sup>15</sup> *Chrysler*, *supra* note 7 at 24–27. See also *B-Filer*, *supra* note 12 at paras 234-235 where the Tribunal found that the refusal to deal was based upon the legal or reputational risks, breach of self-regulatory association rules and other regulatory concerns.

### 1.3 Usual trade terms

The person refused supply, must demonstrate that he is willing and able to meet the usual trade terms of the supplier of the product. “Usual trade terms” is defined narrowly in the legislation to mean “terms in respect of payment, units of purchase and reasonable technical and servicing requirements”.<sup>16</sup> The inability of a purchaser to meet all of the suppliers’ other usual contractual terms is not relevant to the analysis in section 75(1)(c). The failure to meet other usual contractual terms may, however, be relevant to whether supply is unavailable because of insufficient competition among suppliers of the product or whether the Tribunal should exercise its discretion to order supply.<sup>17</sup>

Usual trade terms are relative easy to determine where there are multiple suppliers and customers in the market and trade terms can be identified. It becomes considerably more difficult to determine what the usual trade terms of the supplier are, if the supplier is not supplying the product to other persons and there is no pre-existing supply relationship.

### 1.4 Product in ample supply

There has been little interpretation of the meaning of “ample supply” by the Tribunal. The Tribunal has interpreted this condition as eliminating copyright and intellectual property from the scope of section 75.<sup>18</sup> Essentially, it is physical articles that are in issue from the Tribunal’s perspective. It remains to be seen whether a service could be viewed as being in ample supply and an order issued to supply. The definition of “product” encompasses both an article and a service.<sup>19</sup> However the Tribunal has been prepared, as it did in *Warner*, to narrow the general definitions found in the *Competition Act* in the context of the purposes of section 75.

### 1.5 Adverse effect on competition

In 2002, section 75 was amended to include the additional condition that the refusal to deal have an adverse effect on competition. In considering whether the refusal to deal is having or is likely<sup>20</sup> to have an adverse effect on competition in a market, the Tribunal has held that the remaining market participants

<sup>16</sup> *Competition Act*, *supra* note 4, s.75(3). See also *B-Filer*, *supra* note 12 at paras 182-190.

<sup>17</sup> *B-Filer*, *supra* note 12 at para 193.

<sup>18</sup> *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd. et. al.* (1997) Competition Tribunal CT-97/3 at 14 –15 [*Warner*]:

(...) Although a copyright licence can be a product under the Act, it is clear that the word “product” is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an “ample supply” of a “product” and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a “product” – there cannot be an “ample supply” of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licencing provision for intellectual property.

<sup>19</sup> *Competition Act*, *supra* note 4, s. 2(1). The definition of a “product” includes an article and a service.

<sup>20</sup> The Tribunal in *B-Filer* found that “likely” was equivalent to probable effect on competition, not possible effect on competition. See *B-Filer*, *supra* note 4 at para 211.

must be placed in a position of created, enhanced or preserved market power as a result of the refusal.<sup>21</sup> Any adverse effect on competition is likely to manifest itself in the form of higher prices, preservation of prices when a price decrease would otherwise have resulted, reduced product variety or a decrease in the quality of the products sold in the market (e.g. lower service levels, fewer product features, decreased warranty benefits, reduced product innovation etc.).<sup>22</sup>

Interestingly, the standard of lessening or preventing competition “substantially” in a market found in most other parts of the Competition Act where a competition effects test is required, was not the standard adopted in paragraph 75(1)(e). The Tribunal has found “adverse” effect to be a lower threshold than “substantial” effect.<sup>23</sup>

Even before the 2002 amendments, the Tribunal seemed to be requiring demonstration of a broader competition effect in addition to the individual effect created by the refusal to supply prior to exercising its discretion to order supply.<sup>24</sup> It is unlikely that the previous decisions under section 75 would have been any different in result given the approach applied by the Tribunal in exercising its discretion.

## 2. Remedy under section 75

The only remedy available under section 75 is for the Tribunal to order the supply of the product, by any supplier in the market, on “usual trade terms”. It is unlikely that the Tribunal would order a supplier to supply a product where that supplier was not a party to the proceedings before the Tribunal. Under sections 77 (exclusive dealing, tied selling and market restriction) and 79 (abuse of dominance), the Tribunal has broader powers to order parties to take corrective action to restore competition in the market. Damages, however, are not available to a party injured under any of the civil reviewable provisions of the *Competition Act*, although the Tribunal may award a party its costs in the proceedings.<sup>25</sup>

In addition to issuing an order to supply, the Tribunal, on application of the Commissioner or a private party, also has the power to issue an interim order to supply that is granted on usual mandatory injunctive principles.<sup>26</sup> An applicant for an injunctive order to prevent discontinuation of supply pending a hearing of the case on its merits must demonstrate that (i) there is a “serious issue to be tried”; (ii) that not granting the interim relief will cause irreparable harm to the applicant; and (iii) that the balance of convenience favours the granting of the relief requested by the applicant.<sup>27</sup> This first order can be critical to the success of a case since an order to continue to supply pending the outcome of the application may lead to a

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<sup>21</sup> *Ibid.* at para 208.

<sup>22</sup> *Ibid.* at para 206.

<sup>23</sup> *Ibid.* at para 211.

<sup>24</sup> See *Chrysler* supra note 7 at 27; and *Xerox* supra note 3 at 119.

<sup>25</sup> Note that the Standing Committee on Industry, Science and Technology in its report, *A Plan to Modernise Canada’s Competition Regime*, recommended granting the Competition Tribunal the power to award damages. See infra note 51.

<sup>26</sup> *Competition Act*, supra note 4, s.104. The authority which identifies the principles to be applied for injunctive relief is the decision of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

<sup>27</sup> *B-Filer*, supra note 4 at paras 3-5. See also *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.* (2005), 44 C.P.R. (4<sup>th</sup>) 146 (Comp. Trib.), [*Robinson*]; *Quinlan’s of Huntsville Inc. v. Fred Deeley Imports Ltd.* (2004), 35 C.P.R. (4<sup>th</sup>) 517 (Comp. Trib.), [*Quinlan’s*].

negotiated settlement, while the failure to obtain an interim order may mean the rapid demise of the enterprise such that any final order to supply becomes moot.<sup>28</sup>

The Commissioner may, in limited circumstances, prior to filing an application under section 75, apply *ex parte* to the Tribunal for a temporary interim order to prevent conduct that could be the subject of an order under section 75.<sup>29</sup> The Commissioner must satisfy the Tribunal that (a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur; (b) a person is likely to be eliminated as a competitor; or (c) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.<sup>30</sup> The Commissioner has never sought an interim order in a refusal to supply matter reviewable under section 75. The ability to apply for a temporary interim order is restricted to the Commissioner.

Unlike the section 61 price maintenance section (discussed below), the “pure” refusal to deal provision found in section 75 of the *Competition Act* does not permit a remedy against a third party seeking to interfere with the supply arrangement between business customer and supplier.<sup>31</sup> However, the abuse of dominant position provisions (discussed below) may be applicable to address non-supplier interference with the supply relationship in limited circumstances. Further, a customer denied supply as a result of the interference by another person in its supply relationship could commence a civil action and claim damages under the common law tort of intentional interference with economic relations.

One of the key concerns with any of the remedies proposed, particularly those in section 75, is the lengthy litigation process (including likely appeals to higher courts) that a person denied supply must endure prior to the implementation of an order requiring supply. A person substantially affected in his business may well be insolvent by the time any eventual order is issued.<sup>32</sup>

### 3. Private Access to the Tribunal under section 75

Prior to amendments to the *Competition Act* in 2002, only the Commissioner could bring an application under section 75 for refusal to deal. The 2002 amendments allowed private parties access to the Competition Tribunal to seek an order under section 75 requiring supply of a product. In order to avoid opening the floodgates to costly nuisance litigation, Parliament required that parties seeking to advance their own private claims before the Tribunal, first obtain leave of the Tribunal.<sup>33</sup>

<sup>28</sup> See *Robinson supra* note 27; See also *Quinlan’s supra* note 27.

<sup>29</sup> Temporary interim orders last for a maximum of 10 days if obtained *ex parte*, but on notice may be extended by the Tribunal up to a maximum of two consecutive thirty-five day periods. See *Competition Act*, ss. 103.3(4) and (5).

<sup>30</sup> *Competition Act, supra* note 4, s.103.3. Given the narrow remedies available to the Tribunal under section 75 (i.e. an order to supply) granting of a temporary interim order should favour the Commissioner’s application given that the Tribunal could not compensate a party in damages for lost business or do anything other than order supply.

<sup>31</sup> Other private tort remedies may also exist such as intentional interference with economic relations.

<sup>32</sup> *Symbol Technologies Canada ULC v. Bar Code Systems Inc et al.*, (2005), 2005 Comp. Trib. 32 (CT-2003-008), [*Symbol*]. Note that Bar Code did not seek an interim order for supply at the time that it sought leave to make its application under section 75.

<sup>33</sup> *Competition Act, supra* note 4, s.103. Concerns of excessive nuisance litigation have not materialised. There have only been 15 applications for leave to the Tribunal since 2002.

The Tribunal may grant leave to a person to seek a remedy (namely an order to supply or continue to supply on usual trade terms) where it is satisfied that the applicant is directly and substantially affected in the applicant's business by the refusal to deal which could be the subject of an order under section 75.<sup>34</sup>

An applicant for leave must support the leave application with sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in its business.<sup>35</sup> The kind of credible evidence that the Tribunal expects to receive in support of an application for leave would include profit and loss statements, comparative sales figures before and after the refusal to supply and directly connected to the refusal to supply the relevant products, broad assertions will not be sufficient.<sup>36</sup> Once the Tribunal is satisfied that the refusal to supply is having a direct and substantial effect on the applicant's business, it must consider whether there is some evidence of all of the constituent elements that could lead to the making of an order under section 75. If the Tribunal determines that there are "reasonable grounds to believe" that the refusal to deal could be the subject of an order under section 75(1) it may grant leave – it is a low threshold.<sup>37</sup>

The Tribunal may not consider an application for leave where the matter is the subject of an ongoing inquiry by the Commissioner. Further, where the Commissioner has reached a settlement with the person in respect of whom an order is sought and discontinued the inquiry, no application for leave may be considered.<sup>38</sup> Where a person is granted leave to make an application under section 75, the Commissioner has the right to intervene and make representations in the proceedings.<sup>39</sup>

### 3.1 *Involvement of the Commissioner in a section 75 application*

In view of the new private access provisions, it is likely that the Commissioner will initiate a section 75 application in only carefully considered and exceptional circumstances.

The Commissioner may make written representations in support of a private party's leave application when a particular case has importance beyond the immediate parties; or when the case could result in valuable jurisprudence.<sup>40</sup>

<sup>34</sup> *Competition Act, ibid.*, s.103.1(7).

<sup>35</sup> *Symbol, supra* note 32; *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, [2002] C.C.T.D. No. 38 (QL) at para 14; *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.*, 2007 Comp. Trib. 18 (CT-2007-004) at para 11 [*Sono Pro*].

<sup>36</sup> *Sono Pro, supra* note 35 at paras 14-16. See also *Construx Engineering Corporation v. General Motors of Canada*, 2005, Comp. Trib. 21; but see also *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (CT-2003-009) at paras 17-21; *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23 (CT-2004-006); *Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21 (CT-2004-004); *Mrs. O's Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23 (CT-2004-003).

<sup>37</sup> *Symbol, supra* note 32 at 488-489.

<sup>38</sup> *Competition Act, supra* note 4, s.103.1(3). Note that if an inquiry is discontinued otherwise than because of a settlement there is no bar to a private litigant to pursue a leave application. The Commissioner must be served with a copy of every application for leave and must certify whether or not the matter is the subject of an inquiry or was the subject of an inquiry that has been discontinued because of a settlement (see ss.103.1(2) and (3)).

<sup>39</sup> *Competition Act, ibid.*, s.103.2.

<sup>40</sup> Competition Bureau, *Information Bulletin on Private Access to the Competition Tribunal*, May 4, 2005 [*Private Access Bulletin*], <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1392&lg=e>

The Commissioner will only intervene pursuant to section 103.2 in an application on the merits in exceptional circumstances. Such circumstances may include matters where: the impact on competition has importance beyond the immediate parties and affects a wider geographic area; the issues could have a significant impact on consumers, on the business community or on the Canadian economy; or the case could result in the development of a new economic theory or in valuable jurisprudence. The Commissioner may also seek to intervene or vary a consent agreement between the private parties if the Commissioner believes that the consent agreement has or is likely to have anticompetitive effects.<sup>41</sup>

In very limited circumstances, and before leave is granted, the Commissioner may file her own application with the Tribunal as opposed to intervening in an existing application.<sup>42</sup> The Commissioner might initiate proceedings where there are significant competition issues which would be better dealt with under another provision of the *Competition Act* such as the abuse of dominance provision that private parties cannot pursue themselves (e.g. an order addressing two or more parties – joint abuse as opposed to a single party).<sup>43</sup>

#### 4. Treatment of Refusals to Deal under other sections of the Competition Act

##### 4.1 Abuse of Dominant Position (ss. 78 and 79)<sup>44</sup>

The *Competition Act* does not prohibit the establishment of market power or the existence of a dominant position in a market obtained by superior competitive performance. Rather, the purpose of the provision is to address anti-competitive conduct engaged in by a person in a position of dominance that substantially lessens or prevents competition in a market.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Competition Act*, supra note 4, s. 103.1(10). The Commissioner may not file any application under sections 75, 77, or 79 on the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave to a private party to file an application and the private party has filed an application under sections 75 or 77. Therefore, after leave has been granted and after the private party has filed its application the Commissioner cannot initiate an application in respect of the same matter and is limited to intervening in the private party proceedings.

<sup>43</sup> *Private Access Bulletin*, supra note 40.

<sup>44</sup> *Competition Act*, supra note 4, s. 79.

79(1) Where, on application by the Commissioner, the Tribunal finds that:

- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Refusals to deal can be addressed under the section 79 of the *Competition Act* (abuse of dominant position provision) where the refusal to deal amounts to part of a practice<sup>45</sup> of anticompetitive acts engaged in by a firm or firms that substantially or completely control a market and which substantially lessens or prevents competition.

Section 78 of the *Competition Act* provides an illustrative list of anticompetitive acts. The Tribunal has found that an act will be anticompetitive where there is some element of anticompetitive design, purpose or object that is predatory, exclusionary, or disciplinary on a competitor.<sup>46</sup> It is the overall character of the act, not the subjective intent that must be considered in assessing the overarching purpose of the impugned conduct. Relevant factors to consider include the reasonably foreseeable or expected objective effects of the act from which intention can be ascertained, the express subjective intent and any business justification.<sup>47</sup>

The impugned conduct substantially lessens or prevents competition where the conduct serves to preserve, entrench or enhance the market power of a dominant firm or firms.<sup>48</sup> The question is would the relevant markets in the past, present and future be substantially more competitive *but for* the impugned practice of anti-competitive acts?<sup>49</sup>

Refusals to deal can constitute a disciplinary act or be expressly intended to exclude a competitor or potential competitor from the market. In such circumstances, the Tribunal may prohibit the dominant firm(s) from engaging in the anti-competitive practice.

Where a prohibition order would not alone be sufficient to restore competition in the market, the Tribunal has the broad discretion to a party to take such actions as the Tribunal deems necessary, including the divestiture of assets or shares, to overcome the effects of the anti-competitive practice.<sup>50</sup> Such an order could include an order to supply, provide a service or provide access to a facility.

As with section 75 applications, the Commissioner may apply for interim and temporary interim orders to restrain the alleged anti-competitive conduct pending a final determination of the matter by the Tribunal.

Bill C-19, which was introduced by the Government in November 2004 proposed the imposition of administrative monetary penalties of up to Cdn\$10 million for a first order and up to Cdn\$15 million for each subsequent order for abuse of dominant position. Bill C-19 died on the order paper when a federal

<sup>45</sup> A practice is more than an isolated act. A practice may include one occurrence that is sustained or systematic over a period of time, or a number of different acts, which in their entirety have the effect of substantially lessening or preventing competition. See *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1991), 32 C.P.R. (3d) 1 (Comp. Trib.) at 23 [*NutraSweet*]; *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) at 211 [*Tele-Direct*].

<sup>46</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2006) 49 C.P.R. (4<sup>th</sup>) 241 (FCA) at 272 [*Canada Pipe*]. See also *NutraSweet*, *supra* note 45 at 34.

<sup>47</sup> *Tele-Direct*, *supra* note 45 at 180. See also *Canada Pipe*, *supra* note 46 at 272.

<sup>48</sup> *NutraSweet*, *supra* note 45 at 47.

<sup>49</sup> *Canada Pipe*, *supra* note 46 at 260. See also Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (Industry Canada: Ottawa, 2001) at p.5.

<sup>50</sup> *Competition Act*, *supra* note 4, ss.79(1) and (2). Remedial orders under subsection 79(2) could include orders to change contracting practices, require the dominant firm to permit its customers to terminate long term contracts without penalty, and require supply etc.

election was called.<sup>51</sup> Various proposals for reform have also proposed expanding private access to the abuse of dominance provisions.<sup>52</sup>

#### 4.2 *Essential Facilities & Refusal to Deal*

Whether a complainant could successfully pursue access to essential facilities under the refusal to deal provisions of section 75 has not been resolved. However, the issue will likely be whether the “product” is in ample supply. After *Warner* it is not clear that the Tribunal would entertain an essential facilities argument under section 75.<sup>53</sup> Theoretically, however access to essential facilities could be ordered as it can be viewed as the supply of a service. The concern would be what are the usual trade terms and would the Tribunal be embarking upon the role of a regulator in establishing rates for access – something it outright refused to do in *Tele-Direct*:

The Tribunal is not a rate-setting body. The implication of rate-setting is an ongoing regulatory oversight which is the antithesis of the objectives of competition policy. (...) We could not saddle Tele-Direct or the agents with a rate cast in stone forever and the alternative of ongoing rate regulation is, in our view, simply not part of the mandate of the Tribunal.<sup>54</sup>

Canada’s abuse of dominant position provision explicitly defines the “pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market” as an anti-competitive act.<sup>55</sup>

The *Competition Act*, specifically addresses access to essential facilities in the context of the market for air services. The denial of a person operating a domestic service of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service or the refusal to supply such facilities and services on reasonable commercial terms constitutes an anti-competitive act.<sup>56</sup> It has been proposed, however, that these provisions be repealed.<sup>57</sup>

In Canada access to essential facilities has arisen as an issue most frequently in the telecommunications sector. The Canadian Radio and Telecommunications Commission has the authority

<sup>51</sup> Bill C-19, *An Act to Amend the Competition Act and Make Consequential Amendments to Other Acts*, 1<sup>st</sup> Sess, 38<sup>th</sup> Parl., 2004, cl. 8 – 9 [*Bill C-19*].  
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2333899&Language=e&Mode=1&File=24>

<sup>52</sup> Canada, Parliament, Standing Committee on Industry Science and Technology, *A Plan to Modernize Canada’s Competition Regime* (Ottawa: PWGSC Publishing, 2002) at 68-72.  
<http://cmte.parl.gc.ca/Content/HOC/committee/371/inst/reports/rp1032077/indurp08/indurp08-e.pdf>

<sup>53</sup> Recall that in *Warner* the Tribunal was not satisfied that licenses were a “product” within the meaning of section 75 despite the fact that “product” is defined for the purposes of the act to include an article and a service. “Article” in the *Competition Act* is defined to mean “real and personal property of every description” (see *Competition Act*, *supra* note 4, s.2(1)).

<sup>54</sup> *Tele-Direct*, *supra* note 45 at 177. Note that this case first involved an allegation of refusal to deal under s.75, but the application was subsequently amended.

<sup>55</sup> *Competition Act*, *supra* note 4, s.78(1)(e).

<sup>56</sup> *Competition Act*, *ibid.*, s. 78(1)(k). See also *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service*, SOR 2000-324, s.2.

<sup>57</sup> *Bill C-19*, *supra* note 50, cl. 7. *Bill C-19* died on the order paper and was not introduced following prorogation of Parliament.

as a regulator to grant and regulate access on specific terms and at specific rates. Where a specific regulator with the power to grant access is in a position to regulate access in the market and has not forborne from doing so, it is unlikely that the Bureau would pursue an essential facilities case. It is only where market foreclosure is raised by denial of access to an essential facility that is essential to competition and that is not subject to regulation that the Bureau may pursue a case.

Where a firm or firm(s) has market power and controls an essential facility, a denial of access to that essential facility is an anti-competitive act when its purpose (constructive or subjective) is to exclude or impede actual or potential competitors.<sup>58</sup> While a dominant firm(s) may maximise its profit from its superior technology and intellectual property rights, it may not leverage those rights to create an anticompetitive effect.<sup>59</sup>

### 4.3 *Exclusive dealing, tied selling and market restriction*

Refusal to supply is also relevant when considering exclusive dealing, tied selling and market restriction where supply and conditions of supply of a product are conditional on the person receiving supply committing to certain conduct.

Where a practice<sup>60</sup> of exclusive dealing (a requirement or inducement to deal only or primarily in products of the supplier), tied selling or market restriction is engaged in by a major supplier<sup>61</sup> in the market

<sup>58</sup> Organisation for Economic Co-operation and Development, *The Essential Facilities Concept* (Paris: OECD, 1996) at 52 citing a Submission of the Director of Investigation and Research to the Canadian Radio-Television and Telecommunications Commission; Re: Telecom Public Notice CRTC 95-36. In considering whether action is warranted the Competition Bureau will consider:

- (i) How practical and reasonable would it be for competitors to enter the market and compete effectively in the relevant product and geographic market either by constructing their own facilities or obtaining access to alternative facilities?
- (ii) How long will it take competitors to construct their own facilities or to obtain access to alternative facilities to be able to compete effectively? This time consideration may differ between de novo entry and firms expanding from other geographic areas or using existing facilities in the relevant market.
- (iii) Is there any reason competitors would not be able to compete effectively?
- (iv) Assuming competitors are able to obtain access to their own facilities within a reasonable time frame, would they face any significant distribution or marketing difficulties that would impede their ability to compete effectively?
- (v) Do competitors face any certification, licensing, or other regulatory barriers (e.g. obtaining access to rights-of-way) to be able to compete effectively? If so, how long will it take to overcome these barriers and how costly will it be? Government policies at all levels could have a major and even decisive impact on whether and how fast competition will develop.
- (vi) Is new entry conditional upon attaining minimum scale or scope of economies before effective competition can occur? Do buyers place a premium on buying a full line of products or services such that sellers of only one of these products would not be an effective competitor?
- (vii) Are competitors able to serve a wide range of customers throughout the relevant geographic market, or are they limited to niche markets?
- (viii) To the extent that not all customers have competitive alternatives available to them, could the owner of the essential facility discriminate against just those customers that have no alternative? Or would anti-competitive behaviour against those customers necessarily cause it to lose so many other customers that it could not profitably persist in the anti-competitive behaviour?

<sup>59</sup> See *D&B Co. of Canada v. Canada (Director of Investigation and Research)* (1994), 58 C.P.R. (3d) 342 (Comp. Trib.) [*Nielsen*];

<sup>60</sup> Like section 79, isolated acts are insufficient to constitute a practice. See *NutraSweet, supra* note 45 at 23; *Tele-Direct, supra* note 45 at 211.

or because the practice is widespread in the market and is likely to lessen competition substantially, the Tribunal may issue an order prohibiting a party(ies) from continuing to engage in the practice and containing any other requirement that, in the opinion of the Tribunal, is necessary to restore or stimulate competition in the market.<sup>62</sup>

Overall, the structure of analysis adopted in section 77 is very similar to that of section 79 and some section 79 cases have been brought under both section 79 and the exclusive dealing, tied selling or market restriction provisions of section 77.

#### **4.4 Refusal to Supply by a Foreign Supplier**

The *Competition Act* contains a little known reviewable practice provision related to exertion of buying power outside of Canada. Where a supplier outside of Canada has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada (the “first” person) at the instance of and by reason of the exertion of buying power outside Canada by another person, the Tribunal may order any person in Canada (the “second” person) by whom or on whose behalf or for whose benefit the buying power was exerted to (a) sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of the product and on the same terms and conditions as the second person obtained or obtains from the supplier; or (b) not deal or to cease to deal, in Canada, in that product of the supplier.<sup>63</sup>

No application has ever been brought under this provision, possibly because of the difficulty in obtaining evidence located outside of Canada. The provisions introduce some new language not specifically considered elsewhere in Canada’s *Competition Act* such as “buying power”. Further there is no requirement for any adverse impact on the business of the person denied supply or who is otherwise discriminated against in the supply of a product. There is also no requirement to show any impact on competition in the market. Nevertheless, it is likely that the Tribunal would consider the impact on competition in determining whether to exercise its discretion to make the orders permitted.

#### **4.5 Price Maintenance**

Refusals to deal with a business because of its low pricing policy, or attempts to control the resale prices of another business may constitute a criminal offence. Canada’s price maintenance provision first became law in 1951, with substantial amendments in 1975<sup>64</sup>

It is a *per se* criminal offence in Canada for a person who is engaged in the business of producing or supplying a product to refuse to supply a product to any other person engaged in business in Canada because of the low pricing policy of that person.<sup>65</sup>

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<sup>61</sup> See *Tele-Direct*, *supra* note 45. *Canada (Director of Investigation and Research) v. Bombardier Ltd.* (1980), 53 C.P.R. (2d) 47 (R.T.P.C.) where the Restrictive Trade Practices Commission held that a “major” or important supplier is one whose actions are taken to have an appreciable or significant impact on markets where it sells. Market share, innovativeness and financial strength are all relevant factors to consider when determining if the supplier is a “major” supplier.

<sup>62</sup> *Competition Act*, *supra* note 4, ss.77(1), (2) and (3).

<sup>63</sup> *Competition Act*, *ibid.* s.84.

<sup>64</sup> *An Act to amend the Combines Investigation Act*, S.C. 1951 [2<sup>nd</sup> sess.], c-30, s.1. The provision was originally directed only at “dealers” (i.e. a person manufacturing, supplying or selling a product) and was focused on the price that the article or commodity was resold. It dealt strictly with vertical supply relationships, today, however, horizontal (i.e. competitor to competitor) relationships are also within the scope of the provision.

It is also prohibited for a person by means of a threat, promise, agreement or any like means to attempt to induce a supplier to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.<sup>66</sup>

No adverse inference may be drawn from a refusal to supply where the person who was refused supply was: (i) making a practice of using the product supplied as a loss-leader (i.e. not for the purposes of making a profit thereon, but for advertising); (ii) not selling the product for the purpose of making a profit, but attracting customers to his store in the hope of selling them other products; (iii) making a practice of engaging in misleading advertising in respect of the products supplied; or (iv) not providing the level of servicing that purchasers of the product might reasonably expect from the other person.<sup>67</sup>

A party breaching the price maintenance provisions is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both, the maximum penalties available under the *Competition Act*.<sup>68</sup>

Pure refusals to deal would not constitute an offence under section 61. There must be an intent subjectively to engage in the decision to terminate supply or otherwise threaten, enter into an agreement for the “objective” purpose to influence resale prices upward or discourage the reduction of prices of a product.<sup>69</sup>

The price maintenance provision applies horizontally to competitors who try to affect the supply of another competitor by bringing pressure to bear on a supplier.<sup>70</sup> The provisions also apply vertically to suppliers who seek to maintain or increase prices.

The price maintenance provisions apply not only to suppliers and other persons that seek to terminate supply to an existing customer because of that customer’s low pricing policy, but also to a potential new customer who is denied supply because of the customer’s low pricing policy.<sup>71</sup> It also captures situations of discriminatory treatment against a business because of its low resale pricing policy.

Unlike the section 75 refusal to deal provisions in the *Competition Act* which specify that an article is not a separate product because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like (subject to dominance of the articles in the market), the price maintenance provision contains no such restriction. Therefore, a supplier cannot refuse to supply a particular brand of

<sup>65</sup> *Competition Act*, *supra* note 4, s.61(1)(b).

<sup>66</sup> *Competition Act*, *ibid.* s.61(6).

<sup>67</sup> *Competition Act*, *ibid.*, s.61(10).

<sup>68</sup> *Competition Act*, *ibid.*, s.61(9). Unlike other sections of the Act, price maintenance is not a hybrid offence (there is no provision for the Attorney General to prosecute as a lesser summary conviction offence).

<sup>69</sup> *R. v. 41813 Alberta Ltd.* (1994) Action No. 9201-1336C6 (Alta Q.B.) unreported; *R. v. Royal Lepage Real Estate Services Ltd.* (1994), Action No. 8201-14125 (Alta Q.B.) unreported; where the courts accepted a proximate cause of the termination of supply being related to the low pricing policy of the person denied supply. However, other cases have adopted a more restrictive view that the low pricing policy must be the only central or real reason for the termination of supply – see *R. v. Griffith Saddlery & Leather Ltd.* (1986), 14 C.P.R. (3d) 389 at para 21 (Ont. Prov. Ct. (Crim. Div.)).

<sup>70</sup> See *R. v. Rittenhouse Ribbons & Rolls Ltd.* (18 December 1995), Toronto T-2663-95 (Fed. Ct.) unreported.

<sup>71</sup> *R. v. Chuett, Peabody* (1982), 64 C.P.R. (2d) 30 at paras 54-65 (Ont. Co. Ct.).

merchandise to a customer because of the customer's low pricing policy. As a *per se* offence there is no issue of determining relevant product and geographic markets and no need to demonstrate market power.<sup>72</sup>

Canada's price maintenance prohibition (s.61) contains no exemption for intellectual property rights. Indeed, it explicitly forbids any person who has the "...exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography..." (i.e. intellectual property rights) from refusing to supply a product to a customer because of the customer's low resale pricing policy.

The interpretation of the law under the price maintenance provisions has come both from criminal prosecutions as well as civil suits pursued in reliance on section 36 of the *Competition Act*<sup>73</sup>. Section 36 permits any person who has suffered loss or damage as a result of a breach of any of the Part VI criminal provisions of the *Competition Act* or breach of a Tribunal order to sue for and recover damages in a court of competent jurisdiction.

The cases brought under section 61 have mostly been vertical cases where the supplier seeks to pressure the retailer to maintain resale prices through the means described in the section including threatening or actually refusing supply. A few horizontal (competitor to competitor) cases have also been brought under section 61.<sup>74</sup>

Some authors believe that horizontal price maintenance cases to be attractive because it is a *per se* offence and there is no requirement to show any impact on competition.<sup>75</sup> Section 61 is most commonly used when a competitor engages in unilateral horizontal conduct to attempt to raise prices through threats or inducements by, for example, pressuring a supplier to terminate supply to a competitor. Some commentators believe that vertical price maintenance should be treated as a reviewable practice like the other practices considered under the reviewable refusal to supply, market restriction, exclusive dealing, tied selling and abuse of dominance provisions.<sup>76</sup> This, they argue, would be more consistent with the economic objectives of the legislation: providing a remedy where pricing behaviour is likely to destroy efficiency enhancing competition.<sup>77</sup>

## 5. Conclusion

Refusals to deal can be dealt with differently under the various provisions of the *Competition Act* depending on the characteristics of the supplier and the nature, purpose and effect of the refusal to deal.

In the Competition Bureau's experience the most harmful refusals to deal are those that go beyond pure refusals to deal and are engaged in for an anti-competitive purpose to preserve market power or specifically to enhance or maintain prices. A balance has been struck by Canadian courts in delineating

<sup>72</sup> *R. v. Grange* (1978), 40 C.P.R. (2d) 214 (B.C. Co. Ct.) at 219-220.

<sup>73</sup> *Competition Act*, *supra* note 4, s.36.

<sup>74</sup> It is not unusual for a person who is the subject of a section 45 (price-fixing) inquiry to request to plead guilty to an offence under section 61 since it is viewed as carrying less of a stigma as compared to a conviction under section 45.

<sup>75</sup> Vanduzer et al. Study Commissioned by the Commissioner of Competition *Anticompetitive Pricing Practices and the Competition Act: Theory Law and Practice* (Ottawa: October 1999) at 44.

<sup>76</sup> *Ibid.* at 46.

<sup>77</sup> *Ibid.* at vii.

those refusals to deal that are engaged in for objective and efficient business purposes versus those that have an anti-competitive purpose.

The Competition Bureau will usually not pursue a pure refusal to deal situation under section 75 of the *Competition Act* in the absence a refusal to deal that is, or is engaged in as part of, a practice of anti-competitive acts. The private access provisions of the legislation will generally provide sufficient remedies for specific cases of pure refusals to deal.

The Competition Bureau will usually only refer matters to the Attorney General of Canada for criminal prosecution under the section 61 price maintenance provisions involving a refusal to deal or threat of a refusal to deal only where there is a horizontal competitive impact as opposed to a private vertical impact.

## CZECH REPUBLIC

### 1. Introduction

This paper is the Czech Republic's contribution to the roundtable discussion on refusal to deal held as part of the OECD Competition Committee meeting in October 2007. In this paper the Czech Office for the Protection of Competition (hereinafter "the Office") will discuss the refusal to deal (hereinafter "RTD") doctrine on an example of three cases addressed during its operation in the recent years. In the Office's experience, the refusal to deal is not a very frequent form of abuse of dominant position and, as will be perceptible in the examples, it is a form that is difficult to identify and is serious in terms of impacts on subsequent productions or on consumers. In the following cases the Office succeeded in revealing and sanctioning the anti-competitive behaviour or in preventing it on time, as the case may be, with its decisions being confirmed in appellate proceedings.

### 2. Refusal to deal with customer dependent on delivery

In the recent years the Office dealt with a case of refusal to deal in the area of petrochemical material production. An original gigantic company mostly built in the second half of the 20<sup>th</sup> century was divided into two independent companies through privatisation. Oil cracking and production of basic refinery material became the task of ČESKÁ RAFINÉRSKÁ, a. s., while the production of further inputs for the petrochemical industry (such as rubber production, agro-chemistry, production of building and coating materials, synthetic fibre, etc.) became the main activity of CHEMOPETROL, a.s. Agreements were signed between both companies on the mutual delivery of material while the production of the CHEMOPETROL competitor was fully dependent on deliveries from the refinery. In such a situation of mutual interconnection of operations even a brief delivery breakdown may have a grave impact on further production and the client's equipment condition. The material provider's negotiating position was strengthened by the possibility to threaten with the suspension or stopping of deliveries.

Subsequently, both companies failed to reach an agreement on the prices of deliveries. The period when deliveries were based on temporary contractual arrangements had lasted many months and the supplier, ČESKÁ RAFINÉRSKÁ, elected to use a negotiation tool – prohibited to a dominant player on the market – the threat and execution of RTD.

For this reason the Office was forced to initiate an administrative procedure on the basis of a suspected abuse of dominant position by the refinery. In its decision the Office stated that the party to the proceeding, ČESKÁ RAFINÉRSKÁ, abused its dominant position on the petrochemical materials market by stopping the delivery of materials to its long-term client, CHEMOPETROL, for approximately 39 hours on 31 May 2002 at 24 hrs, during the talks on conditions for the delivery of petrochemical materials for the period starting on 1 June 2002, without any objectively justifiable reason. By this it violated the provision of Section 11 paragraph 1 of the Act on the Protection of Competition<sup>1</sup> to the detriment of CHEMOPETROL and other competitors purchasing petrochemical products from this company.

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<sup>1</sup> This provision is a so-called general clause prohibiting the abuse of the dominant position to the detriment of other competitors or consumers; it provides some specific cases of abuse as examples.

Among other things the Office proved that in case of this refusal to deal it was almost impossible, out of technical as well as economic reasons, for CHEMOPETROL to find a substitute supplier of the required amount of raw materials to be able to continue the production within a reasonable time. In order to respond in this way the company would have had to invest considerable amounts and would have needed more time to adjust the production technology and local conditions to this situation (the railway siding capacity, etc.). ČESKÁ RAFINÉRSKÁ communicated the first information on realising its threat only about three months previously. Under the circumstances CHEMOPETROL was unable to secure such amount of material for production from other sources under comparable conditions to be able to fulfil its own contractual obligations toward its customers. This **dependence was then reflected in many subsequent production operations** in the petrochemical and agro-chemical industries and other competitors whose production depends on the delivery of products from CHEMOPETROL (provided that some of these competitors are connected to CHEMOPETROL with their pipe lines).

In the situation where there was no written agreement stipulating the conditions of delivery in line with the supplier's articles of association, nothing prevented the execution of deliveries on the basis of mutual agreements expressing the will to deliver and purchase the raw material. In order to overcome the basic disagreement – failure to agree on the material delivery price formulas – both parties adopted short-term agreements temporarily covering certain periods. Such agreement was not achieved for the period starting on 1 June 2002 by the expiration of the last valid agreement (at 31 May 2002). The Office stated that both the supplier and the purchaser did not exhaust all possibilities in their effort to reach such an agreement. Proposals by both parties were gradually converging during the talks in May 2002 and the possibility to agree on a mutually acceptable compromise solution was confirmed in an agreement at last. The refusal to deal, however, caused **damage as a result of a dominant player's conduct** on the market and it should not have been used as a negotiation argument. The Office classified the delivery suspension notice – in months – as too short for the fully dependent purchaser to find an alternative source of deliveries.

In the first instance decision the Office imposed a fine for violating the Act on the Protection of Competition and, subsequently, the decision in the first instance was materially confirmed by the Chairman of the Office and the imposed fine amounted to CZK 6 million (ca. EUR 210 thousand).

### 3. Influence of the essential facilities doctrine

In another case the Office had to deal with the question whether it was legally possible to abuse the dominant position of a competitor in the form of refusal to deal (RTD) without denying the access to essential facilities (EF) at the same time, i. e. whether RTD and EF are two separate concepts.

In 2005 the Office issued a decision declaring the abuse of dominant position by ČSAD Liberec, a. s. on the market of services provided by the bus station in Liberec. These services are rendered to entities operating public bus transport. After applying a legal appeal this decision was materially confirmed by the Chairman of the Office and, subsequently, the administrative court.

In the first half of 2005, ČSAD Liberec abused its dominant position on the market specified above by refusing to talk about the use and, subsequently, disabling a proper use of the bus station operated by this company to STUDENT AGENCY s. r. o. for the purpose of operating domestic public transport service on the Prague – Liberec line in both directions, even though it enabled other competitors operating on the same bus line to use the station.

By such conduct the party to the proceeding violated the provision of Section 11 paragraph 1 of the Act on the Protection of Competition to the detriment of STUDENT AGENCY which was discriminated in the competition on the market of services provided by carriers operating domestic public transport service

on the Prague – Liberec line and also to the detriment of end consumers – passengers who demanded services of domestic public transport on the Prague – Liberec line in the period in question. The Office prohibited ČSAD Liberec to behave in this manner and a fine of CZK 2 million was imposed (ca. EUR 69 thousand).

During the investigation the Office was identifying, among other things, whether there was any other bus station or similar facility in the Liberec territory, which also determined the geographic relevant market in this case, that could have competed with the bus station operated by the party to the proceeding, i. e. a station that would facilitate the party's objection that it did not occupy a dominant position on the market. The party referred to many sites where the Prague – Liberec bus line operator, STUDENT AGENCY, could park the vehicles, where passengers could get on and off and where luggage could be handled. The Office's task was to find out whether a similar site was in existence in Liberec and, at the same time, whether the capacity of the bus station operated by the party was really fully occupied, so that it was impossible to receive STUDENT AGENCY buses in it (which was another objection raised by ČSAD Liberec). It was identified in a local investigation that in Liberec there were several places where buses could be parked, that they were more or less accessible by public transport and that they provided room for the waiting of passengers. None of these places, however, was an adequate substitute for the bus station operated by ČSAD Liberec.

For the passengers the bus station is important since it enables the changing of buses, as the bus station concentrates a large number of public transport lines and thus the bus station is an irreplaceable public transport hub for passengers. Furthermore, the bus station offers a number of additional services to the passengers, on a smaller or larger scale, such as information boards and counters, waiting room, left-luggage, toilets, tickets sale and seat reservation office, roofed platforms, fast food stands, cash dispenser, telephone, news stand, exchange office, barrier-free access to the station, local radio, parking area, etc. The services listed above together with the possibility of changing buses mean that from the passengers' point of view the bus stations are not fully interchangeable with other places – facilities that serve or can serve as bus stops, etc. This fact, in consequence, affects the perception of substitutability of bus stations with other places by companies operating public bus transport services.

For carriers the most significant service provided by a bus station is the possibility to use arrival and departure platforms for the purpose of getting on, getting off and changing of passengers using the domestic or international lines or occasional lines (with a minimum parking time guarantee) or the possibility to park on the bus station premises. The carrier information publishing is another important service. For carriers and their drivers the bus stations usually feature a dispatch service, cleaning at the station, relaxation room, toilets, canteen, car wash and other services, filling station, etc. The Office stated that from the carrier's point of view the bus station is not adequately replaceable with other sites that do not provide services connected with a bus station operation.

Further, it was identified that the capacity of the bus station in question was not fully utilised and it enabled the use by other Prague – Liberec bus line operators, one of such carriers being the station operator, i. e. the party to the proceeding, ČSAD Liberec. In this context the Office carried out a detailed analysis of the timetables of all carriers using the bus station and the Office staff members spent one full day at the station monitoring the capacity utilisation.

The Office's conclusions concerning the party's abuse of its position on the market of services provided by its station while attempting to harm its competitor on the market of bus transport services on the Prague – Liberec line were confronted with the allegation by ČSAD Liberec that abuse of dominant position is achieved only by the fulfilment of facts in issue of denying access to essential facilities (EF) without which other competitors cannot operate on the market. The party pointed out the fact that the allegedly harmed competitor continued to provide its services and operate its line, even though passengers

are served on the road close to the bus station. The bus station therefore cannot be a facility satisfying the EF definition.

The Office was of the same opinion as the party to the proceeding, yet it stated an abuse of its position. After gathering all materials relevant for the decision the Office reached the conclusion that companies operating public bus transport services do not need to use a particular stop as an essential facility (even if it is a bus station at the terminal point of the line) in order to compete on the market of services provided by public bus transport operators. On the other hand, however, it was identified that the possibility to use the previously described terminal point of the line represents a significant part of the carriers' activity and also part of services offered to consumers – passengers. Without this quality the particular carrier, STUDENT AGENCY, can compete with its competitors and offer services to customers – passengers but with difficulty<sup>2</sup>, which fact discriminates this company in the competition on the market and, at the same time, it damages this competitor as well as consumers – passengers for whom the bus station represents unique comfort during their travel. The party to the proceeding had a dominant position, as in relation to the carrier it was in the position of the sole operator of the bus station in Liberec. This bus station does not have an adequate substitute on the defined geographic (local) market that STUDENT AGENCY could possibly use.

The Office and, at a later stage, the court concluded that the party to the proceeding did not operate a facility in the sense of *essential facility*, because even without access to this facility STUDENT AGENCY (or any other carrier) could compete on the market, i. e. could offer its services to customers. On the other hand, on the market of services provided by the bus station in Liberec to entities operating public bus transportation the party to the proceeding was in a dominant position which it was not allowed to abuse – if there were no objectively justifiable reasons for doing so. Such reasons were not identified.

This case gave an answer to the question whether an abuse of dominant position by denying access to a facility or refusing to deal must always take the form of denying access to an essential facility (EF) or whether the subject facility does not necessarily have to meet the conditions in the EF definition and still, by an unjustified denial of access to it, the competitor can abuse its position. Both the Office and the administrative court drew the conclusion that the answer is affirmative. Even though the bus station does not meet the EF definition conditions and carriers can provide their services without access to the station, at the same time, it represents an obvious quality that affects the transportation service standard. The dominant competitor apparently did not face competition by fair means and in order to eliminate its competitor it took advantage of the fact that it was the sole provider of services connected with the Liberec bus station operation. So as to qualify its behaviour as a *refusal to deal* (RTD) it is sufficient to use the general clause prohibiting the abuse of the dominant position to the detriment of another competitor provided that the subject facility does not necessarily have to meet the conditions of the *essential facility* (EF) definition.

The conclusion may be that RTD and EF are closely related and frequently connected competition doctrines (where EF is in the position of a special fact in issue of dominance abuse), however, these

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<sup>2</sup> Similar decision was issued by the Commission in the case *Sea Containers v. Stena Sealink*, case 97/19/EC – essential facility is such facility or infrastructure without the use of which competitors cannot provide services to their customers. See also the judgement by the European Court of Justice in the case *Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.*, case C 7/97. It was decided repeatedly that this was not an abuse of the dominant position in the form of “denying access to essential facilities“ (EF) in case that there are real or potential substitutes, even though they are less advantageous. This is why the particular “facility” does not have the character of being essential.

doctrines are not fully identical and the existence of EF is not a necessary condition for the declaration of RTD, even if the subject behaviour of the dominant entity takes the form of denying access to a facility.

#### 4. Dominant firm's right to refuse one customer

The Office also addressed the issue of refusal to deal in an administrative proceeding with a mobile operator, Eurotel Praha – currently Telefónica O2 Czech Republic (hereinafter “Eurotel”). This proceeding was initiated on the basis of a complaint by Eurotel filed to the Office, trying to establish whether its potential behaviour consisting in refusing a direct trade relationship in the area of Go products distribution<sup>3</sup> with the company FINOS (Go products seller) is an abuse of its dominant position under the Czech Act on the Protection of Competition. Eurotel refused to establish this direct co-operation without stating any reason and in the absence of objective reasons. After reviewing the case the Office stated that such behaviour would be an abuse of dominant position on the relevant market of prepaid Go services to the detriment of FINOS. The Office's view was later on fully confirmed by the Regional Court in Brno.

Eurotel refused to supply one customer – FINOS – with Go prepaid cards. Prepaid cards as a payment tool used in order to pay for telephone calls in prepaid services are issued by all mobile operators in the Czech Republic provided that one mobile operator's prepaid card cannot be used to prepay services from another mobile operator. If customers wish to increase the Go service credit, they have to obtain a credit voucher (prepaid card) issued exclusively by Eurotel.

The subject of administrative proceeding was to assess the behaviour of Eurotel in entering an agreement on business co-operation with the distributor of prepaid cards and not in respect of the end customers. The Office assessed whether the distributor had a possibility to enter a contractual relationship with an entity issuing prepaid cards in order to be able to continue selling these to its customers. When selling prepaid cards the distributors and retailers are allowed to compete among themselves in setting the final retail price of the card.

Eurotel refused to specify any reasons for terminating the co-operation; on the contrary, it insisted that it could refuse to establish a contractual relationship with FINOS without giving any reason. However, with regard to the market share on the relevant market of Go prepaid cards (they are not replaceable by any other cards or telecommunication services); the Office was forced to state that such behaviour on this market would be an abuse of dominant position. Especially in a situation where Eurotel, according to its information, assessed every offer of co-operation on an individual basis, evaluated them ad hoc and no candidate was disqualified from the assessment in advance. Eurotel further stated that it had set no criteria and conditions for entering its distribution system, it was supposed to be an open distribution system and entering it was not conditioned by any criteria or conditions that the candidates for distribution would have to meet; the access was free. For this reason the Office stated that in terms of access to open distribution systems the producer enjoying the dominant position is generally obliged to treat the candidates interested in entering the system on a non-discriminatory basis, i. e. behave identically in similar cases. The behaviour of a producer that does not respect such a requirement could potentially bear the signs of the fact in issue of an abuse of dominant position as defined by law, to the detriment of the distribution candidate.

Eurotel's objection that the competition in distributing Go products cannot be affected by refusing one candidate for the distribution of Go products, as there are great many distributors and a rejected candidate was not excluded from the distribution of Go products absolutely because it had a chance to enter a business relationship with one of the existing contractual partners of Eurotel, does not change the above.

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<sup>3</sup> Go products – prepaid mobile operator services. The customer does not pay monthly fees to an operator, does not sign a written agreement, does not pay any activation fee and pays only for the actual calls and text messages.

The extent of the distribution network in terms of distributor numbers or level as well as the openness of the system do not absolve the competitor in the dominant position from the obligation to treat other competitors and consumers under similar conditions in a similar way, so that unjustified discrimination or preference of competitors or consumers were avoided.

## **5. Conclusion**

The Office's decision-making practice should send a clear message to dominant companies that they cannot abuse their dominant position toward customers and competitors, not even by refusing to supply them with their products and services. The fact that the cases of refusal to deal were not justifiable and did not represent healthy competitive behaviour can be proved by the fact that the first-instance decisions by the Office were confirmed by appellate bodies in further instances. The Office intends to continue this established trend and to carefully assess on case-by-case basis whether the refusal to deal does or does not cause a detriment to competition and customers.

## FINLAND

### 1. Introduction

This paper presents the FCA's experiences on how to evaluate, from a competition law viewpoint, refusal to deal. The FCA's basic approach and national case-law concerning refusal to deal is mostly in line with Art. 82 EC and relevant EC case-law.

In the 1990s, cases of pure refusal to deal were still lodged with the office. But after the control of abuse of dominance was established, the companies' conduct has largely changed. Nowadays, very few cases of pure refusal to deal come across in the case-law, whereas the instances of refusal to deal now typically follow from some other form of abuse of dominance, such as unreasonable prices or business terms. Cases of de facto refusal to deal may then be spoken of.

In some contexts, it has been perceived as a potential problem how to define "refusal" to deal forbidden by the competition law. It is an additional problem that, unlike before, the conduct of companies in a dominant position is increasingly evolving into the direction where it is difficult to detect serious violations of the competition law, and the means of abuse of the firms are quite complex: the violation of the law is often composed of a series of measures, and it may be that no single one of them exceeds the intervention threshold but as a whole they may form a de facto refusal to deal.

It is to some extent typical for the cases handled by the FCA that, depending on the angle of inspection, the same conduct as form of abuse of dominance may be classified e.g. as application of unreasonable pricing practice, a price squeeze or refusal to deal.

On the other hand, it should be noted that according to the FCA's view, the exact classification of a dominant firm's conduct into any one category from a competition law viewpoint (refusal to deal, discrimination etc.) is presently not even necessarily needed for reaching a decision in a abuse of dominance case as attention has increasingly been paid on the impacts of the conduct on competition.

### 2. Situations with Dominant Firm not Vertically Integrated

In the assessment of refusal to deal, cases where the refusing company is vertically integrated and cases where it is a question of a company refusing to deal to operators with which it does not compete should mainly be kept apart from each other.

If the company refusing to deal is not vertically integrated and there are many competing firms in the downstream market, individual cases of refusal to deal do not as often have major restrictive impacts. In such cases, refusal may even be sensible from the viewpoint of economic efficiency.

However, the intervention threshold has been exceeded also in cases when the dominant company is not vertically integrated. The FCA has e.g. handled cases where the dominant company tries to prevent a market entry by using selective refusal to deal. The dominant firm uses refusal to deal as a deterrent against the retailers of a company who start to sell products which compete with the products of the dominant firm, or products are offered on appreciably worse conditions or a restricted selection of products is offered to

retailers who sell competing products. In such a situation, in a distant market area like Finland serious exclusionary effects may take place.

Another type of case encountered by the FCA from time to time is when a dominant producer refuses to sell to a supplier seeking entry to the markets on wholesale conditions. The FCA has experience of such conduct e.g. in the form of case *Neste Oy*<sup>1</sup>. In the case, Neste Oy differentiated the sales conditions of its fuel as regards one operator (SEO) in a manner which resulted in Neste refusing a wholesale relationship with SEO.

In the Neste Oy case, the principles on which Neste refused to apply similar sales conditions to SEO as it did to its own subsidiary and other companies active in the similar markets became decisive in the argumentation. The Competition Council, which solved the case, ruled that a company in a dominant position may apply dissimilar price and other conditions to its clients if the grounds for differentiating the terms are objective and acceptable from a competition law viewpoint. However, Neste Oy had applied such sales conditions in the case which appreciably weakened SEO's preconditions to operate in the fuel market and which resulted in Neste refusing to sell to SEO on wholesale customer conditions, i.e. SEO was in the capacity of a retail client in the fuel deliveries, although assessed from all main perspectives, SEO did not differ from the other wholesale firms.

### 3. Cases with vertically Integrated Dominant Firm

A vertically integrated company which is in a dominant position in the market of a product or supply of raw material is able to strongly influence the competitive conditions in the downstream markets. In such a situation, refusal to deal may have serious restrictive impacts on competition. In the worst case, a vertically integrated company may entirely close down competition from the downstream markets. In such cases, an intervention by the competition authority is naturally mostly warranted. But it should also be borne in mind that financial preconditions should also be guaranteed for companies in a dominant position, and the competition authorities cannot force firms into activities which are economically unsound. Sufficient attention shall also be paid to dynamic efficiencies in the implementation of the competition rules in these cases.

The FCA has a number of experiences of exclusionary conduct in the telecommunications sector, in particular refusal to deal by a vertically integrated dominant firm with its competitors in the downstream market.

In the case involving the regional telephone company *Lännen Puhelin Oy (LP)*<sup>2</sup>, LP as a dominant player prevented competition in the broadband Internet market. The creation of competition in LP's operating area would have required that the competing companies would have obtained access from LP to a wholesale product needed to carry out an ADSL connection. However, LP refused to deliver the wholesale product on conditions which would have enabled commercially viable operations in the retail markets.

There are two parts in the LP case which the de facto refusal to deal was composed of. Firstly, LP offered to its competitors an IP-based wholesale product which did not enable competition with LP as regards its technical properties. The IP-based wholesale product was based on the so-called retailing model, and essentially curtailed the productisation possibilities of a competing operator. In practice, it was

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<sup>1</sup> Neste Oy (Dnr 3506, 3833, 3854/1/94), Supreme Administrative Court 30.11.1995.

<sup>2</sup> Lännen Puhelin Dnr (949/61/2002), proposal to Market Court 21.10.2004.

impossible for the operators competing with the IP-based wholesale product to offer to their clients reliable broadband services.<sup>3</sup>

Secondly, in addition to the IP-based wholesale product, LP offered to its competitors an ATM-based wholesale product, which would have enabled competition with LP as regards its technical properties in the retail market of broadband Internet connections. LP had priced the compensations required of the ATM-based wholesale product in such a way, however, that the compensations alone were higher than the prices collected by LP from the consumers in the retail market (margin squeeze).

The FCA made a proposal to the Market Court in the LP case on the imposition of a competition infringement fine. The case is still pending at the Market Court.

The case described above is a typical example of the present cases of abuse of dominance / refusal to deal. The abuse of dominance cases are increasingly difficult to investigate these days, because they often involve complex technical or other special features, which makes it increasingly difficult to distinguish between prohibited and permitted conduct. The LP case is also a good example of how, in certain sectors, it is possible by making minute changes in productisation to create a situation of de facto refusal to deal with serious consequences. An additional problem in dynamically developing fields, such as telecoms, is that it may be difficult to detect the competitive impacts of a restraint particularly in the short term.

The court proceedings of LP have another interesting dimension. On the basis of LP and a few other similar cases, it would appear that companies may appeal to the essential facilities doctrine in cases which involve refusal to deal. Companies accused of abuse of dominance seek to prove by their argumentation that a product covered by refusal to deal would not hold the position of an essential facility with the purpose to show that the provisions on the abuse of dominance could not be applied to the terms of delivery of the said product. In this regard, it must be stated that so far there are no clear national court decisions where a stand would have been taken to such argumentation. E.g. in the case described above, instead of ESF, the FCA has focused its argumentation on the impacts which the conduct has on the competition, and the foreclosure caused by the conduct, in particular.

#### **4. Assessing Reasonable Justifications in Sectors Covered by Special Legislation, Case SNOY**

In the case involving *Suomen Numeropalvelu Oy*<sup>4</sup> (Finnish Telephone Number Service, SNOY), SNOY prevented competition by refusing to deliver from the national database of telephone subscriber information maintained by it information to such customer companies who offered their services to end customers for free and without prior registration over the Internet. SNOY is the only firm which governs a national database of telephone subscriber information, and there is no competition in the wholesale market of subscriber information. In order to offer catalogue services to end customers, it is hence imperative to do business with SNOY. SNOY is owned by two major firms active in the catalogue service market. By its activities, it is thus possible for SNOY to affect the competition met by its owners in the said market.

In the case regarding SNOY, the FCA had to assess, in particular, on what grounds a company in a dominant position may refuse to deal. SNOY's main justification for the refusal was to appeal to reasons of

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<sup>3</sup> Technically, it was a question of how it is critical for competing operators to obtain, from the local network, an OSI model data link layer (L2) connection, whereby the operators are able to provide transparent ADSL services from the ATM knot to the end user. Due to the technical specifications made to it, LP's IP-based service was in fact based on the OSI model network layer (L3), which e.g. imposed limitations on the productisation of the ADSL connections, free development, defect management and means of supply.

<sup>4</sup> Suomen Numeropalvelu Oy, (Dnr 1097/61/2003), proposal to Market Court 17.5.2005.

data protection and, in particular, that SNOY had a duty to see to it that the information submitted by it to its customer companies would not be used in a manner which violates the legislation on data and privacy protection.

The FCA found that by its conduct, SNOY sought to foreclose companies offering a new business model (i.e. catalogue services in the Internet for free without registration) from the market. The FCA found SNOY's justification for the refusal to deal on the grounds of privacy protection an abuse of dominance, as SNOY itself began to monitor the compliance with the law although there exist special authorities for such purpose. It has been found in the case-law that it is not the business of a dominant firm to confirm that the actions of its customer companies comply with the law; the implementation of the relevant acts and the monitoring of the firms' activities are done by the appropriate authorities.

The SNOY case is a typical example of cases dealt by the FCA where dominant firm seeks to justify refusal to deal with the obligations of special legislation. FCA made a proposal to the Market Court on imposing an infringement fine on SNOY. The case is still pending at the Market Court.

As stated above, in the FCA's experience, special legislation is the grounds on which refusal to deal is from often justified. Appeal is typically made to how in the sector specific legislation, no obligation to deliver has been imposed. On the other hand, situations where an obligation to deliver a product is prescribed in the sector specific legislation may also cause problems. It may then become a problem that such provisions do not sufficiently take account of the objectives of sound competition and promotion of entry to the field. It may also be a question of how the authority responsible for the implementation of the sector specific legislation interprets the legislation on the e.g. access obligations. It has determined in the Finnish case-law at least in some instances that obligations which go further than sector specific legislation cannot be imposed on firms in the competition legislation.

## **5. Conclusions**

When an intervention is made with refusal to deal on the basis of the provisions on the abuse of dominant position, it is conversely a question of obligating a dominant firm into a business relationship. This means a strong deviation from the freedom of contract which is the rule in business. An intervention with undertakings' freedom of contract requires forceful grounds. In practice, we may assume that the refusal to deal by a dominant firm would mean the prevention of competition or at least a significant limitation thereof.

It may be stated that there is no unambiguous frame of assessment for refusal to deal. For economic activities, it is critical which refusal to deal leads to an intervention. Unfortunately, no simple answer exists; it may only be stated that cases where actually or potentially exclusionary impacts cannot be detected at all are likely to remain outside the threshold of intervention.

When the position of the refusing firm is assessed, the criteria often include the market power of the firm and the issues of whether the firm is vertically integrated, assuming that the firm has been found to occupy a dominant position in the relevant market. If the market share of the firm is extremely high, refusal to deal is likely to have harmful impacts due to the lack of options. For example in the LP case described above, LP's market share in the market of the ADSL wholesale product was roughly 90 per cent at the time of the competition restraint. A firm which is vertically integrated or integrating vertically has a more obvious interest to limit competition in the end product market, as the foreclosure facilitates the operations of its own production unit in the competitive markets. Hence, a critical stance toward refusal to deal by a vertically integrated company with a high market share may be considered the general rule.

Irrespective of whether a vertically integrated company is involved or not, an assessment shall also be made on the significance of the product the delivery of which has been refused. It may e.g. be an infrastructure product (telecommunications network etc.), the reproduction of which is often impossible or at least economically unprofitable in the short term. In such situations, the creation of competition in the end product market requires that it is possible for firms to obtain the product on reasonable conditions. At the other end of the line are situations where the firm governing a product has invested a large number of innovation and R&D resources into it. In such cases, imposing an obligation to deliver on competition law grounds may be harmful for dynamic development because an intervention would be likely to decrease the firms' innovation incentives. Refusal to deal may in such instances have efficiency impacts, as it spurs the competitors to develop corresponding or better innovative solutions.

From the viewpoint of well-functioning competition and the promotion of the dynamic efficiency of the economy, it is critical that the competition authorities only intervene with such cases of refusal to deal which have clear restrictive impacts on competition. In addition to the obvious benefits, the problems caused by issues of interpretation between the different forms of conduct may be eliminated when the approach focusing on the assessment of economic impacts instead of a formal evaluation is applied in the assessment of abuse of a dominant position. The effects-based approach is also likely to decrease the impact of the to some extent problematic use of argumentation related to the essential facilities doctrine in the handling and evaluation of refusals to deal cases.



## FRANCE

Le refus de vente est généralement défini comme le fait pour un fournisseur, quel que soit le niveau où il opère dans la chaîne de distribution, de refuser de vendre un bien ou un service

En France, l'interdiction du refus de vente était réglementée par l'ordonnance n°86-1243 du 1<sup>er</sup> décembre 1986. Son article 36-2 disposait :

« Engage la responsabilité de son auteur le fait de refuser de satisfaire aux demandes des acheteurs de produits ou aux demandes de prestataires de services, lorsque ces demandes ne présentent aucun caractère anormal, qu'elles sont faites de bonne foi ».<sup>1</sup>

Néanmoins, le refus de vente pouvait être légitime dans des cas déterminés : ceux résultant d'un texte législatif ou réglementaire ou encore résultant de certaines catégories d'accords (ex : accords de distribution sélective).

Depuis la loi Galland n°96-588 du 1<sup>er</sup> juillet 1996 sur la loyauté et l'équilibre des relations commerciales, le refus de vente entre professionnels est devenu licite. La loi de 1996 n'a en revanche rien changé au régime du refus de vente opposé par un professionnel à un consommateur qui est toujours sanctionné pénalement. En effet, l'article 30 de l'ordonnance de 1986 a été codifié à l'article L 122-1 du code de la consommation.

La doctrine française parle souvent de « grand » droit de la concurrence, qui regroupe le droit des pratiques anticoncurrentielles et le droit des concentrations, et de « petit » droit de la concurrence constitué par le droit des pratiques restrictives de concurrence. Ainsi, le droit français de la concurrence se retrouve dans plusieurs titres du code de commerce mais également dans d'autres codes et législations (responsabilité contractuelle, concurrence déloyale).

Comme rappelé précédemment, le refus de vente entre professionnels est licite depuis la loi Galland de 1996 mais cette liberté n'est pas absolue. Le refus de vente peut être contrôlé et sanctionné au moyen d'autres dispositifs juridiques : sous l'angle des pratiques discriminatoires (1) et celui de l'abus de position dominante (2).

### **1. Le refus de vente appréhendé sous l'angle des pratiques discriminatoires**

#### ***1.1 L'obligation de communiquer les conditions générales de vente***

Pour prévenir les refus de vente fondés sur un motif illégitime, la loi a prévu un dispositif d'obligation d'information: la communication des conditions générales de vente. Le principe de la liberté du commerce et de l'industrie, combiné avec celui de la liberté contractuelle, n'imposent pas en effet au professionnel de nouer des relations commerciales, mais le refus ne doit pas être fondé sur un motif illégitime ou être

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<sup>1</sup> Il s'agissait en réalité de l'application en droit de la concurrence d'une notion bien connue en droit civil : la responsabilité contractuelle prévue à l'article 1382 du code civil.

anormal. Afin de vérifier que le refus de vente d'un professionnel est licite, la loi a prévu un dispositif contraignant, sanctionné pénalement en cas de non respect : l'obligation de communiquer les conditions générales de vente.

L'article L 441-6 du code de commerce prévoit ainsi que tout vendeur doit communiquer, selon les usages de la profession, à l'acheteur qui en fait la demande son barème de prix et ses conditions de vente. Cette obligation s'adresse à tout producteur, prestataire de services, grossiste ou importateur.<sup>2</sup> Ce qui est soumis à l'obligation de communication, les conditions générales de vente en l'occurrence, engage la responsabilité du vendeur et l'oblige à réparer le préjudice causé à l'acheteur dès lors qu'il ne communique pas. L'obligation de transparence comprend les barèmes de prix, les conditions de ventes (règlement, rabais et ristournes, clauses juridiques, conditions tarifaires...). Toutefois les conditions générales de vente peuvent être différenciées selon les catégories d'acheteurs, notamment entre grossistes et détaillants.

Il faut noter que la communication des conditions générales de vente et du barème de prix, ainsi que les réductions de prix et conditions de règlement, est le préalable à toute négociation entre un fournisseur et un acheteur. L'article L 441-6 du code de commerce ajoute même qu'elle constitue le socle de la négociation commerciale.

L'acheteur peut ainsi s'assurer qu'il ne fait pas l'objet d'un traitement discriminatoire injustifié. Au demeurant même si le code de commerce ne prescrit pas d'obligations d'édicter des conditions générales de vente et un barème de prix, leur rédaction est recommandée. Pour la Cour de cassation, l'absence de conditions générales de vente peut constituer une présomption de discrimination<sup>3</sup>.

Pour l'administration française, le fournisseur ne saurait imposer ses propres conditions générales de vente qui comporteraient des clauses qui traduisent un abus de dépendance (du distributeur) ou de puissance de vente au risque de se retrouver en contradiction avec l'article L 442-6 du code de commerce. Mais l'inverse pourrait être tenu pour vrai aussi ; ainsi, imposer au détriment des conditions générales de vente du fournisseur des conditions générales d'achat pourrait être considéré comme la manifestation d'un abus de puissance d'achat ou d'une discrimination abusive au sens de l'article L. 442-6 du Code de commerce.

## **1.2 La rupture unilatérale des relations contractuelles**

Sous l'angle des pratiques restrictives de concurrence, lesquelles n'ont généralement pas d'impact sur le fonctionnement ou la structure de la concurrence mais affecte principalement le partenaire économique de celui qui refuse de vendre, l'article L 442-6 du code de commerce regroupe tous les cas de comportements d'entreprises qui, sans refuser de vendre à proprement parler, vont créer à l'égard de leurs partenaires économiques un désavantage dans la concurrence en raison de conditions de vente discriminatoires.

Il sera porté une attention particulière aux cas de rupture brutale de relations commerciales prévus par l'article L 442-6, 5° du code de commerce. En effet, alors que les comportements visés par l'article L 442-

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<sup>2</sup> Cependant un prestataire de services, producteur, grossiste ou importateur peut prévoir des conditions particulières de vente, souvent négociées, justifiées par la spécificité des services rendus qui ne sont alors pas soumises à l'obligation de communication et dont il résultera le plus souvent une différenciation tarifaire.

<sup>3</sup> Cass. com. 18 janv. 1994, Charpentier publicité/Havas régie.

6 du code de commerce visent toutes sortes de pratiques discriminatoires, la rupture brutale de relations commerciales n'est en réalité rien de moins qu'un refus de vente entre professionnels.

Il convient tout d'abord de préciser que, si cette disposition a avant tout été prévue pour le secteur de la distribution, la généralité de ses termes permet son application à tous types de rapports commerciaux.

La rupture peut résulter avant tout d'une résiliation du contrat. Cependant, le texte lui-même prévoit qu'une rupture même partielle peut satisfaire aux conditions de l'article L.442-6 5° (par exemple le déréférencement par un distributeur d'un seul produit mais non de l'ensemble de la gamme du fournisseur). La jurisprudence a étendu cette notion à la seule diminution des commandes (**Cour d'appel de Lyon, 15 mars 2002**) considérant en quelque sorte qu'il serait trop facile de se contenter de tarir les commandes pour éviter qu'une résiliation pure et simple soit considérée comme brutale.

Le caractère "brutal" de la rupture résulte de l'absence de préavis écrit d'une durée suffisante - et ce quel que soit le préavis éventuellement prévu dans le contrat. Toute la question est de savoir quelle doit être la durée de ce préavis. Or, c'est la jurisprudence qui fixe cette durée au cas par cas, en fonction de la durée de la relation contractuelle concernée (plus le contrat a duré, plus le préavis doit être long) et - s'il en existe - des usages et accords inter-professionnels. On trouve ainsi des décisions de justice fixant la durée du préavis de un mois à plus d'un an !

En réalité, cette jurisprudence relativement abondante a créé une obligation pour toute entreprise de respecter un préavis raisonnable (dont la durée est difficile à apprécier) avant toute résiliation d'un contrat. Naturellement, lorsque la rupture est motivée par une faute contractuelle de l'autre partie, le préavis écrit n'est pas nécessaire (sauf s'il est prévu par le contrat).

Les dommages-intérêts qui peuvent être réclamés en cas de rupture des relations commerciales peuvent s'avérer substantiels dans la mesure où ils visent à réparer plusieurs types de préjudices possibles, et en particulier:

- perte de marge/chiffre d'affaires: la partie qui se plaint de la rupture peut demander la réparation du préjudice résultant de la perte de sa marge sur le contrat concerné pendant la période du préavis qui aurait dû lui être accordé. Certaines décisions se fondent sur le chiffre d'affaires et non sur la marge - ce qui peut paraître justifié si l'entreprise continue à supporter des coûts inhérents à l'exécution du contrat.
- coûts de la rupture: la partie qui se plaint de la rupture peut demander le remboursement des coûts supportés en raison de la brutalité de la rupture contractuelle (par exemple le surcoût d'une solution de remplacement mise en place en urgence). Il ne paraît toutefois pas justifié de demander la réparation du préjudice qui résulterait non pas de la brutalité de la rupture, mais simplement de la rupture elle-même (par exemple investissements fondés sur une durée contractuelle plus longue), puisque seule l'absence de préavis est sanctionnée.
- préjudice d'image: la partie qui se plaint de la rupture sans préavis peut démontrer que celle-ci a causé une atteinte à son image et la défiance d'autres partenaires économiques.

Les comportements visés par l'article L 442-6 du code de commerce, et notamment la rupture brutale de relations commerciales, lorsqu'ils affectent la structure ou le fonctionnement de la concurrence, peuvent faire l'objet d'une double qualification juridique : en effet, ils peuvent également constituer un abus de dépendance économique au sens de l'article L 420-2, alinéa 2 du code de commerce.

Ainsi, il apparaît que certains comportements peuvent tomber sous le coup d'une double qualification juridique et qu'une compétition s'instaurent entre ces deux modes de répression.

Pour qu'il y ait abus de dépendance économique au sens de l'article L. 420-2 du code de commerce, trois conditions cumulatives devront cependant être réunies : l'existence d'une situation de dépendance économique, une exploitation abusive de cette situation et une affectation, réelle ou potentielle, du fonctionnement ou de la structure de la concurrence sur le marché.

Dans la mise en œuvre de ce principe, le Conseil de la concurrence a fait preuve d'une très grande rigueur, comme en témoigne la décision **93-D-21 du 8 juin 1993**.

## 2. Le refus de vente appréhendé sous l'angle de l'abus de position dominante

En matière de pratiques anticoncurrentielles, les refus de vente unilatéraux se retrouvent dans les cas d'abus de domination, visés par l'article L 420-2 du code de commerce. Cet article dispose :

*« Est prohibée, dans les conditions prévues à l'article L. 420-1, l'exploitation abusive par une entreprise ou un groupe d'entreprises d'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci. Ces abus peuvent notamment consister en **refus de vente**, en ventes liées ou en conditions de vente discriminatoires ainsi que dans la rupture de relations commerciales établies, au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées.*

*Est en outre prohibée, dès lors qu'elle est susceptible d'affecter le fonctionnement ou la structure de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises de l'état de dépendance économique dans lequel se trouve à son égard une entreprise cliente ou fournisseur. Ces abus peuvent notamment consister en **refus de vente**, en ventes liées, en pratiques discriminatoires visées au I de l'article L. 442-6 ou en accords de gamme. »*

Le cas typique d'un refus de vente sur le fondement de l'article L 420-2, alinéa 1 du code de commerce est le refus d'accorder un accès à une infrastructure essentielle.

La théorie des facilités essentielles consiste à obliger une entreprise dominante, détentrice d'une «facilité» se révélant indispensable à d'autres opérateurs pour leur activité économique, à leur partager celle-ci moyennant rémunération adéquate et ce, dans un souci d'ouverture ou de maintien de la concurrence et de protection des consommateurs. De par son côté coercitif, s'agissant, en effet, de contraindre un agent économique à contracter contre son gré, cette doctrine constitue, on l'aura compris, une limitation patente de la liberté contractuelle de l'entreprise détentrice de la facilité en cause, mais aussi, une limite également de son droit de propriété.

La théorie des infrastructures essentielles a été conçue par la jurisprudence américaine, qui a posé le principe selon lequel une entreprise en situation de monopole ou de position dominante, qui détient une infrastructure non duplicable en raison de son coût ou de la réglementation, à laquelle les entreprises opérant sur un marché aval (ou amont) doivent nécessairement avoir accès pour concurrencer l'entreprise détentrice de l'infrastructure, doit en permettre l'accès à cette dernière sur une base équitable et non discriminatoire, dès lors qu'aucune impossibilité technique ne s'y oppose.<sup>4</sup>

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<sup>4</sup> Ayant à apprécier la validité, au regard du droit de la concurrence, du refus de la compagnie de téléphone ATT d'accorder à MCI une interconnexion à ses réseaux locaux, la Cour d'appel du 7e Circuit a jugé, dans

Pour obliger une entreprise en position dominante à donner accès à la facilité essentielle qu'elle détient, quatre conditions doivent être remplies :

- une entreprise est en situation de monopole ou de position dominante sur le marché de cette infrastructure essentielle ;
- cette infrastructure n'est pas duplicable techniquement dans des conditions raisonnables ;
- l'entreprise qui la contrôle en refuse l'accès ;
- cet accès est possible.

Appliqué ensuite par le juge communautaire, notamment le 6 mars 1974, dans une affaire « *commercial solvents* », la Commission européenne a utilisé le vocable pour la première fois en 1992 à propos du port irlandais de Holyhead (11 juin 1992 Sealink c/ B § I). Dans son rapport pour 1995, la Commission est allée jusqu'à qualifier de « *principe général du droit européen* », le principe selon lequel :

*« lorsqu'une entreprise dominante possède ou contrôle l'accès à une installation qui est essentielle pour permettre à ses concurrents d'exercer leurs activités, elle ne peut refuser l'accès à cette installation et elle doit le leur accorder sur une base non discriminatoire ».*

En France, le Conseil de la concurrence a fait un usage raisonné de la théorie des infrastructures essentielles, pour la première fois en 1990, de manière implicite (**décision 90-D-22 du 26 juin 1990**), puis dans une décision **96-D-51 du 3 septembre 1996** « *Héli-inter assistance* » où il retient explicitement la qualification d'infrastructures essentielles.

L'avis **02-A-08 du 22 mai 2002** du Conseil de la concurrence paraît à cet égard très pédagogique puisqu'il énonce avec clarté les conditions de qualification d'une infrastructure essentielle.

Ont ainsi été qualifiées d'infrastructures ou de facilités essentielles des infrastructures lourdes : un réseau de tuyaux permettant l'acheminement et le stockage de carburacteur sur des aéroports (**décision 90-D-22 du 26 juin 1990**), un héliport (**décision 96-D-51 du 3 septembre 1996**), le tunnel sous la Manche (13 décembre 1994 Eurotunnel) et le gazoduc Interconnector sous-marin entre le Royaume-Uni et la Belgique. Sont également susceptibles de répondre à cette qualification, des services, par exemple la fourniture de matières premières à un client (arrêt CJCE du 6 mars 1974 « *commercial solvents* ») ou la fourniture d'un temps d'antenne (arrêt CJCE Télémarketing du 03/10/85).

Par ailleurs, en dehors de la théorie des infrastructures essentielles, le Conseil de la concurrence a, dans d'autres affaires, condamné des pratiques de refus de vente sur le fondement de l'abus de position dominante. A ce sujet, on peut citer l'affaire Reims bio (décision 04-D-26 du 30 juin 2004) dans laquelle le Conseil de la concurrence a condamné l'Etablissement Français de Sang (EFS) pour abus de position dominante, car l'EFS avait refusé de livrer Reims bio. Le Conseil avait notamment précisé que

*« 63. Le fait, pour une entreprise en position dominante sur un marché de matières premières, de refuser, pour des raisons non objectives ou discriminatoires, de vendre ses produits à un opérateur situé sur un marché aval, ayant pour objet ou pour effet de fausser le jeu de la*

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un arrêt MCI Communications Corps c/ATT (1983), que du fait de cet abus, MCI ne pouvait offrir des services à longue distance concurrents. La Cour a, à cette occasion, défini les quatre conditions régissant l'application de la théorie des infrastructures essentielles.

*concurrence, constitue un abus de position dominante au sens de l'article L. 420-2 du code de commerce (ancien article 8 de l'ordonnance du 1er décembre 1986) et de l'article 82 du traité de Rome.*

*64. En vertu d'une jurisprudence constante, la Cour de Justice des Communautés européennes (CJCE) considère "que le détenteur d'une position dominante sur le marché des matières premières qui, dans le but de les réserver à sa propre production de dérivés, en refuse la fourniture à un client, lui-même producteur des dérivés au risque d'éliminer toute concurrence de la part de ce client, exploite sa position dominante de façon abusive au sens de l'article 86 [nouvel article 82 CE]" (CJCE, 6 mars 1974, C-6 et 7/73). »*

De même, le Conseil de la concurrence et la cour d'appel de Paris estiment "qu'est particulièrement grave le fait, pour une entreprise en position dominante sur un marché de matières premières, de tenter de faire obstacle à l'implantation sur un marché aval de son seul concurrent, alors même que celui-ci avait mis au point une innovation importante" (Décision du Conseil de la concurrence n° 92-D-26 et arrêt de la cour d'appel de Paris du 14 janvier 1993).

En revanche, dans l'affaire récentes des oxymètres (décision 07-D-20 du 19 juin 2007), le Conseil avait rejeté la saisine, considérant que la dénonciation du contrat liant I.P. et Masimo pour la vente de ses capteurs est la conséquence de la réorganisation de son service de distribution, qu'elle assume désormais elle-même. Les refus de livraison de capteurs à I.P. à des tarifs de gros découlent de cette réorganisation et ne revêtent donc pas un caractère anticoncurrentiel.

Par ailleurs, le Conseil de la concurrence a rappelé, dans un avis n° 04-A-14 du 23 juillet 2004, que la liberté d'organisation de son réseau de distribution par un fournisseur constitue un principe de base, sous réserve que les modes de distribution mis en œuvre n'aient pas pour objet ou pour effet d'affecter le fonctionnement du marché (voir aussi décision 05-D-46).

Enfin, dans certaines affaires verticales, qu'elles soient traitées sous l'angle des ententes ou des abus de position dominantes, le conseil de la concurrence a été amené à se prononcer sur des refus de ventes (ou des menaces de refus de vente).

Ainsi, dans l'affaire Royal Canin (décision 05-D-32 du 22 juin 2005), Royal Canin a été condamné pour abus de position dominante pour des "pratiques de restriction de clientèles".

## **Conclusion**

Si le refus de vente entre professionnel est devenu licite depuis la loi Galland de 1996, cette liberté n'est pas absolue et les textes législatifs et réglementaires témoignent de l'attention particulière portée à ce type de comportement, que l'opérateur soit en position dominante sur le marché de référence ou non. La jurisprudence s'avère être un bon relais dans la recherche, la qualification et la sanction de telles pratiques.

## GERMANY

### 1 Statutory basis

In Germany, anti-competitive refusals to deal are prohibited by Article 82 EC as well as Sections 19, 20 and 21 of the Act against Restraints of Competition (ARC).

Section 19 (1) ARC constitutes a general prohibition of abuse of market power by dominant companies as a blanket clause and is similar to Art. 82 sentence 1 EC. Similar to Article 82 sentence 2 EC, Section 19 (4) ARC sets out four non-exhaustive examples of forbidden abusive behaviour. These examples include impairing the ability to compete, demanding unfavourable or discriminating business terms and the refusal to provide network or infrastructure facility access. Even though the examples in Section 19 (4) ARC are not conclusive, in practice they cover almost all abuse cases. Section 20 (1) ARC adds that unfair hindrance and discrimination by dominant firms are prohibited.

Sections 20 and 21 of the ARC also apply to refusals to deal by non-dominant firms under certain circumstances. According to Article 3 (2) sentence 2 of Regulation 1/2003, the member states are not precluded from adopting or applying on their territory stricter national laws which prohibit or punish unilateral conduct by companies. Section 20 ARC provides that an undertaking with a position of “superior market power” in relation to other undertakings must not unfairly abuse its position or hinder another undertaking without an objective justification. “Superior market power” may be present in a horizontal or vertical context. Section 21 (1) ARC contains a special provision against requests to refuse to supply (so-called boycotts) which applies irrespective of a market power test: “Undertakings and associations of undertakings shall not request another undertaking or other associations of undertakings to refuse to sell or purchase, with the intention of unfairly harming certain undertakings.”

The elements that have to be established in order to find a refusal to deal anti-competitive include:

- Dominance, or at least “superior market power” (except for boycott cases);
- Hindrance/foreclosure;
- Absence of an objective justification.

### 2 Hindrance/foreclosure and defining refusal to deal

A hindrance according to section 20 (1) ARC is a market behaviour which has objectively negative effects on the hindered firm. However, such a behaviour is not abusive solely because of negative effects on a firm. Rather it has to be determined whether the behaviour constitutes objectively justified competition on the merits or not (Federal Court of Justice - FCJ, 22.9.1981, Original-VW-Ersatzteile II). Similarly, under Article 82 an abuse is defined as a behaviour which, through recourse to methods different from those which condition normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (European Court of Justice - ECJ, 13.2.1979, Hoffman-La Roche).

In assessing refusals to deal, the definition of a “refusal to deal” is thus irrelevant from a legal perspective. Instead, the element to be established is whether the behaviour is likely to have (or have had) a hindrance/foreclosure effect. In refusal to deal cases, this assessment is typically straight-forward. From a

more analytical (non-legalistic) perspective it should be noted that a refusal to deal in practice can take many different forms: Apart from simply declaring its refusal to deal the supplier may for example use delaying tactics, request excessive prices for the input or impose other unreasonable trading conditions. Also a margin squeeze is properly conceived as a “constructive” refusal to deal. In addition, a broad concept of hindrance/foreclosure includes the unjustified differential treatment (so-called discrimination) as treating customers differently without objective justification typically results in hindering the customer that obtained unfavourable terms.

Conceptually similar to a refusal to deal is the refusal by an undertaking to allow another company access to its own networks or other infrastructure facilities. The concepts of “refusal to deal” and “refusal of infrastructure access” can thus be viewed as two instances of a class of behaviour which could be labelled as “input foreclosure”. In 1998, the refusal of infrastructure access was adopted as an abuse example in the ARC. According to Section 19 (4) no. 4 ARC, an abuse exists in particular if a dominant undertaking refuses to allow access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable to operate as a competitor of the dominant undertaking on the upstream or downstream market (unless such concurrent use is impossible or cannot reasonably be expected).

### **3. Objective justification**

#### **3.1 *Defence and weighing of interests***

Under Article 82 EC the objective justification takes more the character of a defence for which the dominant company carries the burden of proof (see the case law referenced in the DG Competition Article 82 EC discussion paper).

According to the case law on Section 19 and 20 ARC the element of objective justification requires a comprehensive weighing up of interests and is the central element in the assessment of abusive practices. The weighing up of interests allows and calls for a broad consideration of all relevant facts of the individual case. In weighing up the different interests concerned, the purpose of the ARC, which is to ensure that competition between undertakings is, as much as possible, free of limitations, has to be taken into consideration at all times. This means primarily that markets are kept open and artificial barriers to entry are not raised. All the interests of the parties concerned and directly involved must be considered. In refusal to deal cases, the following aspects typically play an important role in the weighing up of interests:

- degree of market power of the supplier,
- degree of (likely) hindrance/foreclose effect,
- whether there has previously been a supply relationship, and
- all other aspects of the individual case.

#### **3.2 *The seller’s right of autonomy vs. special responsibility of dominant firms***

In principle, dominant undertakings are also free to determine their sales strategy and thus to decide with whom to deal. This is especially true for dealing with competitors. The Federal Court of Justice held that in principle there is no duty for dominant companies to promote competition (FCJ, 12.11.1991, Aktionsbeiträge). In addition, the dominant company may in principle design its distribution system in the way it believes to be efficient, i.e. refuse to sell to retailers according to quantitative and qualitative criteria. At the same time, the dominant company has a special responsibility not to allow its conduct to

impair genuine undistorted competition (ECJ, 9.11.1984, Michelin). In German case law these seemingly polar opposites are reconciled by the comprehensive weighing of interests which takes all relevant aspects of the case into account.

### **3.3 *Relevance of the degree of market power and hindrance effect***

The degree of market power and the degree of the hindrance/foreclosure effect play an important role in the weighing of interests.

The greater the market power of the supplier, the more restricted is its freedom to refuse to deal. A monopolist may only under quite limited circumstances refuse to deal whereas a supplier that has only “superior market power” enjoys a rather broad margin of discretion.

Similarly, there is a sliding scale with respect to the (likely) hindrance effect. A refusal to deal is unlikely to be objectively justified if the refusal results in a significant barrier to entry (FCJ, 12.3.1991, Krankentransportunternehmen II). In pursuing its interests, the powerful firm has to choose the means with the lowest possible hindrance effect that is capable of achieving the objectives of the firm (FCJ, 22.9.1981, Original-VW-Ersatzteile II).

### **3.4 *Termination of existing supply relationship vs. refusing to start a supply relationship***

In the case law, it also makes an important difference whether the refusal to deal amounts to the termination of a previously existing supply relationship or rather to not starting a supply relationship. The termination of an existing supply relationship is less likely to be objectively justified than the refusal to start supplying.

A previously existing supply relationship shows that the supplier previously considered it efficient to engage in such a supply relationship. However, also the termination of an existing supply relationship may be objectively justified. Such circumstances include in particular a situation where the supplier reorganises its distribution system according to objective qualitative and/or quantitative criteria (selective distribution), and the retailer does not meet (any more) these criteria (FCJ, 30.6.1981, Adidas). Such selection criteria have to satisfy the competition law principles applicable to selective distribution, and reasonable periods of notice must be met. The termination of an existing supply relationship is also objectively justified if the customer faces illiquidity. The supplier cannot invoke this justification if the customer provides sufficient securities (e.g. payment in advance).

### **3.5 *Some examples of objectives justifications***

A refusal to deal was found to be objectively justified:

- if the supplier ceases supply of an input because its customer/competitor has unlawfully copied the design of the supplier (FCJ, 25.10.1988, Lüsterbehangsteine);
- if a car manufacturer grants its leasing firms preferential conditions which it does not offer other leasing firms (FCJ, 12.11.1991, Aktionsbeiträge).

A refusal to deal was not found to be objectively justified:

- if a phone directory refuses to deal with an advertisement agency because that agency seeks to reduce advertisement prices to end-customers by re-arranging previous advertisement contracts (FCJ, 13.7.2004, Sparberaterin);

- if a health insurance refuses to deal with a private provider of patient transports because it wants to keep the market exclusively for public providers of patient transports (FCJ, 12.3.1991, Krankentransportunternehmen II);
- if a (monopolist) supplier ceases supply because it wants to expand into the downstream market (ECJ, 6.3.1974, Commercial Solvents).

Further examples which are explained in more detail are provided below.

#### **4 Bundeskartellamt enforcement practice: Some selected cases**

In Germany, refusal to deal cases are primarily enforced through private litigation so that there is a quite ample case law. Over the past years, the Bundeskartellamt investigated refusal to deal cases primarily in liberalised sectors.

##### **4.1 Deutsche Post – refusal to provide mail services to competitors**

In February 2005, the Bundeskartellamt prohibited Deutsche Post AG from hindering or discriminating against a certain group of providers of postal services, so-called “mail consolidators”, which carry out “mail preparation services.”<sup>1</sup> The mail preparation services concerned include in particular the collection and pre-sorting of letters and the feeding of mail items weighing under 100 grammes into Deutsche Post AG’s sorting centres. Deutsche Post AG awarded discounts of 3 to 21 per cent on the regular postage for these services only to its own major customers but not to the mail consolidators concerned. Small and medium-sized senders generally do not reach the minimum volumes of letters required by Deutsche Post AG to qualify for the higher levels of the discount echelon. They can thus only reduce their postage costs through the activities of the consolidators which allow senders to achieve higher discounts through pooling the mail volumes of various senders.

In its examination of the case the Bundeskartellamt came to the conclusion that the practice of Deutsche Post AG violated German and European competition law. As a dominant company it may not treat providers of mail services feeding in letters from only one large customer and mail consolidators feeding in letters from various customers differently without justification. Furthermore Deutsche Post AG may not hinder consolidators by refusing them access to the partial services of letter conveyance and delivery (without collection, pre-sorting and feeding-in) without any objective justification. According to the Bundeskartellamt’s decision Deutsche Post AG now has to grant discounts for the feeding-in of pre-sorted bulk mailings into its mail sorting centres even where competitors collect and sort letters from different senders to ultimately hand these over to Deutsche Post AG bundled (“consolidated”).

The Bundeskartellamt rejected the claim of Deutsche Post AG in which it invoked its limited exclusive licence under the German Postal Act to justify its behaviour. According to a decision issued by the European Commission in proceedings against the Federal Republic of Germany, the German Postal Act violates European provisions to open up the postal sector insofar as it reserves mail preparation services for letters under 100 grammes exclusively for Deutsche Post AG. A behaviour cannot be justified by invoking a national provision which is in violation of European law.

In an interim ruling, the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt decision in April 2005. The German Federal Network Agency has in the meantime issued some additional decisions regulating access to partial services of Deutsche Post. The proceedings are currently on hold awaiting a

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<sup>1</sup> The full text of the decision is available at:  
<http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell05/B9-55-03.pdf>

preliminary ruling by the ECJ according to Article 234 EC which is expected by the end of 2007. [Anmerkung: Die mündliche Verhandlung ist am 13.9.]

#### **4.2 Mainova – Refusal of electricity network interconnection**

In October 2003, the Bundeskartellamt prohibited the energy supplier Mainova AG from denying GETEC net GmbH and Energieversorgung Offenbach AG (EVO) connection to its medium-voltage network.<sup>2</sup>

Mainova AG supplies the city of Frankfurt with electricity. Its shareholders include the city of Frankfurt/Main and the E.ON group. GETEC net and EVO depend on this network connection in order to be able to operate site network facilities on premises used for housing or business purposes and to supply end customers located there with electricity generated by the companies themselves or by third suppliers. The establishment and operation of site networks represented a newly emerging market in which Mainova AG attempted to eliminate competition from the outset.

According to the Bundeskartellamt's decision, both site network operators were entitled to have access to Mainova AG's medium-voltage network (Section 19 (4) no. 4 of the ARC). In several other German cities distributing site networks are not operated by the local distribution network operator but by third companies. However, Mainova AG refused the necessary connection to its medium-voltage network for several projects in Frankfurt and announced that it would continue to do so with regard to future projects.

According to the Bundeskartellamt the grounds given by Mainova AG to justify this conduct were not valid. Energy law provisions such as the general obligation to connect and supply under Section 10 of the Energy Industry Act provided no legal basis for Mainova AG to claim each new site for itself either. Supply security was not threatened nor did alleged "cherry picking" by the competing site network facility operators constitute an objective justification as claimed by Mainova.

In 2004 the Düsseldorf Higher Regional Court and in 2005 the Federal Court of Justice confirmed the Bundeskartellamt decision.

#### **4.3 Scandlines – refusal of access to Puttgarden ferry terminal**

In December 1999, the Bundeskartellamt prohibited Scandlines Deutschland GmbH from refusing competing ferry companies access to the Puttgarden terminal on payment of an adequate fee.<sup>3</sup>

The proceedings were based on complaints by two competitors who wanted to start a ferry service on the Puttgarden-Rödby (Denmark) route, but whose application for the shared use of the Puttgarden ferry terminal had been refused by Scandlines, the terminal owner. One of these competitors was easy-line A/S, Rödby, owned by the Norwegian company Eidsiva Rederi and the other was a consortium owned by the Swedish company Stena Rederi AB, the Danish company Difko A/S and the Danish ship owner Ole Lauritzen. Back in 1993, the European Commission refused the Danish government permission to prevent Stena Rederi from setting up a ferry service in Rödby. On the basis of the complaints, the Bundeskartellamt investigated whether Scandlines was infringing Article 82 EC and Section 19 (4) no. 4 ARC in preventing terminal access.

<sup>2</sup> The full text of the decision is available at:  
[http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B11\\_12\\_03.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B11_12_03.pdf)

<sup>3</sup> The full text of the decision is available at:  
[http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B9\\_199\\_97\\_16\\_98.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B9_199_97_16_98.pdf)

According to the Bundeskartellamt's decision, Scandlines dominated the market, both as regards its terminal facilities on the Puttgarden-Rödby route and the downstream market for ferry services between Puttgarden and Rödby. The existing fringe competition from alternative ferry routes and the bridge across the Great Belt was not strong enough to prevent this market dominance on the Puttgarden-Rödby route. Legal and physical obstacles stood in the way of the construction of a new terminal in Puttgarden, whereas the shared use of existing terminal facilities by an additional ferry operator was possible following appropriate construction and organisational modifications. In the necessary process of weighing Scandlines' interest in having the unlimited use of its own terminal against the applicants' interest in starting up competing ferry operations, the decisive factor was the public interest in opening up the market to competition.

In August 2000 the Düsseldorf Higher Regional Court overturned the Bundeskartellamt decision. In September 2002 the Federal Court of Justice rejected the arguments of the Düsseldorf Higher Regional Court by which it overturned the Bundeskartellamt decision. However, the Düsseldorf Higher Regional Court did not issue a new decision because in early 2003 the proceedings ended as both undertakings requesting access did not exist anymore. Later in 2003 Eidsiva Reederi SA, the former owner of easyline, which went bankrupt, resurrected its complaint before the European Commission. In 2006 the European Commission referred the case to the Bundeskartellamt. The Bundeskartellamt started a new proceeding tying up to the 1999-decision and recently commissioned a nautical expertise about the potential of the Puttgarden port basin to set up a further ferry service.

## HUNGARY

The Hungarian Competition Act contains a general prohibition on abuse of dominance combined with prohibition of particular abuses. In this latter category among others, refusal without justification, to create or maintain business relations appropriate for the type of transaction are specifically mentioned. Though in the last ten years the GVH (the competition authority of Hungary) had a number of cases concerning refusal to deal scenarios, constituting mainly negligible if any problems, the related procedures almost always ended in the termination of proceedings. Therefore the GVH rarely engaged into in depth consideration of the most important issues of the theory of refusal to deal. Still some lessons can be drawn on the basic approaches of the Hungarian jurisdiction.

### **1. Defining refusal**

In the cases investigated by the authority mainly clearcut refusals were analysed. The GVH established in general that an act qualifies as refusal to supply if the dominant firm refuses to enter into an agreement, ceases existing business relations or makes the maintenance of such relations conditional upon the acceptance of unrealistic conditions. In a case assessing the exclusionary strategy of the incumbent railway operator and infrastructure owner MÁV, the GVH established that the fact that MÁV provided its consent to requests for access to infrastructure in great delay did qualify as a *de facto* refusal to supply. The GVH took into consideration that due to this delay, existing freight contracts of the competing railway company were cancelled and damages were claimed by the contractors. Temporary refusal to deal can also qualify as an abuse of dominance.

### **2. Refusing to deal with customers versus competitors**

Vertical refusals are generally considered less problematic in scenarios when the dominant supplier itself engages into the distribution of its products. In such cases unless consumer harm can be identified abuse would not be established if competitor buyers get smaller quantities than required or become not supplied at all. However in a case the GVH made a distinction between possible objective justifications applicable in horizontal and vertical scenarios in the telecommunications market. Though in principle the GVH accepted an argument of the incumbent party according to which its own investment and telecom network enabling it to provide service, and transmit it through the border does not qualify as a strategic barrier to entry for all competitors, and therefore it cannot be obliged to share the use of the infrastructure with its competitors. However as the case related to the refusal of access for (potential) buyers and not for competitors, the reasoning was not relevant and sufficient to serve as an objective defence for vertical relationships.

### **3. Distinguishing harmful RTDs from efficient ones**

In lack of objective justifications a refusal to supply qualifies as an abuse of dominance only if besides the harm caused to a specific market participant, the action has an appreciable negative effect on market competition and on its effectiveness. In a case where a newspaper wholesaler – the monopolist supplier of other wholesalers – terminated the contract relating to the supply of such wholesalers, the GVH established that this step had no actual impact on consumers, having regard to the fact that newspaper prices were determined by the publishers. It established that the competition authority should not intervene into developments of the market where such an intervention would not increase efficiency of competition

serving consumers' interest. The foreclosure of a single competitor is only anticompetitive if following the exit of that company, effective competition is to be considered distorted. However this is not the case where consumers do not experience any direct or indirect negative consequences. The role of competition law is not to protect the existence of market participants but to ensure the maintenance of effective competition.

#### **4. Sellers' right of autonomy versus special responsibility of dominant firms**

The GVH did establish the special responsibility of dominant undertakings, meanwhile not fully excluding the dominant firm's right of autonomy. In 1998 it brought two such decisions. In the first case it was considered that the organiser of an exhibition of wedding services, even if it were dominant was not obliged to contract with all the service providers willing to be present on the exhibition. It is not an abuse if the seller chooses among different partners willing to enter into agreement in order to ensure the required level of professional quality and the balance among the number of providers of different groups of products. In the other case a paper manufacturer undertook to use excess energy supplied by its power plant for the heating of nearby settlements. Later it intended to engage into more widespread activity and signalled to the inhabitants that no excess energy would be available in the future and therefore they should seek alternative solutions for heating. The GVH in its procedure established that the supplier's primary activity is the manufacturing of paper, and should it intend to intensify its activity, it is in its legitimate interest to use the previously surplus energy for its own purposes.

In 2000 however, the GVH applied a stricter approach and obliged Phillips to engage into the supply of the spare parts of its household electronics products and to provide these parts to companies dealing with repairment but not belonging to its own service network. It was argued that it is in the interest of consumers to be able to make their appliances repaired cheaper by independent service providers. It was also established that though dominant firms can not be obliged to engage into non profitable activity, should the provision of access to spare parts be profitable, than it is obliged to engage into such distribution, irrespective of whether it would prefer to continue different, more profitable activities. The arguments of Phillips concerning the relationship between brand image and the designated service network were also rejected. It should be noted that this highly interventionist approach did not take into consideration the existence of opportunity costs. The establishment of profitability was therefore not sufficiently well based and this whole approach has not become a standard in the jurisdiction of the GVH. Moreover in the very same year the GVH stated that an incumbent telecommunications firm can only be obliged to vertically supply if it is technically capable, and has no appropriate business interests to refuse. This decision seems to overrule the previous one as it may be an appropriate business interest not to spare resources on an activity that is not the most profitable among the alternative possibilities.

The dominant undertaking's right of autonomy was upheld in a decision establishing that the aim of competition supervision is to protect competition – normally constituting a pressure for efficiency and maximising welfare – and can not be considered as means to ensure the existence of certain undertakings on the market. In a manufacturer-distributor relationship there is no such as competition law protected right to create or maintain preferential, exclusive partnership with the manufacturer. This is even so in the case of a pure monopoly. Competition law provides a wide discretion for the manufacturer to determine the framework of its distribution policy.

#### **5. Same conduct – different analysis**

As mentioned above, constructive refusals could fall under the title of refusal to supply and be assessed under the approach laid down by the GVH concerning these types of abuses. On the other hand the GVH does not always seek to establish that a given form of abuse was actually constituted. In a case the complainant was an undertaking that intended to take over public lighting services in a municipality but

faced exclusionary practices on behalf of the incumbent electricity supplier that previously provided this service too. The GVH established that the incumbent abused its dominant position when it caused undue delays and costs for the new entrant while exercising the rights provided to it as the designated electricity supplier. Though in a later case mentioned above, the similar behaviour of the incumbent railway company was identified as a constructive, de facto refusal to supply, this approach did not appear in this case. It can therefore be said that the GVH does not pay too much attention to the qualification of the allegedly abusive behaviours but instead follows a more pragmatic approach identifying the nature and effects of the behaviours and turns to the test of refusal to supply where it has an additional value in the assessment of the case.

## **6. Influence of the essential facilities doctrine**

Refusal to supply is enumerated as a type of abuse of dominance in the Competition Act and the jurisdiction does not make a distinction between the nature of markets or products affected by dominant positions on the basis of the type of abusive behaviour. Therefore in refusal to supply cases the GVH has not elaborated an essential facility doctrine but used the normal dominance test, requiring the capability for independent behaviour. Nevertheless it is true that infringements were established almost exclusively in scenarios where the refused product did qualify indispensable or essential to competitors e.g. access of Internet providers to the network, access to railway infrastructure.

No cases have arisen in which the limits of the obligation to provide access would have been at issue. However the GVH does not consider that such an obligation, once established should be considered unlimited and that all applicants should be treated the same way. This is implicit in the present jurisdiction according to which it is not the right to be present on the market, but the effectiveness of competition that should be taken into account in the assessment of refusal to supply cases. The fact that the GVH established that a competitor has the right to enter or remain in business relations with a dominant firm does not in itself suffice to uphold similar future claims by other, potential or actual competitors.

## **7. History of dealing**

The rather pragmatic approach of the GVH made no distinction between the two situations and implicitly qualifies it irrelevant whether there was a history of dealing between the parties or not and concentrates on the effects on competition. As the right to continue a certain business activity is not endorsed by the GVH, in both situations it is assessed whether the refusal is justified and whether it has negative effects on market competition.

## **8. Reasonable Justifications**

The jurisdiction of the GVH endorses the possibility to justify a refusal to supply. The existence of legitimate business interest was generally accepted as a justification both in the case of horizontal and vertical refusals. The business interest could be the right to continue a more profitable activity instead of engaging into supply, to refuse dealing with a firm with bad business reputation or poor performance in the past or the refusal to share the use of one's investment with its competitors. It is also legitimate to refuse to supply if it requires additional investment the recovering of which is uncertain. Similarly a dominant firm is allowed to switch supplier or buyer should a more effective business partner appear.



## IRELAND

### 1. Introduction

This is the written submission from the Competition Authority, Ireland to the OECD Competition Committee Roundtable on Refusals to Deal (“RTD”). As requested in the letter of 17 July 2007 from the Chairman of the Competition Committee, the focus in this submission is on unilateral RTDs.

Section 2 gives an outline of the Competition Authority’s approach to the issue of refusals to supply/deal. Two important relevant court cases, one brought by an undertaking under the statutory right of private action and one brought by the Competition Authority, are presented in section 3.

### 2. The approach of the Irish Competition Authority to RTD complaints

In Ireland a finding of an abuse of dominance can only be made by the Courts. The Competition Authority has the same rights as private individuals to bring cases before the Court on civil matters. There is a long history of private action cases in the Irish Courts<sup>1</sup>. The Competition Authority uses a consumer harm standard to decide whether it has a role as the public enforcer of competition law.

Approximately one in ten of all complaints received by the Competition Authority each year fall under the heading of “refusals to supply/deal”. However, only a small proportion of these complaints merit investigation because the Competition Authority takes the view that, in general, firms should be able to contract with parties of their choice. The Competition Authority is only concerned with whether or not the RTD has an effect on competition, and ultimately, on consumer welfare. Therefore, the Competition Authority does not take action in relation to, for example, disputes between a seller and a buyer that do not ultimately harm consumers. In this manner, the Competition Authority strikes a balance between the views that sellers have a right of autonomy and restrictions on the behaviour on a dominant firm. The Competition Authority, will not as a matter of policy, attack refusals that do not clearly harm consumers. However, this leaves the way open for private enforcement in other cases.

The approach of the Competition Authority to abuses of dominance is strongly supported by case law in the Irish Courts. In the judgment of the recent Irish League of Credit Unions (“ILCU”) case, Justice Fennelly of the Irish Supreme Court stated that “the entire aim and object of competition law is consumer welfare. Competitive markets must serve the consumer. That is their sole purpose. Competition law, as is often said, is about protecting competition, not competitors, even if it is competitors that most frequently invoke it.” A summary of the ILCU case is given below.

The Competition Authority considers “constructive refusals” to be included in its definition of a “refusal”. The Competition Authority would treat a case where the terms are clearly unreasonable and unacceptable to an efficient firm in the same manner as a blank refusal. However, such cases are rare as it is more likely that a blank refusal is issued in these cases. However, there are a class of cases that fall into the middle which could also arguably be about a failure to agree terms. Such cases are harder to prove and

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<sup>1</sup> In *A&N Pharmacy v. United Drug Wholesale Limited* [1996] 2 ILRM 42, an interlocutory injunction in the case of a pharmacy that was unable to obtain a drug from any other source.

often raise questions about when the issue might be more properly taken on as a private action. The Competition Authority is wary of taking on the role of a regulator in such circumstances, which can itself lead to a failure to reach a commercial agreement.

The Competition Authority takes an effects-based approach to analysing potential abuses rather than looking at the form of the abuse. This links into the self imposed requirement to show consumer harm. Competition can be eliminated by either a blank refusal or by a demonstrably excessive wholesale price. However, case law on different means of achieving the same goal may not be evenly developed. Prudence in litigation dictates that the most stable body of case law is relied upon. This may create the impression that a different approach might lead to a different outcome but the Competition Authority does not think this would be the case in an Irish Court where the consumer harm has long been an important tenet in any abuse of dominance case.

For a RTD to impact on consumer welfare there must be considerable barriers to addressing the retail market in the face of the refusal. However, a unilateral RFD need not be linked to an essential facility but could be related to some other barrier such as IP rights etc. However, having identified an essential facility it is easier to show that a given RTD has a large impact on consumers. In these circumstances a RTD can be allowed if there is objective justification. However, in such a case the onus moves to the dominant undertaking to show that their conduct is justified and proportionate.

The sectors where RTD would be most harmful are normally subject to *ex ante* regulation. These sectors share with others where RTD can be harmful in that there is a vertical link. In these circumstances, control of a key input can deliver control of the downstream retail market without regard to the relative efficiency of the firms. Horizontal RFDs can arise in industries that can support multiple networks. Here a refusal to interconnect systems may be used to support a particular network over another. In many sectors such issues are dealt with by direct regulation (interconnection in the communications sector). In other areas, computer operating systems etc., there is a danger that a RFD in these circumstances is an attempt to protect a particular outcome of consumer choices that may be subject to a tipping effect. Such issues are likely to be the main ones left to anti-trust authorities to deal with. However, the role of a national competition authority may be limited in this respect.

A history of dealing limits the set of objective justifications that can be relied upon. For instance, a claim that it is not feasible to supply would need to be justified on the basis of clear unplanned drastic changes in circumstances. Nonetheless, a company may have entered into an arrangement with an undertaking that is not a competitor and find that the agreement did not work out as planned. In these circumstances the history may itself be the reason for the refusal to renew. If, even in these circumstances, a dominant firm would still have an objective justification there is no need to consider the normal issues of market definition, dominance and abuse.

To provide guidance to those making complaints, so as to improve the quality of the complaints, and to assist businesses and others to comply with competition law, the Competition Authority published a "Guidance Note" on the issue of refusals to supply/deal. This is available on the Competition Authority's website at:

[www.tca.ie/PromotingCompetition/GuidanceNotes/GuidanceNotes.aspx](http://www.tca.ie/PromotingCompetition/GuidanceNotes/GuidanceNotes.aspx)

### **3. Irish Court Cases**

#### **3.1 Meridian – Eircell case**

Meridian Communications Ltd., owner of the mobile services provider Cellular 3 Ltd., took a case under the statutory right of private action against the Eircom group subsidiary Eircell Ltd. concerning

wholesale access to the mobile telephones market in 2000. Meridian's argument was that Eircell, by terminating its volume discount agreement with Meridian, was abusing its dominant position by refusing to supply Meridian at the corporate rate.

In 2001 the High Court judge ruled that, despite having a 60 percent share of the market, Eircell did not have a dominant position because, *inter alia*, Eircell's market share was declining rapidly (Eircell's only competitor, Esat Digifone, had won around 40 percent of the market in just two years), and the significance of the high barriers to market entry was "vastly reduced" by the low barriers to expansion. He also ruled that Eircell's mobile network was not an essential facility which had to be made available to other market operators.

Therefore it was judged that Eircell was entitled to terminate its agreement with Meridian, i.e. Eircell was entitled to refuse to deal with Meridian. The fact that Eircell had a history of dealing with Meridian did not appear to impact on the judgment.

The High Court judgement is available at:

<http://www.bailii.org/ie/cases/IEHC/2001/195.html>

#### ***Competition Authority – ILCU case***

In July 2003, the Competition Authority initiated proceedings against the Irish League of Credit Unions ("ILCU"). During the High Court proceedings in 2004, the Competition Authority alleged that ILCU occupied a dominant position in the market for Savings Protection Scheme ("SPS") services (SPS is a stabilisation scheme established to protect the savings of members of a credit union in the event of insolvency or other financial default on the part of the credit union) and that ILCU was abusing its dominant position in the SPS market by tying the provision of SPS to the provision of credit union representation. The Competition Authority also suggested, but very much as a subsidiary argument, that this conduct was anti-competitive by reason of abusive refusal to supply SPS by a dominant firm.

The High Court judge concluded that ILCU had a dominant position both in the market for representation services and for SPS. Although various witnesses had referred to the SPS service as "vital", the trial judge rejected the argument that the case was to be considered as one involving essential facilities because SPS was not essential in the sense that credit unions could not carry on business without it. He accepted the characterisation of the application of the ILCU rules as a tying arrangement and found in favour of the Competition Authority.

The High Court judgement is available at:

<http://www.bailii.org/ie/cases/IEHC/2004/330.html>

The ILCU appealed the High Court decision to the Supreme Court. In May 2007, the Supreme Court concluded that the representation and SPS services are not in separate product markets and, therefore, no question of abusive tying could arise. After having dealt with the issue of the market definition, the Supreme Court considered that there was no need to analyse the issue of dominant position, its abuse or any objective justification.

The judgment also indicated that there cannot be an abusive refusal to supply, although it did not go into further detail on this point given that it was presented as a subsidiary argument.

The Supreme Court upheld the ILCU appeal. The Supreme Court judgment is available at:

<http://www.bailii.org/ie/cases/IESC/2007/S22.html>

#### **4. Conclusion**

Despite the large number of complaints that the Competition Authority receives that fall under the heading of “refusals to supply/deal”, the only undertaking to have been found by an Irish Court to have breached competition law in a case where the issue of a unilateral RTD arose successfully appealed that judgement.

## JAPAN

### 1. Introduction

A unilateral refusal to deal can be regulated as an “Other Refusal to Deal” among “Unfair Trade Practices” prohibited by the Antimonopoly Act (“AMA”), if it tends to impede fair competition in markets.<sup>1</sup> A unilateral refusal to deal also can be regulated as “Private Monopolisation” prohibited by the AMA, if it substantially restrains competition in markets.

Japan’s views and recent cases on unilateral refusal to deal are described below.

### 2. Views

#### 2.1 “Other Refusal to Deal” as an “Unfair Trade Practice”

##### 2.1.1 Provision

Basically speaking, a company is free to decide which company it will do business with. Even if a company, considering such factors as price, quality and service, decides not to deal with a certain company for its own reasons, there would be fundamentally no problem under the AMA.

However, a unilateral refusal to deal which tends to impede fair competition in markets can be prohibited by the AMA as an “Other Refusal to Deal” among “Unfair Trade Practices” designated by the JFTC. An “Other Refusal to Deal” is defined as “unjustly refusing to deal, or restricting the quantity or substance of a commodity or service involved in the transaction with a certain entrepreneur, or causing another entrepreneur to take any act which comes under one of these categories.”

“Unjustly” is interpreted as unjustness in terms of the AMA, i.e. a tendency to impede fair competition.<sup>2</sup> Particular cases in which a tendency to impede fair competition can occur will be described later.

“Refusing to deal, or restricting the quantity or substance of a commodity or service involved in the transaction with a certain entrepreneur” stipulates a direct refusal to deal. A direct refusal to deal can be conducted by sellers or buyers. It also covers not only the suspension of existing transactions with companies with a history of dealing but also the refusal of a new offer from companies without a history. It also includes any substantial restriction on the quantity or substance of a commodity or service involved in the transaction, even if this is not an actual refusal.

“Causing another entrepreneur to take any act which comes under one of these categories,” stipulates an indirect refusal to deal by which a company lets another company refuse to deal with third parties.

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<sup>1</sup> Paragraph 1 of “Unfair Trade Practices” (JFTC Notification No. 15 of 1982) stipulates “Concerted Refusal to Deal,” while other forms of refusal to deal are regulated as “Other Refusal to Deal” defined in Paragraph 2.

<sup>2</sup> For examples, Tokyo High Court, July 17, 1971, and Supreme Court, July 10, 1975.

Explicit obstruction to other companies is not a necessary element of an indirect refusal to deal; a fact that other companies have refused to deal at the request of a tortfeasor is sufficient.

### 2.1.2 *Particular cases in which a tendency to impede fair competition can occur*

Even a refusal to deal by a single company can impede fair competition and be a problem under the AMA, for example, in cases where *the company refuses to deal as a means to secure the effectiveness of its illegal conduct under the AMA* and where *the company refuses to deal as a means to achieve such unjust purposes under the AMA as excluding its competitors from a market*.

According to the “Guidelines Concerning Distribution Systems and Business Practices,”<sup>3</sup> when a company engages in such conduct as (i), below, as a means to ensure the effectiveness of its illegal practice under the AMA, such conduct is illegal as an unfair trade practice. Moreover, in cases where an influential company<sup>4</sup> in a market engages in such conduct as (ii) or (iii), below, as a means to achieve such unjust purposes under the AMA as excluding its competitors from a market, and if such conduct may make it difficult for the company, whose transactions have been refused, to carry on normal business activities, such conduct is illegal as an unfair trade practice:

- (i) A manufacturer influential in a market, by causing its distributors not to deal with its competitors, and prevents the competitors from readily finding alternative trading partners, and, with a view to ensuring the effectiveness of such conduct, refuses to deal with distributors who do not yield to this request;
- (ii) A material manufacturer with influence in a market, in an attempt to prevent its customers (finished product manufacturers) from manufacturing certain kinds of materials by themselves, stops the supply of main materials that have been supplied to the finished product manufacturers; or
- (iii) A material manufacturer with influence in a market, in an attempt to exclude competitors of its customers (finished product manufacturers) who have close relations with the material manufacturer<sup>5</sup> from the finished product market, stops the supply of the materials that have been supplied to the competitors.

## 2.2 **“Private Monopolisation”**

The AMA prohibits as Private Monopolisation “such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, *excludes or controls* the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a *substantial restraint of competition* in any particular field of trade.”

“Exclusion” in this definition is interpreted as making it difficult for other companies to continue their business activities or to enter the market. “Control” is construed as depriving other companies of their

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<sup>3</sup> General Secretariat of the JFTC, 1991.

<sup>4</sup> Whether a company has influence in a market is in the first instance judged by a market share of the firm, namely whether it has no less than 10% or its position is within the top three in the market.

<sup>5</sup> A company “which has close relations” with another company means one having common interests with the other, which is judged on a case-by-case basis, taking into comprehensive consideration such factors as stockholding relationship, interlocking directorates or dispatching of directors, trading and financial relationships, and common membership of so-called corporate groups.

freedom to make decisions concerning their business activities and forcing them to obey the controller's intent.

As to "a substantial restraint of competition" in this definition, the case law states "restraining competition substantially means bringing about a situation in which competition itself has significantly lessened and thereby a specific company or companies can control the market by determining freely, to some extent, prices, qualities, volumes, and various other terms on its or their own volition."<sup>6</sup>

Therefore, anti-competitive conduct consisting of a unilateral refusal to deal and/or others can be regulated as Private Monopolisation prohibited by the AMA if it causes a substantial restraint of competition by excluding or controlling the business activities of other companies.

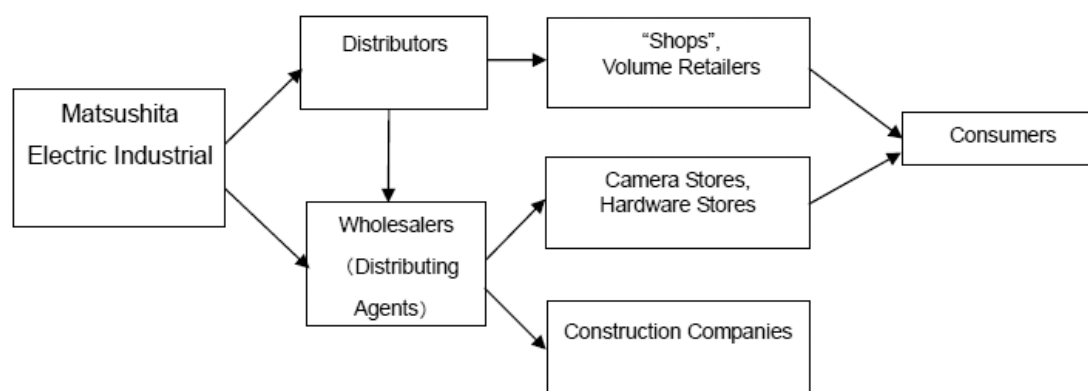
### 3. Recent cases

Recent cases in which the JFTC took action against a unilateral refusal to deal or anti-competitive conduct consisting of it as an Unfair Trade Practice (Other Refusal to Deal) or Private Monopolisation are described below.

#### 3.1 Unfair Trade Practice

##### 3.1.1 Case against Matsushita Electric Industrial Co. Ltd. (recommendation decision on July 27, 2001)

With respect to transactions involving Matsushita's electric appliances, Matsushita Electric Industrial with its distributors, in which Matsushita Electric Industries holds an equity stake, received complaints from retailers, with which its distributors had business, about the discount sale of Matsushita appliances by retailers, with which its distributors did not have ongoing business. Matsushita investigated the distribution channel, and forced wholesalers and retailers, with which Matsushita Electric Industrial or its distributors do business, to refuse the sale of Matsushita's appliances to retailers conducting discount sales. The JFTC judged that these acts fell under "Other Refusal to Deal."



(Note) "Shops" were selling only Matsushita products.

<sup>6</sup> Tokyo High Court, December 7, 1953.

3.1.2 Case against Uemura Kaihatsu Co., Ltd. and 16 other parties, and WAKITA Corporation (recommendation decision on October 31, 2000)

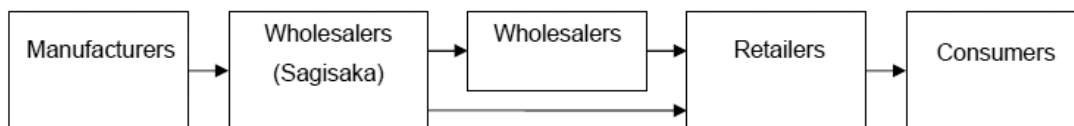
Seventeen construction companies adopting the Rockman construction method<sup>7</sup>, who were members of the Subgroup on Construction of the Rockman Association, and Wakita, who was the sales company of machines exclusively used for the Rockman construction method, cooperated as follows: (i) The seventeen contractors jointly refused to lease or resell the machines to non-members of the Subgroup without due cause; and (ii) Wakita unjustly refused to sell or lease the machines to non-members unless they were admitted to the Subgroup. The JFTC judged that the act committed by Wakita as shown in (ii) above fell under “Other Refusal to Deal.”

3.1.3 Case against Sagisaka (recommendation decision on May 16, 2000)

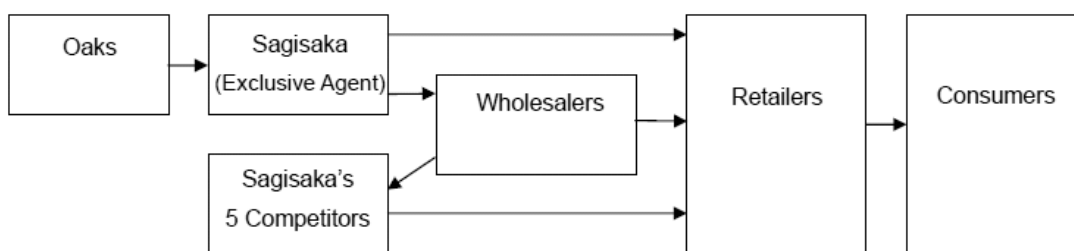
Sagisaka was purchasing bicycle parts from manufacturers and packaging them using the Sagisaka specifications, thus creating a wide assortment of bicycle parts and selling them to mass retailers directly or through wholesalers. Sagisaka ranked first in the sales volume of bicycle parts sold to mass retailers in Japan.

(i) When it purchased bicycle parts from manufacturers, Sagisaka forced the manufacturers not to sell bicycle parts to mass retailers, with which Sagisaka deals, directly or indirectly, without going through Sagisaka. (ii) Sagisaka also forced its wholesalers to refuse to sell Oaks bicycle parts with popular figures to five competitor companies which would either decrease, or possibly decrease, the business between Sagisaka and mass retailers, resulting from the discount sale of bicycle parts. The JFTC judged that the act in (ii) above fell under “Other Refusal to Deal.”

< Distribution Channel for General Bicycle Parts >



< Distribution Channel for Oaks Bicycle Parts >

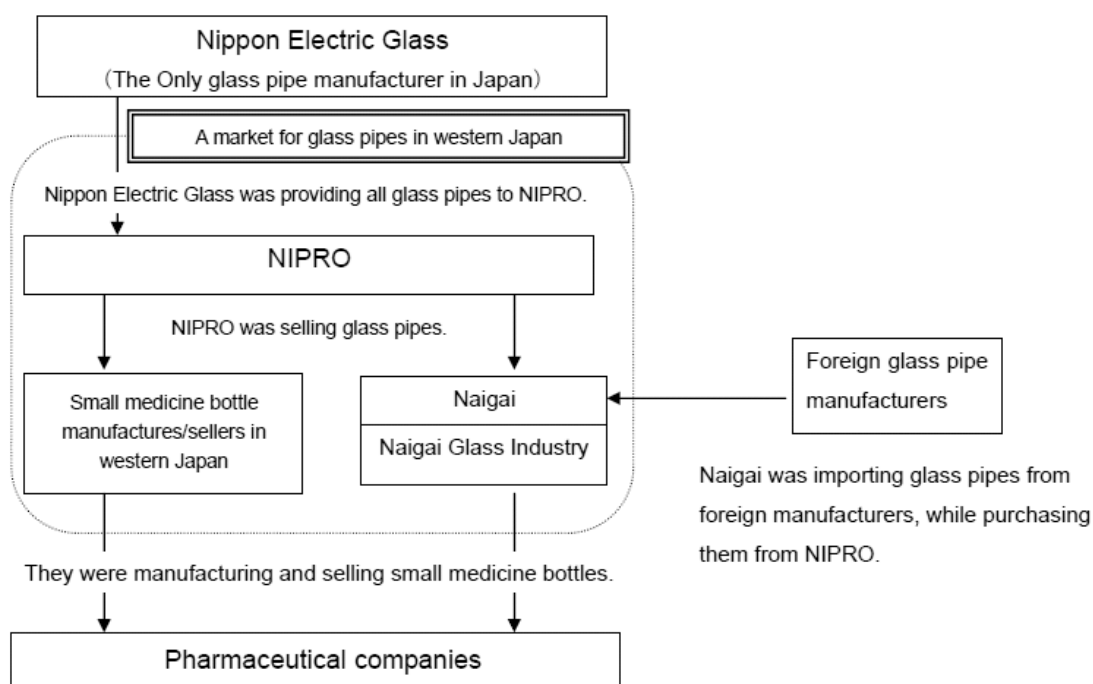


<sup>7</sup> The Rockman Construction method is a jacking method used for the plate laying work of drainage pipelines, and is especially appropriate for work on soil with a high degree of hardness, such as soil consisting of small stones, rounded stones, boulders and bedrock.

### 3.2 *Private Monopolisation*

#### 3.2.1 *Case against NIPRO Corporation (hearing decision on June 5, 2006)*

NIPRO (i) made a proposal to Naigai Co., Ltd., its buyer of glass pipes used for small medicine bottle (ampule) production, which called for a change in commercial conditions for transactions from April 1, 1995 (increase in prices up to official prices, the shortening of the term of promissory notes and the total abolition of the special price discount). NIPRO also (ii) refused to accept orders from Naigai for glass pipes manufactured by Nippon Electric Glass Co., Ltd. similar to imported glass pipes after August 1997. NIPRO (iii) further revised conditions for commercial transactions only with Naigai (demanding security and cash settlement only) on March 23, 1999. The JFTC judged that these acts constituted acts to exclude the business activities of competitors; NIPRO was the exclusive supplier of glass pipes manufactured by Nippon Electric Glass in the glass pipe supply market of western Japan and already possessed a market dominant position; it committed acts against the Naigai group (Naigai and Naigai Glass Industry Co., Ltd.) with the intent of preventing the inflow of imported glass pipes from continuing or increasing and imposing sanctions on this; NIPRO thereby intended to avoid situations in which both quality and price competition occurred or could occur, by restricting or suppressing the import of competitive glass pipes manufactured by its competitors. These acts substantially restrained competition in the glass pipe supply market of western Japan and thus constituted Private Monopolisation.





## KOREA

### Current institution of Korea

Korea's competition law, the Monopoly Regulation and Fair Trade Act (MRFTA), stipulates that undue refusal to deal is a type of unfair trade practices, and clearly states more specifically in sub-provisions that collective refusal to deal and unilateral refusal to deal constitute unfair trade practices. Past cases show that the latter accounts for most of the cases related to refusal to deal, and naturally, the KFTC's law enforcement has been focused on addressing unilateral refusal to deal.

Refusal to deal, both collective and unilateral, can be categorized into three types; refusal to initiate business, suspension of transaction and restriction on transaction. Here "refusal to initiate business" refers to the act of unfairly refusing to initiate business with a certain enterpriser and "suspension of transaction" refers to the act of unduly suspending a longstanding transaction with a certain enterpriser. "Restriction on transaction" points to the act of significantly restricting the quantity or nature of goods or services in transaction with a certain enterpriser in a continuous transaction relation.

However, in case a monopolistic enterpriser refuses to deal, the act is treated as abuse of market dominance not subject to the unfair trade practice-related provisions of the MRFTA. More specifically, Article 3-2 of the MRFTA ("Prohibition of Abuse of Market-Dominant Positions") is applied to refusal to deal by a monopolistic enterpriser while Article 23 of the MRFTA ("Prohibition of Unfair Business Practices") is applied to refusal to deal by other general enterprisers. In such cases, heavier surcharges or punishments may be imposed on monopolistic enterprisers than on others.

### Overview

#### 1. Definition of refusal to deal

Refusal to deal is an act of unduly refusing to deal with a certain enterpriser that has a potential to undermine fair trade. Of the two types of refusal to deal, collective and unilateral, this report will only deal with unilateral refusal to deal. Unilateral refusal to deal refers to the act of refusing to initiate business with a certain enterpriser or suspending transaction or significantly restricting the quantity or nature of goods or services in a continuous transaction relation.

Unilateral refusal to deal includes refusal to supply, refusal to purchase, refusal to initiate business and refusal to continue to deal. It also covers the act of proposing transaction terms notably disadvantageous to the transaction counterpart or the act of substantially restricting the quantity or the nature of traded goods and services, which constitutes de facto refusal to deal. The followings are examples of unilateral refusal to act included in the "Guidelines on review of unfair business practices" enacted by the KFTC.

- 1) when an enterpriser refuses to deal without any good reason, as a result of which business activities of enterprisers in the concerned market are disturbed and competition is substantially reduced

- 2) when an enterpriser suspends or restricts, without good reason, transaction with enterprisers who do business with its competitors, while continuing to trade with others who are in exclusive dealings with it or with enterprisers closely related to it, leading to reduced competition in the relevant market.
- 3) when an enterpriser undermines competition in the relevant market by forcing sales agents or agencies, to whom it supplies raw materials, to refuse to deal with its rival raw material suppliers in the after market
- 4) when an enterpriser undermines competition by suspending or forcing to suspend raw material supply to a certain enterpriser newly entering the market it is doing business in
- 5) when an enterpriser tries to exclude competitors of its partner enterprisers, which manufacture finished goods with raw materials supplied by it, from the finished goods market by suspending to supply raw materials to those rival companies
- 6) when a raw materials manufacturer refuses, without good reason, to supply raw materials to a finished goods manufacturer that tries to produce and purchase raw materials itself in order to maintain and strengthen its market position
- 7) when an enterpriser refuses to deal with certain types of sales businesses, such as discount stores or online sellers, as a result of which those businesses are put at a disadvantage in competition compared to others such as offline sellers
- 8) when an enterpriser makes it compulsory for its business partners to purchase goods and services from enterprisers designated by it, otherwise refusing to initiate a deal, thereby affecting competition in the concerned goods and services market

## **2. Refusal to deal with customers versus refusal to deal with competitors**

The MRFTA stipulates the counterpart of refusal to deal as "a certain enterpriser." Thus, only refusal to deal with enterprisers, not customers, is prohibited under the law. Nevertheless, that does not mean that only "horizontal refusal to deal" is banned since "vertical refusal to deal" is not allowed, either. In fact, most of the refusal to deal-related cases where the KFTC imposed remedies concerned vertical refusal to deal. Usually, horizontal refusal to deal is about refusing to deal with competitors and vertical refusal to deal concerns refusing to deal with enterprisers not in direct competition. However, even in horizontal refusal to deal cases, the counterpart of refusal to deal (Company B) may not be a rival of the enterpriser refusing to deal (Company A) but often a competitor of an enterpriser (Company C) that is doing business with Company A.

One example of horizontal refusal to deal corrected by the KFTC is the KT Corporation's refusal to deal<sup>1</sup>. When the KT Corporation published residential and business phone directories, it refused to include the subscribers of its rival, Hanaro Telecom in the listings. The KFTC recognized this act as unfair refusal to deal because 1). the KT's local call market share (in terms of the number of subscribers) was 98.2% as of the end of 2000, 2). operators with little market share needed to provide a phone directory service to enable their subscribers easily find the phone numbers of those subscribed to other operators and check their own subscribed phone number, which is an important competition factor in the local call market and 3). it was pointless for Hanaro to publish a separate directory of only its subscribers, for its market share stood at a mere 1.8%.

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<sup>1</sup> KFTC 2001. 3. 31. Resolution 2001-43

An example of vertical refusal to deal, for which the KFTC imposed remedies, is Tbroad Chonju Broadcasting Co.'s abuse of market dominance<sup>2</sup>. In this case, Tbroad, which is a cable system operator, signed a program supply contract with Woori Home Shopping and transmitted TV home shopping broadcasts. Then from 15:08 July 31, 2006 to 09:12 August 2, 2006, for a total of 42 hours and four minutes, it stopped transmitting Woori Home Shopping's programs. The KFTC recognized this act as abuse of market dominance and imposed remedies citing the following reasons; 1). Tbroad continued to transmit programs of other home shopping companies, 2). Tbroad's market share (in terms of the number of subscribed households) in Chonju, Wanju, Muju and Jinan, which are Tbroad's transmission area, was 83%, 3). home shopping sales, by nature, is impossible without a program transmission base provided by cable system operators like Tbroad, 4). Tbroad's act was intended as a protest to Lotte Shopping's acquisition of Woori Home Shopping's shares at a time when the conflict between Lotte Shopping and Taekwang Industrial Co., Tbroad's affiliate, over acquisition of Woori Home Shopping was at its highest and 5). Woori Home Shopping's sales loss caused by Tbroad's suspension of program transmission was expected to reach 23 million won.

### **3. Distinguishing harmful RTDs from efficient ones**

As seen above, acts of unduly refusing to deal that have the potential to undermine fair trade are prohibited under the law and are considered harmful. Meanwhile, acts of suspending transaction or significantly restricting the quantity and nature of goods and services transacted, which were inevitable in the process of cutting back business due to sluggish performance, can be considered efficient refusal to deal on the part of the enterpriser.

### **4. Sellers' right of autonomy versus special responsibility of dominant firm**

In principle, enterprisers are free to decide whether to initiate or continue transaction and with whom to deal. However, market dominant enterprisers have a special obligation to begin or continue transaction in most cases, because if they refuse to supply goods or services or suspend transaction of goods or services, their counterparts' business will become unsustainable because they will not be able to find alternative partners. Then competition in the concerned market will be reduced, hurting consumer welfare.

One of the cases where the KFTC recognized this special obligation of market dominant enterprisers and imposed remedies for their violation of that duty is abuse of market dominance by Royal Information Technology Corporation (RITCO)<sup>3</sup>. Hyundai Engineering & Construction landed a contract for land improvement of the area between Shinbuk and Yanggu of Gangwon province, and held a public tender on November 19, 2004 for installation of automatic fire detectors in Suin tunnel (hereinafter "installation project"). The installation project was designed to use distribution-type pneumatic tube detectors imported from SECURITON AG of Switzerland exclusively by RITCO. In the bid for the installation project, four companies, including RITCO and Shinwha Electronics, participated and Shinwha Electronics won the bid with the lowest bid price.

To get a supply of pneumatic tube detectors from RITCO, Shinwha Electronics requested RITCO three times (on Dec. 23, 2004, Dec. 31, 2004 and Jan. 20, 2005), by official notes, to send an estimate for the detectors together with other documents needed to get approval from the project orderer, but never got a reply. As a result, Shinwha Electronics was unable to purchase the detectors and get approval from the orderer, and in the end, it notified Hyundai Engineering & Construction that it was abandoning the contract for the installation project on April 7, 2005. Then, Hyundai Engineering & Construction contacted Woosuk

<sup>2</sup> KFTC 2007. 3. 19. Resolution 2007-137.

<sup>3</sup> KFTC 2006. 10. 10. Resolution 2006-221.

Electronic Company, which had offered the second lowest bid price, to sign the project contract with. Woosuk Electronic Company did receive an estimate from RITCO but was discouraged by the unreasonably high price of detectors. At the end of the day, it, too, notified Hyundai Engineering & Construction of its contract abandonment on April 11, 2005.

Consequently, Hyundai Engineering & Construction ended up signing a contract with RITCO, which had offered the third lowest bid price, at 300 million won on April 15, 2005. Regarding this case, the KFTC ruled RITCO's act as abuse of market dominance and imposed corrective orders. Here, RITCO's act can be classified as refusal to deal with competitors, as described in section 2., which is a horizontal refusal to deal.

## **5. Same conduct-different analysis?**

Different legal outcomes are possible on cases involving the same act of refusal to deal depending on whether the case is investigated as a case of unfair business practice or of abuse of market dominance. In the former case, the KFTC only need to see whether the actor is an enterpriser subject to the MRFTA, but in the latter case, it has to go through more complex process of determining whether the actor holds market dominance and defining the relevant market. Past cases handled by the KFTC show that the same conduct can be remedied as abuse of market dominance in one case<sup>4</sup> and as refusal to deal as an unfair business practice in another<sup>5</sup>. In either case, the fact remains the same that the act in question has a negative influence on competition.

A case in point is Tongyang Magic Co.'s refusal to deal<sup>6</sup>, which was actually corrected as a case of refusal to deal but could also be perceived as a case of exclusive dealing for its nature. Here, Tongyang Magic sent a letter to Choi (owner of Tongyang Magic's Shinjoongang agency), with whom it was in a continuous business relationship, demanding his withdrawal from the store at the National Credit Union Federation on March 9, 1998, after finding out that Choi ran two separate stores there selling gas ovens and dishwashers (of both Tongyang Magic and its rival Rinnai). As Choi refused to withdraw his stores, Tongyang Magic made another request and then cancelled its agency contract with Choi on March 19, 1998.

## **6. Influence of the essential facilities doctrine**

The MRFTA prohibits market dominant enterprisers' act of unjustifiably refusing, suspending or restricting other enterprisers' use of or access to goods or services that are essential to production, supply and sales as abuse of market dominance. Refusal of deal can easily be recognized when essential facilities are involved, but it does not mean that essential facilities must be involved in order for an act to be regarded as refusal to deal. In addition, it cannot be considered that all acts of refusal to deal by essential facilities owners are illegal.

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<sup>4</sup> Royal Information Technology Corporation's abuse of market dominance, introduced in section 4., is an example.

<sup>5</sup> Insung Industry's refusal to deal (KFTC 2005. 9. 9. Resolution 2005-174) is an example. Insung Industry refused, without good reason, to provide technology (through conclusion of an agreement on the use of new technology) to its counterpart, which could not execute a public construction project without the technology exclusively owned by Insung Industry.

<sup>6</sup> KFTC 1998. 11. 19. Resolution 1998-91.

## **7. History of dealing**

If the concerned parties have a history of transaction between them, one's act of refusing to deal with the other is considered as "suspension of transaction," and if there is no such history, the act is defined as "refusal to initiate business." In terms of the remedies imposed by the KFTC, there is not much difference between the two.

## **8. Reasonable Justifications**

The "Guidelines on review of unfair business practices" stipulate that even when anti-competitiveness of an act of refusal to deal is recognized, the act may be considered legal in case there exists good reason for it. Examples of this include 1). when it is impossible to supply the quantity wanted by the counterpart due to lack of production or inventory, 2). when refusal to deal is the only way to respond to situations triggered by the counterpart's bankruptcy and other credit problems, the danger of bankruptcy of one's own and other clear reasons, 3). when the efficiency gain effect or consumer welfare increasing effect of the concerned refusal to deal surpasses the anti-competitiveness of the act and 4). when other good reasons for a unilateral refusal to deal are acknowledged.

## **9. The KFTC's experience**

The most harmful refusal to act, as can be recognized from the KFTC's law enforcement experience, is the case when an enterpriser's market share is 100% and it is thus impossible for its counterparts to look for an alternative. This mostly happens in the form of a market dominant enterpriser's refusal to deal. The Royal Information Technology Corporation case in section 4. is a good example. One of the cases when refusal to act is legitimized is when the enterpriser refusing to deal has a market share of less than 10% or when its annual sales revenue is less than two billion won. In such cases, the KFTC does not launch a review process in principle (the safety zone).

## **10. Statutory effectiveness**

The current provisions are considered sufficient to regulate anti-competitive refusal to deal. However, under the current competition law, the remedies the KFTC can impose for refusal to deal, whether it is classified as unfair business practice or abuse of market dominance and even if the concerned enterpriser's market share is 100% or significantly high, are limited to an order of discontinuation of the act in violation of the law (Article 5, Article 24 of the MRFTA). And whether the KFTC can order initiation or continuation of transaction as part of the remedies remains controversial since there is not written provision on the matter. It is deemed necessary for the KFTC to actively consider reinforcing relevant provisions so that it can order initiation or continuation of transaction regarding anti-competitive refusal to deal.



## MEXICO

This note reviews Mexico's experience in the assessment of refusal to deal. Section 1 describes the legal provisions that set the framework for assessing the anticompetitive nature of this conduct. Section 2 addresses the vertical nature of RTDs and the influence of the essential facilities doctrine in the analysis of RTD cases. Section 3 delves into how the Mexican competition authority handles the right of firms to make autonomous decisions and the special responsibility of a dominant firm. Section 4 explains why under the Mexican framework, the assessment under an effects based approach would likely have a different legal outcome depending on whether the conduct is investigated as a RTD or as some other conduct. Section 5 briefly refers to how the Federal Competition Commission (CFC) measures the harm to competition. Section 6 offers some critical thoughts on the effectiveness of the current framework for the assessment of RTDs and its practical consequences. Finally section 7 presents some concluding remarks.

### 1. The framework for assessing RTD

Article 10, section V of the Mexican Federal Law of Economic Competition (FLEC) typifies refusal to deal (RTD) as a relative monopolistic practice, in the following terms: "The unilateral action consisting in refusing to sell, commercialize or provide to certain people goods or services available and normally offered to third parties."

The preamble of article 10 provides a generic definition of relative monopolistic practices as "those acts, contracts, agreements or combinations, whose aim or effect is or could be to improperly displace other agents from the market, substantially hinder their access, or that establish exclusive advantages in favour of one or several entities or individuals." It also establishes that these practices are subject to a rule of reason treatment as defined by articles 11 (demonstration of infringement), 12 (relevant market definition) and 13 (assessment of substantial market power) of the FLEC.

Thus, to find liability under the RTD provision, the CFC must demonstrate the following elements (The first three are common to all relative monopolistic practice cases, while the last four are specific to the provision on RTD):

- (a) Determination that the alleged violator has substantial power (dominance) in the relevant market. This determination entails an analysis of market concentration and entry barriers.
- (b) The conduct concerns goods/services in the relevant market.
- (c) Evidence of intent or effect (actual or likely). The evidence must demonstrate either that the conduct i) is aimed at displacing agents, hindering access or establishing an exclusive advantage; ii) may produce such effects or iii) actually generates them. This demonstration accounts for the anticompetitive nature of the conduct.
- (d) That the person requesting a good or service actually requested it to the person that may provide it.
- (e) That the requested person has refused to provide the good/service.
- (f) That the requested person normally provides the good/service to third parties.

The criteria set in (c) imply that foreclosure in the downstream market may have the purpose or effect of strengthening a dominant position in the upstream market or leveraging on this dominance to obtain market power in the downstream market (or conversely).

The alleged responsible party may present an efficiency defence and justifications. While the former is expressly characterized in the LFCE, the latter are not and thus may include a variety of reasons such as IPR issues, legal or technical impediments, and lack of payment, to justify the refusal. The CFC will assess whether the justification is sufficiently demonstrated, otherwise will reject it and thus confirm that the refusal occurred.

As to the efficiency defence, the agent may contend that its conduct will produce efficiency gains in which case the CFC must assess the net effect of the conduct on consumer welfare.

This approach intends to ensure that only harmful anticompetitive RTD is sanctioned by requiring that: i) the conduct may or actually does deteriorate the competitive process; ii) it is undertaken by a dominant player; and iii) the resulting efficiencies do not offset its anticompetitive effects. However, so far agents have not brought before the CFC efficiency defences regarding RTD cases.

The RTD provision in the FLEC is strictly focussed on absolute unwillingness to deal. A “constructive refusal,” which would occur if, for example, a seller imposes conditions that are so undesirable that no reasonable buyer would agree to the transaction, would be more appropriately addressed under the non-discrimination provision.

The following two cases illustrate this approach. In 1995 cellular service providers filed a complaint challenging Teléfonos de México (Telmex) and Radiomóvil Dipsa (Telmex’s cellular division) with refusing to grant them a 10% discount in long distance calls as mandated by the sector regulator, among other practices<sup>1</sup>. The CFC demonstrated that the telecoms regulator had actually required the defendants to confer discounts to the plaintiffs. The conduct was further sustained with letters issued by Telmex indicating they would not grant the discounts requested. In a different case, involving the exclusive distributor of magazines refusal to supply retailers that were not members of the local Union, the CFC demonstrated refusal by means of a covenant whereby the distributor agreed not to supply certain non-members.

The FLEC does not provide for a special consideration of RTDs depending on whether there is a history of dealing between the parties.

## **2. Refusing to deal with customers versus competitors and the influence of the essential facilities doctrine**

The RTD provision in the FLEC makes no distinction as to the person who is denied the possibility to deal. Therefore it is applicable both to refusing to deal with competitors or customers. In practice the CFC has only addressed cases involving vertical relationships.

Generally, in a finding of liability a firm holding a dominant position in an upstream market refuses to supply an input to a customer who is also a competitor in the downstream market. By refusing to supply this input, the dominant firm intends to put its downstream division in an advantageous position and displace its downstream competitor.

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<sup>1</sup> DE-16-95

This is the case of an investigation<sup>2</sup> where the CFC found Aeroméxico responsible for refusing to issue tickets to a particular travel agency and denying this service to any travel agency that sold tickets of Taesa, a competing airline.<sup>3</sup> The relevant market was defined as ticketing services supplied by airlines to travel agencies which in turn sold those tickets on commission. The affected travel agency demonstrated that it had complied with the requirements set out by Aeromexico for this purpose, and still was denied the service. Aeromexico was found to have substantial market power because it provided the majority of flights to and from the city where this policy was established and hence a substantial part of an agency's incomes depended on its sales of Aeromexico flights. The purpose of this RTD was to displace Taesa, Aeromexico's competitor in passenger travel services in the city concerned.

However, some early CFC decisions did not define the relevant market as that concerning the input, but rather defined it as that in which the anticompetitive effect occurred or was intended to occur. One such decision is the case described above in which Telmex refused to grant competing cellular operators a mandatory 10% discount applicable to intensive long distance users. The relevant market was defined as cellular telephony services where Telmex' cellular operator had substantial market power. However, the refusal entailed discounts in long distance telephony services, and the CFC found that this refusal had the purpose to hinder competition in cellular telephony by inhibiting the use of cellular phones to make long distance calls.

On the other hand, the analysis of a horizontal RTD under the Mexican legislation would entail differences as to the market where the displacement or access denial occurs or is intended to occur, which would presumably be same in which the alleged responsible party holds market power.

The essential facilities doctrine (EFD) has not been developed in Mexico, but a word may be said with respect to the influence of disputes associated with access to facilities in the assessment of RTD cases. In solving access controversies, competition and sectoral legislations play a complementary role. Sectoral laws guaranty access to certain facilities under an ex ante approach. Meanwhile, the FLEC focuses on preventing anticompetitive conduct and the emergence of a dominant agent in the markets under an ex-post approach.

The FLEC does not explicitly refer to essential facilities. However, relative monopolistic practices typified in the FLEC embrace all access disputes arising in public utilities, namely RTD, discrimination in price or conditions of sale and raising rival's costs. The assessment of discriminatory conduct and raising rival's costs is subject to the same general approach described above for RTD.

Under the FLEC, access controversies are analysed as relative monopolistic practices and are reviewed on a case-by case basis. In competition analysis, the definition of relevant product and geographic markets is central to determine whether a facility is essential or not: an improper definition may result in a facility being labelled *essential* when it clearly is not the case. The substitution analysis applied permits a broader definition than that forseen in the sectoral approach which limits itself to the facility, the feasibility of it being replicated and its significance for the complementary activity.

As explained above, the relevant market is where the key facility lies (upstream market), while the complementary market is where the new entrant is seeking access. Under this analysis, access concerns may arise even with no vertical integration on the part of the key facility provider. For example, if the agent limiting access wields substantial market power, unjustified access denial, delay or discrimination is considered a relative monopolistic practice in violation of the FLEC.

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<sup>2</sup> IO-14-94 and RA-15-95

<sup>3</sup> IO-14-94 and RA-15-95

Determining market power involves the assessment of the effects of barriers to entry on competition conditions, and some of these elements are common to the EFD. For instance, a competitor's inability to develop alternative facilities because of investment requirements, access to financing, term required to recoup the investment, and the importance of sunk costs. The existence of normative barriers such as exclusive rights over key facilities are also considered.

In addition, proceedings under the FLEC allow the responsible party to justify access denial, delay or discrimination. The arguments submitted by the dominant party for its defence, which can be either technical or commercial, are weighed against their effect on competition. Some common justifications for refusal are: that the competitor has a poor credit history or is technically ill-equipped; that there is no spare capacity and no additional capacity can be created. If objectively justified, the CFC can agree to accept a refusal of access.

### **3. Sellers' right of autonomy versus special responsibility of dominant firms.**

The requirement that firms possess substantial market power for a finding of liability to proceed could be taken to mean that dominant firms have a special responsibility not to harm competition, under the Mexican approach. Moreover, unilateral conduct by non dominant firms may not be sanctioned. Therefore, while non-dominant firms may harm individual competitors, their lack of market power makes it unlikely that their conduct harms the competitive process.

However, the demonstration of dominance may not be interpreted as if RTD (and unilateral practices generally) by dominant firms ensue a per se offense. As explained in the first section, by providing for an efficiency defence, the rule of reason approach used in Mexico intends to sanction only unilateral conduct that generates economic inefficiency.<sup>4</sup>

Furthermore, by permitting alleged violators to offer justifications for their RTD, the Mexican approach is open to consider the legitimate right of firms to choose with whom they will and will not deal, as long as this decision does not deter competitive conditions. The demonstration of intent or effect plays a complementary role by requiring that the RTD be aimed at or has the effect of displacing agents, impeding access or establishing exclusive advantages.

The RTD case concerning Aeromexico's denial to provide ticketing services to travel agents illustrates this issue. During the investigation Aeromexico claimed that a travel agent meeting its requirements for the provision of ticketing could be legitimately denied this service in view of the market size. Its argument was that market saturation increases costs of the distribution channel and thus limits the feasible number of travel agencies. However, the CFC considered that the argument prevented competitive entry of travel agencies. In its appeal Aeromexico claimed that the CFC intervention ordering it to cease denial limited its freedom to deal with whomever he chose to. The CFC acknowledged Aeromexico's right to establish sales conditions but required equal treatment to competing agents meeting those conditions.

### **4. Same conduct – different analysis?**

Under the framework set forth by the FLEC, it is not possible to predict that consistent legal outcomes will be attained whether the conduct is investigated as a RTD or as some other conduct such as discrimination. Although it may be argued that it is the effects of the conduct on competition that matter, under the Mexican methodology effects are not the only standard for sustaining harm to competition. The FLEC grants the CFC preventive powers in the enforcement of competition legislation and therefore a demonstration of intent is equivalent to actual or potential anticompetitive effect stemming from RTD in

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<sup>4</sup> García Alba, 2003

terms of displacing agents, hindering access or establishing exclusive advantages. This implies that actual harm need not occur for a RTD to be sanctioned.

In addition, divergent results may also derive from the lack of sufficient evidence to demonstrate the occurrence of a given conduct. Whereas the standard for RTD implies showing there was a request, that the request was denied and that the requested party normally provides the good/service to third parties, a finding of discrimination needs to meet different standards. This does not invalidate the fact that a RTD may have a discriminatory nature. The CFC has actually acknowledged the discriminatory nature of RTD in its decisions, as in the case where Aeromexico denied ticketing services to travel agents that also sold tickets of a competitor airline. In its response to the appeal the CFC demanded equal treatment of competitor travel agencies that met all the conditions imposed to obtain ticketing services.

Furthermore, complaints brought before the CFC typically allege the commission of simultaneous conducts which reinforce each other resulting in harm to competition. For instance, in two similar investigations<sup>5</sup> entailing exclusive magazine distributors refusing to supply non-members of retailer unions, the CFC also found that the unions themselves were incurring in boycott actions to punish dissident members and to reinforce their dominance in their respective regions.

Similarly, in the complaint filed by cellular phone operators charging Telmex with denying mandatory discounts to intensive users of long distance calls, predatory pricing was also claimed. The CFC found that Telcel systematically charged predatory prices in cellular services thus increasing its revenues in the access market. It also found that the refusal to grant cellular phone operators the applicable discount reduced these agents' ability to compete for long distance calls originated in cellular phones.

## **5. Harmful and justified RTD**

Harm to competition is assessed on the grounds of intent and effects of displacing, hindering access or establishing exclusive advantages. As explained above, this implies that actual harm need not occur for a RTD to be sanctioned. This acknowledges the CFC's preventive powers in the enforcement of competition legislation. However, in determining the sanction, the CFC makes an additional evaluation of the illegal conduct that comprises gravity, harm caused, intent, market share and size, duration of the conduct, as well as recidivism, records and economic capacity.

Under these criteria, RTD having actual effects rather than only potential ones would be considered for a stronger sanction. The essentiality of inputs denied, market size and duration of the conduct would also add to the anticompetitive harm.

Insofar as no efficiency gains have been accredited in RTD, the CFC has little experience in justifying RTD by dominant agents.

## **6. Statutory effectiveness**

As described above, the FLEC explicitly addresses RTD, and sets out a framework that enables the CFC to sanction those RTDs that are harmful to competition. However, there are several factors that have weakened the effectiveness of RTD rules and provisions on relative monopolistic practices generally. First, the Mexican judicial system provides too many incentives for the defendants to undertake excessive litigation and delay the application of the CFC's resolutions.<sup>6</sup> Second, in many instances, the level of fines

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<sup>5</sup> IO-11-95 e IO-13-95

<sup>6</sup> For example, the CFC is not empowered to impose precautionary measures, which provides defendants with incentives to undertake excessive litigation to delay judicial decisions even if they expect to lose the case.

established in the law has not been enough to deter anticompetitive behaviour, in view of the size and economic power of violators.

## **7. Concluding remarks**

The FLEC contains specific provisions on RTD and sets out a framework that enables the CFC to sanction only those conducts that are harmful to competition by requiring that: i) the refusal may or actually does deteriorate the competitive process; ii) it is undertaken by a dominant player; and iii) the resulting efficiencies do not offset the anticompetitive effects of RTD. In addition this framework is suited to address access disputes in consistency with the principles of the essential facilities doctrine. The CFC has reviewed and sanctioned some relevant vertical RTD but it has not been immune to conceptual problems in this analysis, particularly regarding the adequate identification of the relevant and complementary markets. Thus, although the general framework seems to be conceptually fit to address RTD, the lack of guidelines setting conduct-specific criteria to apply this framework has generated uncertainty and lack of consideration of legitimate efficiency defences.

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Furthermore, since judicial authorities lack expertise in competition matters, they tend to avoid decisions based on the substantive merits of the case, which, provides defendants with incentives to excessively focus on procedural details.

## LA SUISSE

### 1. Contexte Juridique Suisse d'abus de position dominante et du refus en l'espèce d'entretenir des relations commerciales.

Selon la législation suisse, à savoir la loi sur les cartels et autres restrictions à la concurrence (LCart; RS 251), l'article 7 al. 2 LCart énumère certaines pratiques réputées illicites de la part d'entreprise ayant une position dominante. La lettre a de l'art 7 al. 2 LCart dispose qu'il est illicite de la part d'une entreprise en position dominante de refuser d'entretenir des relations commerciales, par exemple en refusant de livrer des marchandises.

Une entreprise, même celle disposant d'une position dominante, demeure en principe libre de choisir sa politique de marketing, ses partenaires contractuels, son réseau de fournisseurs et son système de distribution. Ce n'est qu'en cas d'abus d'une position dominante qu'une obligation de contracter peut être mise à charge de l'entreprise en position dominante (Message LCart, FF 1995 I p. 565ss).

Ainsi, l'interdiction visée à l'art 7 II/a LCart comporte 3 conditions. En premier lieu, l'entreprise doit disposer d'une **position dominante** sur le marché. Le **refus** - en l'espèce d'entretenir des relations commerciales - **doit être abusif**. Enfin, le refus d'entretenir des relations commerciales ne doit reposer sur **aucune raison commerciale légitime**.

Ainsi, selon la doctrine<sup>1</sup> la rupture arbitraire par une entreprise dominante des relations commerciales qu'elle entretenait avec un partenaire sont abusifs à quatre conditions cumulatives:

- absence de substitut réel ou potentiel;
- caractère indispensable du produit, service ou infrastructure en cause;
- suppression de la concurrence;
- absence de légitimation objective.

Si le refus est inspiré par un motif anticoncurrentiel, le fait qu'il a aussi un objectif légitime ne suffit pas nécessairement à le justifier. L'entreprise dominante peut notamment se comporter de manière abusive dans les situations suivantes :

#### *1.1 Préservation ou augmentation des parts de marché*

La rupture arbitraire des relations commerciales peut relever uniquement de la volonté de l'entreprise dominante de préserver ou augmenter ses parts de marché au détriment d'un partenaire. Par conséquent, ce type d'action est considéré comme abusif.

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<sup>1</sup> Droit de la concurrence, Commentaire Romand, Helbing et Lichtenhahn 2002, page 395 et ss

## **1.2 Expansion sur un marché voisin**

La rupture ou le refus arbitraire peut aussi reposer sur la volonté de l'entreprise dominante d'entrer sur un marché ou d'étendre sa position sur le marché voisin, en écartant des entreprises indépendantes ou en empêchant l'entrée de nouveaux concurrents sur ce marché voisin.

Ainsi, l'entreprise dominante abuse de sa position dominante si elle refuse, sans motif valable, de livrer un produit ou de fournir un service sur le marché où elle occupe déjà une position dominante, aux entreprises dont les activités se situent sur le marché voisin sur lequel elle pénètre et avec lesquelles elle entrerait en concurrence. A la condition précédente, s'ajoute le caractère indispensable du produit ou service à l'activité des entreprises en cause et que la rupture des relations commerciales aura pour effet d'éliminer celle-ci de la concurrence. Comme on le verra, cette situation caractérise le cas ETA SA Fabriques d'Ébauches (ci-après ETA) développé ci-dessous.

La rupture de relations commerciales ou le refus de contracter peut être abusif aussi bien lorsque l'entreprise dominante se réserve à elle-même que lorsqu'elle réserve à une entité membre de son groupe une activité auxiliaire sur un marché voisin.

A contrario, il n'y a pas d'abus en l'absence de restriction à la concurrence, c'est-à-dire, dans l'hypothèse où, soit le concurrent est déjà présent sur le marché voisin et n'en est pas écarté, soit l'entreprise dominante n'est pas présente sur le marché voisin et n'a pas l'intention d'y entrer.

## **1.3 Discrimination d'un partenaire commercial**

Un refus discriminatoire de contracter ou une rupture discriminatoire des relations commerciales est abusif lorsque l'entreprise dominante refuse de débiter des relations commerciales avec un partenaire commercial, ou interrompt celles-ci, alors qu'elle a conclu ou qu'elle poursuit des contrats similaires dans des conditions comparables avec d'autres entreprises, et lorsque le produit ou service en cause est indispensable à l'exercice des activités de l'entreprise requérante, de sorte que celle-ci risque d'être exclue de la concurrence.

Par contre la rupture des relations commerciales peut être justifiée par la nécessité pour une entreprise dominante d'adapter son réseau de fournisseurs, ses canaux de distribution aux modifications des circonstances intervenant sur le marché.

Si les mêmes conditions sont appliquées pour apprécier les effets d'une rupture ou d'un refus de relations commerciales, elles sont toutefois interprétées de manière plus stricte dans les cas de rupture de relations commerciales existantes que dans ceux qui veulent amorcer de telles relations. Par ailleurs, des relations commerciales existantes peuvent créer au cours du temps une situation de dépendance. Il s'agit alors de voir la responsabilité du lésé dans la constitution de cette relation de dépendance. Une analyse de l'histoire de la relation commerciale concernée et de l'industrie est alors indispensable.

## **2. Le cas ETA Swatch<sup>2</sup>**

### **2.1 Le comportement incriminé**

En juillet 2002, l'entreprise ETA filiale du Swatch Group (groupe possédant plusieurs entreprises à différents niveaux de production de l'industrie horlogère ainsi qu'un portefeuille important de marques)

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<sup>2</sup> ETA SA Fabriques d'Ébauches, DPC 2003/3, p. 504 et ss.

informait tous ses clients qu'elle allait réduire à partir du 1er janvier 2003 les quantités d'ébauches<sup>3</sup> livrées et cesser à partir du 1er janvier 2006 toute livraison d'ébauches ("phasing-out"). Pendant la période de phasing-out de trois ans, ETA devait livrer le volume correspondant à la réduction des quantités d'ébauches sous forme de mouvements, c'est-à-dire d'ébauches déjà assemblées.

ETA a justifié cette décision dans son courrier par la volonté d'améliorer notamment sa logistique ainsi que de garantir la qualité des produits finis.

## 2.2 *Position d'ETA sur le marché pertinent*

ETA était quasi l'unique fournisseur sur le marché des ébauches mécaniques *Swiss made* dont le prix unitaire de vente se situe au dessous de CHF 300. En effet environ 75% de tous les mouvements mécaniques produits en Suisse se basent sur une ébauche produite par ETA. Rolex produit également des ébauches en quantité importante mais destinées seulement à sa propre production; aucune vente à des tiers n'est effectuée.

D'autres entreprises horlogères produisent également des ébauches. Toutefois, ces ébauches ne sont fabriquées qu'en nombre limité et leur prix est en conséquence beaucoup plus élevé (de CHF 400 jusqu'à CHF 2'500 - et plus). Celles-ci ne constituent donc pas un substitut aux ébauches d'ETA. Si on exclut les ébauches de Rolex et les ébauches qui ne sont pas substituables en raison de leur prix élevé et de leur quantité ainsi que les ébauches vendues par ETA sous forme de mouvements terminés, ETA possédait une part de marché de plus de 95%. ETA est ainsi dominant sur le marché pertinent des ébauches mécaniques *Swiss made*<sup>4</sup> dont le prix unitaire va jusqu'à CHF 300 - CHF.

## 2.3 *Contexte historique*

Les conditions actuelles sur le marché et les relations commerciales entre ETA et les clients sont marquées par une dépendance économique qu'il faut replacer dans le contexte historique .

En 1926, en temps de surproduction, trois des plus grands producteurs d'ébauches de Suisse s'unissaient sous la bannière d'Ébauches SA. L'objectif de cette union était en particulier de stabiliser les prix et les conditions de vente des ébauches.

Par le biais d'acquisitions, Ebauches SA acquit très rapidement dans le monde entier une grande importance au sein de l'industrie horlogère. Sa vocation était d'affirmer et de renforcer la position leader de l'industrie horlogère suisse par un niveau élevé de développement de ses produits et une offre large de calibres produits en quantités industrielles.

Ainsi, au milieu des années 80, les plus grands producteurs d'ébauches étaient rassemblés dans une seule société, l'ancienne ETA SA Fabriques d'ébauches, aujourd'hui dénommée ETA Manufacture Horlogère Suisse.

La situation actuelle du marché découle donc d'une première concentration des différents fabricants d'ébauches dans une seule entreprise réalisée pour des raisons d'efficience qui plus tard – suite à des

<sup>3</sup> Ensemble de pièces non assemblées du mouvement d'une montre et commercialisées sous cette forme.

<sup>4</sup> Le « made in swiss » pour des raisons notamment de marketing est une caractéristique fondamentale du marché pertinent, ceci, notamment pour respecter ce label lors de la vente du produit fini. Ainsi les ébauches *made in swiss* de ce point de vue (et donc de celui des assembleurs et des marque de montres) n'est pas substituable avec des ébauches d'autres provenances.

réglementations nationales de certains secteurs de l'industrie horlogère – a été chargée notamment d'un contrat d'approvisionnement.

Même si le statut de l'horlogerie n'est plus en vigueur aujourd'hui, toute l'industrie horlogère suisse repose sur l'existence de ces vieilles structures, sur lesquelles tous les participants au marché, y compris ETA, se sont appuyés et pouvaient s'appuyer. Et cette situation est la résultante notamment d'une volonté de l'état de rationaliser la structure industrielle de la production d'ébauches.

## **2.4 Analyse concurrentielle**

Comme déjà précisé ci-dessus, selon l'art. 7 al. 2 lit. a LCart, une entreprise dominant le marché se comporte abusivement si elle refuse d'entretenir des relations commerciales (p. ex. refus de livrer ou d'acheter des marchandises). La notion d'abus de position dominante couvre également, outre la cessation et le refus de livrer, la restriction des relations commerciales. Une entreprise dominant le marché ne peut pas ainsi mettre fin à des relations commerciales pour évincer du marché des clients ou des fournisseurs ou parce qu'elle a décidé d'être elle-même active sur un marché en aval ou en amont du client.

## **2.5 Effet sur les marchés en aval**

La mise en œuvre de la cessation progressive de livraison d'ébauches prévue par ETA influencerait de différentes manières le marché concerné et les marchés en aval. En effet, ETA fournit trois différents types de clients d'ébauches: les assembleurs, les modificateurs<sup>5</sup> et les marques de montres.

Parmi ces trois types de clients, les entreprises d'assemblage sont particulièrement dépendantes de la livraison d'ébauches. Pour ces entreprises, des mouvements terminés ne représentent pas d'alternatives. Si ETA livre des mouvements terminés à la place d'ébauches, les assembleurs n'ont plus la possibilité de travailler puisque leur tâche principale consiste justement en l'assemblage de mouvements.

Les modificateurs sont aussi dépendants de la livraison d'ébauches puisque pour la majorité des modifications (complications), la platine de base de l'ébauche doit être modifiée par des perforations supplémentaires et d'autres ajouts. Si des mouvements étaient livrés terminés, ceux-ci devraient d'abord être démontés. Le démontage des différents éléments du mouvement induit des frais supplémentaires et entraîne des détériorations de la qualité. C'est pourquoi le démontage d'un mouvement terminé est peu attractif pour les modificateurs.

La réduction de la quantité livrée en ébauches signifierait déjà pour les assembleurs et les modificateurs qu'ils ne pourront plus satisfaire l'intégralité de la demande de leurs clients actuels en mouvements terminés et mouvements modifiés puisqu'ils ne disposeraient plus de suffisamment d'ébauches. Ces clients seraient donc contraints de se procurer ailleurs les mouvements manquants.

Comme ETA serait la seule à disposer de suffisamment d'ébauches, les clients pour les mouvements manquants devraient s'adresser à ETA. Après la cessation complète des livraisons d'ébauches, ces clients devraient couvrir l'intégralité de leurs besoins en mouvements terminés auprès d'ETA, puisque les producteurs de mouvements terminés ne pourraient plus fabriquer de tels mouvements faute d'ébauches. Les fabricants de montres qui montaient jusqu'alors eux-mêmes leurs mouvements avec des ébauches d'ETA ne pourraient plus procéder de la sorte mais seraient forcés de les acheter sous forme finie. Pour les raisons mentionnées ci-dessus, la seule source d'approvisionnement serait ETA. Ainsi, il faut partir du principe que la mise en œuvre du *phasing out*, suivi de l'arrêt complet des livraisons d'ébauches, pourrait entraîner pour les assembleurs et les modificateurs des pertes financières significatives et même la faillite.

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<sup>5</sup> Les entreprises ont souvent les deux activités d'assembleur et de modificateur.

Il ne subsisterait sur le marché que les entreprises qui fabriquent des ébauches pour leur propre utilisation. ETA serait quasiment le seul fournisseur (puisque les entreprises intégrées ne font pas partie du marché) de mouvements et donc, aurait un contrôle total sur toutes les marques sauf celles intégrées verticalement comme Rolex et d'autres petites manufactures.

Ainsi, le quasi-monopole d'ETA sur le marché des mouvements et donc de l'assemblage de ceux-ci conduirait l'industrie horlogère suisse au niveau des marques de montres dans une situation de grande dépendance vis-à-vis d'ETA.

La mise en œuvre du phasing-out, suivi de l'arrêt complet des livraisons d'ébauches, constituerait une rupture des relations commerciales existantes par l'entreprise en position dominante qu'est ETA et affecterait de manière notable la concurrence sur tous les échelons des marchés situés en aval, mettant ainsi en danger l'existence de plusieurs acteurs importants du marché et leur indépendance voire leur survie.

En effet Swatch Group a un important portefeuille de marques de montres dans différents segments qui sont en concurrence soit avec d'autres groupes possédant aussi un portefeuille de plusieurs marques ou possédant seulement une seule marque sur ces mêmes segments. Ces différents acteurs seraient par ailleurs dépendants en terme de fournisseur de mouvements du groupe Swatch. Outre la disparition de nombre d'acteurs, on voit ainsi les problèmes que peut induire en terme de discrimination, et donc de distorsion de la concurrence, une telle structure industrielle.

Ainsi les quatre conditions (absence de substitut réel ou potentiel, caractère indispensable du produit, service ou infrastructure en cause, suppression de la concurrence, absence de légitimation objective) mentionnées ci-dessus pour que le refus d'entretenir des relations commerciales soit abusif sont remplies. En ce qui concerne les légitimations qu'a fait valoir ETA à savoir la volonté d'améliorer sa logistique ainsi que de garantir la qualité des produits finis, elles n'ont pas été retenues après examen.

## **2.6 Accord amiable**

Il s'agissait ainsi de répondre à ce refus à terme d'entretenir des relations commerciales par un remède de type comportemental.

Parmi les remèdes comportementaux, on trouve l'aménagement de l'accès à des licences, les brevets, marques ou technologies telles que la licence de marques, l'obligation de concéder à des conditions raisonnables une licence de brevet à tout demandeur éventuel ou la concession de licence de fabrication ou encore, comme le cas présent, d'inputs indispensables à la fabrication d'un produit.

L'autorité lors de l'analyse de ces engagements, va vérifier si les remèdes permettent le maintien d'une concurrence effective. Dans le cas précité, le risque était la mise en difficulté de concurrents et à terme d'avoir un monopole sur le marché (les autres entreprises étant intégrées) de l'assemblage de mouvement et de contrôler ainsi toute l'industrie en aval.

Il s'agissait donc de définir un remède comportemental. La Comco a choisi dans un accord amiable de définir les conditions de livraison des ébauches pour une période donnée.

Le secrétariat de la Comco a donc examiné de manière approfondie les projets des concurrents potentiels, et en particulier la question du temps nécessaire pour pouvoir développer, produire et mettre sur le marché un substitut aux ébauches d'ETA (barrières d'entrée au marché). Cette analyse s'est fondée sur les „business plans“ fournis par les concurrents potentiels. L'analyse des business plans ainsi que l'évaluation des réponses aux questionnaires ont montré que la mise sur pied d'une production concurrente d'ébauches représente une entreprise longue et coûteuse.

Le déroulement temporel du projet dépend de différents facteurs. La complexité du calibre<sup>6</sup>, le volume de production envisagé ainsi que la gamme de produits à fabriquer jouent un rôle important. La question du nombre de calibres différents à développer simultanément et dans quels intervalles de temps est fortement dépendante des moyens financiers disponibles. Les investissements nécessaires oscillent selon les projets entre plusieurs millions et plusieurs dizaines de millions de francs suisses. Il faut compter une durée d'environ huit ans pour le lancement de deux à quatre calibres. Cela signifie qu'il faut compter au minimum jusqu'à 2011 pour voir l'arrivée de nouveaux concurrents sur le marché qui en tant qu'offres alternatives d'ébauches ou de mouvements terminés soient à même de constituer un contrepois à ETA. Pendant la période de développement, les nouveaux entrants dépendent toutefois encore des ébauches d'ETA pour continuer à livrer leurs clients et ainsi rester actifs sur le marché de l'assemblage.

Il convenait de trouver une solution pour faire face à cette période de transition. Le 7 septembre 2004, un accord amiable a pu être trouvé avec ETA concernant la poursuite des livraisons d'ébauches.

Les points suivants forment le contenu essentiel de cet accord. ETA s'est engagée à livrer jusqu'en 2008 (y compris) à chaque client 85% de la quantité moyenne d'ébauches livrées dans les années 1999/2000/2001 de chaque famille de calibres. En 2009, l'obligation de livraison sera réduite à 50% et en 2010 à 25%. La quantité de référence est déterminée pour chaque famille de calibre<sup>7</sup>. La différence par rapport à la quantité de référence pour chaque famille de calibre sera livrée sous forme d'ébauches assemblées, donc de mouvements terminés.

Il a été de plus convenu de qualifier les prix actuellement en vigueur comme étant des prix couvrant les coûts plus une marge habituelle. Pour cette raison, ETA doit annoncer au secrétariat de la Comco toute augmentation de prix future allant au-delà du renchérissement normal. Après audition d'un expert neutre, le secrétariat décidera si l'augmentation de prix est justifiée.

En cas de non-respect de cet engagement, une peine conventionnelle sera due. Pour éviter le problème de la contrefaçon qui était mis en avant par ETA pour justifier son *phasing out* - qui n'a pas été retenu par la Comco comme justificatif -, l'accord amiable retient une condition y relative. Selon cet accord, ETA a le droit de lier ses livraisons d'ébauches à la condition que le client fournisse une déclaration écrite, selon laquelle il livre exclusivement des clients avec des mouvements mécaniques ETA qui se sont eux-mêmes engagés par écrit à ne pas intégrer des mouvements ETA à des fins de contrefaçon.

Il faut ici souligner que la Commission de la concurrence respecte fondamentalement le changement de stratégie d'ETA. Cela ne doit cependant pas se faire aux dépens de la concurrence, ce qui aurait été le cas avec un *phasing-out* d'une durée de trois ans seulement.

## 2.7 *Effet de l'accord amiable*

L'accord amiable passé avec ETA accorde aux acteurs du marché un délai réaliste pour mettre sur pied des sources d'approvisionnement alternatives d'ébauches. L'objectif de cet accord amiable est de rendre possible l'introduction de produits concurrents aux ébauches d'ETA et de créer ainsi les bases pour une situation concurrentielle sur différents niveaux de production de l'industrie horlogère suisse mécanique. Ceci étant, au terme de l'accord en 2010, s'il y a lieu que la situation concurrentielle est telle

<sup>6</sup> Un calibre qualifie un mouvement spécifique et donc les ébauches y relatives.

<sup>7</sup> Familles de calibres : les différents calibres se classent par famille de calibres. La famille de calibre 2670 contient par exemple les calibres 2660, 2671, 2678, 2681 et 2688. Tous les calibres d'une famille sont basés sur une même platine. La platine est la pièce de base sur laquelle toutes les autres pièces du mouvement sont assemblées. Dans une famille de calibre il existe différentes variantes techniques tels qu'un mouvement automatique, manuel, ou encore la présence d'un calendrier.

qu'ETA et toujours en position dominante elle se devra évidemment de respecter l'article 7 de la LCart et ainsi notamment ne pas discriminer ni de refuser d'entretenir des relations commerciales avec ses clients.

Aujourd'hui en 2007, la structure industrielle est beaucoup plus dynamique qu'en 2002. Plusieurs acteurs se sont lancés sur le marché en amont et sont donc actifs sur le marché des ébauches et de la conception de mouvements. La quantité produite par ces acteurs est significative.

Leur *know how* acquis sur le marché de l'assemblage et leur connaissance de l'industrie horlogère leur a permis de mettre en œuvre relativement rapidement l'organisation d'un réseau de fournisseurs et de concevoir des mouvements et les ébauches y relatives. Ceci met en évidence que si ces acteurs avaient disparu - ce qui aurait été le cas sans l'intervention de la Comco – outre les problèmes concurrentiels mis en évidence ci-dessus, l'entrée sur le marché d'acteurs ayant moins de proximité avec l'industrie concernée, aurait été beaucoup plus aléatoire et longue. Aujourd'hui, à deux ans du terme de l'accord, s'il existe des alternatives sur le marché, ETA a encore une part de marché plus que significative.



## TURKEY

### 1. Legal Framework and General Consideration

The main legal framework to deal with refusal to deal (RTD) by dominant undertakings is the Article 6 of the Turkish Competition Law (TCL) which is Act on Protection of Competition No:4054. Article 6 prohibits abuse of dominant position and contains a non-exhaustive list of abusive practices. Though RTD is not directly counted by the Article 6 as an example, as the list is not exhaustive, then it is possible to prohibit such practices under Article 6.

The most important concern in RTD cases is the exclusion/foreclosure which would result from refusal conduct.

Generally dominant undertakings are considered to have a special responsibility not to impair competition in the market where due to its dominant position competition is already been restricted. This responsibility is of great importance for RTD cases in particular. In line with the special responsibility, dominant undertaking is assumed to be under a general obligation to deal with its long-time customers. This general approach is also applied by the Turkish Competition Authority (TCA).

Considering the practice of the TCA, the following conditions are generally sought for an analysis of a traditional RTD case:

- whether the undertaking is dominant or not,
- whether there is any refusal conduct or not (while supplying for some customer/competitors, stopping to deal with some other),
- whether there is any history of relation or not,
- whether there is any objective justification or not,
- whether there is any objective to restrict competition and/or any negative impact on competition.

However, in practice the examination of above conditions in particular the very last two conditions (justification and objective/impact) are required to be examined carefully. Otherwise, it might be the case that a successful competitor who as a result of its higher efficiency and dynamism holds a market power, can be punished due to an over jealous enforcement of competition rules. If the objective behind the idea of competition is to force companies to be the best, then that objective should be respected when the companies are in the position of being the better or the best.

### 2. Defining refusal

In the Turkish practice, refusal is not directly defined. However, from experience on the basis of the specific cases dealt with by the TCA, refusal conduct can be classified as a direct refusal which takes place in the form of an explicit rejection to trade to a particular customer/competitor and as an indirect refusal

which takes place in the form of either unreasonably excessively high pricing in compare to production cost, provision of low quality goods/services which would damage the trading partners.

Thus for a practice to be regarded as a refusal, it is not needed to be a direct refusal. Other types of conducts which produce a similar result can also be regarded as a refusal and can be an abusive practice under competition law.

### **3. Customer/Competitor**

The TCL does not explicitly mention RTD an abuse example and therefore it does not make any direct distinction between a RTD with a customer and RTD with a competitors. Considering the practice of the TCA it is possible to argue that a RTD with a competitor is more harmful in terms of competition and therefore such practice is needed to be examined more carefully. However, examination of an RTD with a competitor requires a competition agency to be also careful in differing between a competitive reaction and abusive reaction. Correspondingly, as it can be seen from the cases examined for the purposes of this contribution, in cases where RDT takes place with respect to customer, the TCA does not consider the conduct as an abusive practice, however in cases where RTD takes place with respect to a competitor, the TCA has a more strict approach and may find such conduct as an abusive practice.

### **4. Harmful RTD from Efficient Ones**

In the Turkish practice, it is possible to argue that the objective of enforcement of competition rules is basically to protect the competitive process as a result of which the social welfare could be increased. In this regard, the main idea and purpose behind the enforcement of competition rules in the area of RTDs, is to protect competition rather than a particular competitor.

However, in practice it is not an easy work to observe this objective, as in many cases, exclusion of particular competitor could well coincide with restriction of competition in the market.

The following cases (Anadolu Cam/Mercan Solmaz Case and Aysan/Elkamet Case)

are important in demonstrating the approach of the TCA in this respect.

#### **4.1 *Anadolu Cam/Mercan Solmaz Case (date: 05.06.2007 and no: 07-47/506-181)***

In Anadolu Cam/Mercan Solmaz case, the TCA did not consider the RTD by Anadolu Cam to its customer Mercan Solmaz an abuse.

In this case, the TCA defined two relevant markets which are respectively “glass home product market” and “glass package market”.

Anadolu Cam is a dominant company operating in glass package market. Mercan Solmaz is a company operating in glass home products market and it purchases certain intermediary products produced by Anadolu Cam as glass package products such as bottle, cups etc. Mercan Solmaz makes such intermediary products to be subject to certain production processes and finalize them as glass home products. On the other hand, Paşabahçe, an affiliate of Anadolu Cam operates in Glass Home Products market in competition with Mercan Solmaz.

Mercan Solmaz claimed that Anadolu Cam refused to supply glass package products and did aim at driving Mercan Solmaz out of Glass Home Products Market.

The TCA investigated the practice whether it is an abuse of not under Article 6 of the TCL. The TCA did examine the RTD by Anadolu Cam on the basis of following criteria:

- whether Anadolu Cam is dominant or not,
- whether there is a refusal to deal or not (considering also the history of relation),
- whether there is any objective justification or not,
- whether competition is restricted or not.

The TCA evaluated the allegation on the basis of the above criteria. Considering first three criteria the TCA did have the following findings:

- Anadolu Cam holds a dominant position in the relevant market,
- There is an explicit refusal conduct by Anadolu Cam,
- Anadolu Cam does not have sufficient objective justification.

However, the TCA did not suffice with these three conditions and additionally sought to find out whether the RTD had a negative effect or not on competition in the market where Solmaz Mercan operates.

The findings of investigation demonstrated that the refusal did not create any negative effect on competition and thereby did not restrict competition. In reaching at this conclusion the TCA basically examined how the refusal conduct affected the competitive conditions in the market.

During the period where the refusal conduct did take place, it was seen that Solmaz Mercan could find two alternatives, import and Marmara Cam, a competitor of Anadolu Cam. However these two alternatives were less convenient in compare to Anadolu Cam. The TCA did not regard that fact of less convenience as an important evidence to conclude that the competition was impaired.

Significantly the TCA examined the market parameters such as price, quality and quantity in the market where Solmaz Mercan operated and concluded that despite the fact that Solmaz Mercan was influenced by the refusal conduct, it did not significantly affect competition in the market.

#### **4.2 In Aysan/Elkamet Case (date: 22.3.2007 and no: 07-27/248-83)**

In this case Aysan complained that Elkamet had terminated the dealer relationship in between Aysan and Elkamet and Elkamet had signed a dealer agreement with another company (Selden) and importantly it had forced Aysan to deal with Selden.

In this case, the TCA examined the following conditions to conclude for an abuse:

- the company should hold a dominant position,
- the dominant company should cease to supply a sufficiently long-contracted customer without any objective justification,
- While the dominant undertaking supplies to certain customer it does stop to supply some other customers,

- whether the dominant company has any purpose to restrict competition or not or alternatively the conduct has any restrictive effect,

Analysis of the case under those conditions it was concluded that there is no long term relations in between the complainant customer and supplier, additionally even if the customer was refused to be supplied, then this refusal did not result in any restriction of competition as the refused customer was shown another resource to purchase its needs as well as such refusal did not drive out of market any company. In this regard, the TCA mainly examined whether the conduct restricts the competition or not, and it did not find it sufficient the fact that a particular customer's interest was damaged.

## **5. Same Conduct/Different Analysis**

For an analysis of an RTD, it does not matter whether it is a direct refusal to deal or an indirect one for example in the form of excessively high pricing in terms of its implications. What matters in terms of implication is whether the conduct produce any exclusionary effect the conduct may produce. For example in *Teleon case* and *National Roaming case* to be examined below, excessively high pricing was regarded as an RTD.

On the other hand, the conduct can be analyzed via different methods if it is a direct refusal or it is an indirect one.

## **6. History of Dealing**

History of dealing is an important factor in particular for traditional RTD cases. In such cases, the market conditions are determined to a certain extent by the existence of dealing relation in between the supplier and customer/competitor and therefore, generally if there is no objective justification for a RTD where there is a history of dealing, then the conduct can easily be regarded as an abuse.

In the TCA's practice whether there is a history of dealing is always sought as a criterion in assessing in RTD. In this regard, almost in all cases examined and mentioned in this contribution, history of dealing is an important criterion.

## **7. Reasonable Justification**

The existence of reasonable justification is quite important in concluding that a particular refusal conduct is not an abuse under the TCL. Considering the special responsibility of a dominant undertaking in cases where it is under a general obligation to deal with its customer with a sufficiently long history of trading, any possible reasonable justification should be regarded and examined carefully in order to come to a true conclusion about the conduct. Depending on the characteristics of the market in question, the undertakings can put forward different justifications which are objective in order to avoid from a possible accusation under competition rules.

In the cases examined below the TCA accepted different reasons as objective justification and did not find RTD as an abuse.

### **7.1 *Dog-Al Gübre-Ulusal Tarım Case (date: 19.10.2004 and no: 4-66/946-224)***

In this case, Ulusal Tarım among other claims did allege that Doğ-Al Gübre (fertilizer producing company) did refuse to supply the fertilizer to Ulusal Tarım and thereby did drive it out of market. Doğ-Al Gübre is a company which produces and sells fertilizer through Ulusal Tarım, which is the exclusive distributor of Doğ-Al Gübre in Turkish fertilizer market. In this regard, Doğ-Al Gübre did have a exclusive dealing agreement with Ulusal Tarım. The exclusive dealing agreement envisages the marketing and

promotion of Dođ-Al Gübre by Ulusal Tarım and it also prohibits the marketing of competing brands by Ulusal Tarım.

The TCA examined whether the refusal constitutes a true abusive practice or not. For this purpose, the exclusive dealing agreement was examined. The agreements envisages rights to terminate the agreements in case that parties fail to abide by their responsibilities such as timely payment, respect for marketing and promotion responsibilities etc.

The TCA held that for such a practice to constitute an abusive behaviour then it should result in the exclusion of competition appreciably. In particular, the TCA held that the practice can be regarded as an abuse if the dominant undertaking does not have any objective justification and the competitors/customers should be badly influenced in a manner to impede competition in the market.

The TCA mentioned for example the risky conducts and failure to abide by responsibilities envisaged for their commercial relations by their customers/competitors as a possible justification for an RTD

In this specific case of Dog-Al Gübre-Ulusal Tarım, the TCA found that Dođ-Al Gübre did refuse to supply to Ulusal because Ulusal Tarım failed to respect for its responsibilities arising from the dealer agreement in between them. Considering this reasoning as an objective justification, the TCA did not find the conduct as an infringement

## **7.2 *Türkiye Taşkömürü İşletmeleri (Turkish Coal Enterprise) (date: 19.10.2004 and no: 04-66/949-227)***

Türkiye Taşkömürü İşletmeleri (Turkish Coal Enterprise-TKI), State-Owned Enterprise organized a tender to create a new-dealer system in order to distribute its products in Konya City. As a result of this tender, TKI stopped to supply coal to its pre-tender customers in Konya. Those customers of TKI who were refused complained TKI to the TCA.

The TCA examined the complaint whether the refusal is an abuse or not. In this case, the following criteria are sought to assess the case:

- whether the company is dominant or not,
- whether the dominant company refuse to deal with some customer while continuing to deal with other,
- whether the refused customers are a sufficiently old or not,
- whether there is any objective justification or not,
- whether there is any purpose to restrict competition or not.

The TCA concluded that the TKI is a dominant position in coal market and it stopped to supply coal with those companies with a sufficiently long history of doing business with TKI. On the other hand, in terms of objective justification, the TCA founded out that TKI demolished the old system of distribution and wanted to introduce a new system of distribution based on tendering. By introducing this new distribution system, TKI wanted to establish a more efficient and productive distribution system. The TCA accepted this reasoning of the TKI as an objective justification for refusal conduct and therefore concluded that TKI had no objective of restricting competition and the refusal did not constitute an abuse under Article 6 of the TCL.

### 7.3 *Gölcük Belediyesi/Batıçim (date: 14.12.2006 and no: 06-90/1142-338)*

In this case, Izmir Governorship did claim that Batıçim did refuse to supply ready-mixed concrete to those construction fields located in Gölcük Municipality, a town in Izmir without any objective justification.

The TCA did examine four conditions to conclude whether the refusal is an abuse of not:

- the company should hold a dominant position,
- the dominant company should cease to supply a sufficiently long-time customer without any objective justification,
- While the dominant undertaking supplies to certain customer it does stop to supply some other customers,
- whether the dominant company has any purpose to restrict competition or not or else alternatively the conduct has any restrictive effect.

In this case, the TCA considered Batıçim hypothetically dominant and examined other conditions.

It was found out that while Batıçim did supply 2005 to meet the demand from the relevant region, however it ceased to supply the demanded product in the year 2006 considering the fact that transportation time needed is longer than it should be for the product to be used properly.

Additionally, the TCA did examine whether there is any objective justification or not. In this case, Batıçim did argue that the time needed to transport from the production plant to construction fields in Gölcük, is not sufficient to keep the product usable considering the sui-generis characteristics of the product.

It was argued that after loading the product into the Lorries, the product should be transported where there is a demand in due time (two hours after production) and if such timing is not respected then the product becomes un-useable.

Thus Batıçim did put forward a very economic and technical justification for its refusal. The TCA did accept this justification and did not see any other purpose to restrict competition in the market.

## 8. **Agency's Experience**

The key in evaluating a RTD is whether it excludes competitor or not from the market where the refusing undertaking has a possibility to monopolise or to have a market power. Such cases should be regarded as the most harmful RTDs and a strict set of standards should be exploited in order to evaluate the conduct under competition law.

The TCA examined carefully RTD in the following cases of *Ulusal Basın/BBD/YAYSAT and Teleon* and found that the RTD would significantly exclude competition from the relevant market thereby creating conditions which would facilitate the monopolisation in the market.

**8.1 *Ulusal Basın/BBD/YAYSAT Case (date: 14.12.2000 and no: 00-49/529-291)***

In this case, Ulusal Basın was the distributor of Star Daily. Ulusal Basın argued that BBD and YAYSAT had wanted to drive Star Daily out of newspaper market by forcing newspaper sale agents to not sell Star Daily distributed by Ulusal Basın.

According to findings of investigation, the newspaper agents constituted sort of facility without access to which in individual newspaper could not survive.

In particular considering the particular characteristics of newspaper market, it was seen that all newspaper regardless of who publishes them, should be available at newspaper agents at the same time. In this regard, the establishment of an alternative system of newspaper agents is not economically feasible and, even if it is possible to establish such system it is not sustainable as it is not profitable for a newspaper agent to sell only a particular brand as well as it is not preferable for the customers who want to see all newspaper at the same place.

Taking into consideration of those features of the newspaper market, the TCA considered that all newspaper agents should be accessible for Star Daily for its survival.

The investigations demonstrated that BBD and YAYSAT held a collective dominant position in newspaper distribution market and they refused to deal with newspaper agents who sold Star Daily. Such RTD did influence the decisions of many newspaper agents not to sell Star Daily.

Thus it was seen that the main purpose behind such refusal was to exclude a new newspaper brand (Star Daily) from the market and thereby such refusal constituted an abuse under Article 6 of the TCL.

**8.2 *Teleon Decision (first decision date: 06.02.2001 and no: 01-07/62-19; second decision date: 26.09.2005 and no: 05-61/900-243 taken after the annulment of Council of State)***

In Teleon decision, the TCA examined the conduct of requesting a guarantee letter of 2 million USD to provide three minutes highlights from the matches by Teleon, a pay-tv company with a contract based monopoly over broadcasting and filming of football matches in Turkey. As a result of the investigation it was found out that a guarantee letter of 2 million USD did work as a deterrent factor over the requested television companies and thereby it did result in the fact that those television companies could not buy the needed three minutes highlights of football matches.

Thus such request for a guarantee letter of 2 million USD constituted an indirect refusal to deal and importantly this conduct had the potential to extent the monopoly of Teleon in pay-tv (decoded broadcasting) market towards general TV broadcasting markets in terms of sport programs. Considering these facts the TCA concluded that RTD by Teleon constituted an abuse under Article 6 of the TCL.

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On the other hand, in the Turkish practice, if the dominant undertaking simply refuses a customer to which it does not have any competitor relation, and then such refusal can be evaluated under relatively relax set of standards. In particular, if the supplier would like to change its distributor and/or distribution system, then it may have to refuse to deal its one/more of its existing customer and that refusal conduct should be approached flexibly and should not be regarded as an abuse. Or in cases where dominant undertaking has a problem of limited capacity, then such refusal, which results from lack of capacity, should also not be regarded as an abuse.

This situation is the case in the above-mentioned cases mentioned under the title of reasonable justification. In particular in TKI case, the RTD is basically a result of re-organisation of its distribution system by the TKI in Konya city and therefore the TCA considered RTD not as an abuse under the TCL.

## **9. Influence of Essential Facilities Doctrine**

Essential facility is generally defined as a facility without access to which a competitor cannot survive. Under Essential Facility Doctrine (EFD), undertaking which control a so-called essential facility is under a general obligation to deal where a refusal would result in restriction of competition.

Generally, if the controlling undertaking does not have a sufficiently convincing justification, then it is to be under an obligation to deal with its customer as well as competitor.

What generally makes EFD different from tradition RDTs is the fact that under EFD a new customer should also be granted access to the needed facility/goods/services. Therefore, EFD brings an additional discipline on the dominant undertaking. In other words, the scope of obligation to deal is widened by the application of EFD. Under EFD, once any facility/goods/services are registered as an essential facility, then almost an automatic obligation to deal emerges.

A key concern about the enforcement of EFD is the fear that an over-jealous application of such doctrine can damage and lessen the incentive to innovate by the undertakings if their R&D based innovations are easily regarded as an essential facility.

National roaming case which is examined below is an important case explicitly based on EFD and in which the TCA imposed a record level of fine on the undertakings that refused to deal with a new operator in the Turkish GSM market.

### **9.1 National Roaming Case (date: 09.06.2003 and no: 03-40/432-186)**

In national roaming case, the TCA concluded that Turkcell and Telsim hold a collective dominant position in GSM infrastructure and they refused to deal with Avea a new comer into the GSM market. In this case, Turkcell and Telsim were the first operators in the Turkish GSM market in 1994. They were granted a GSM 900 license to operate in GSM market.

Almost 6 years later Avea and Aycell were granted a GSM1800 license to operate in GSM market. However, in this period of 6-year time, Turkcell and Telsim could well establish sufficiently country-wide coverage infrastructure in order to meet the demand from the whole country.

On the other hand, according to relevant telecommunication legal framework, the existing operators are required to share their infrastructure with the newly entering operators until they could establish a sufficient level of coverage infrastructure. However, Turkcell did apply to Council of State in order to suspend the execution of relevant legal framework which required them to share its infrastructure.

Due to suspension decision of the Council of State, the relevant regulatory framework did not work properly in order to endorse and improve competitive conditions in the GSM market.

Under these circumstances, Turkcell and Telsim asked excessively high fee for roaming agreement with Avea which means an indirect RTD. Avea brought the case before the TCA arguing that Turkcell and Telsim refused to deal and abused their collective dominant position in a manner to exclude Avea from the market.

The TCA opened an investigation against Turkcell and Telsim. The TCA did significantly consider the regulatory failure which resulted from the suspension decision of the Council of State. As result of investigation, the TCA considered the coverage infrastructures of Turkcell and Telsim as an essential facility without access to which new competitors could not survive in the market properly and thereby prone to be driven out of market.

The key concern of the TCA was that the relevant regulatory framework did not work properly and thereby created a failure that favoured the incumbents in the market against the newly entering competitors. The TCA considered that the existing operators did benefit from this regulatory failure and refused to deal with Avea in a manner that would reinforce their market position vis-à-vis the new operators.

Thus the TCA did regard refusal to allow for access of Avea to their infrastructure by Turkcell and Telsim as a significant restriction of competition which unfairly reinforced the market positions of Turkcell and Telsim against the new operators. And the TCA imposed a record fine on these undertakings and importantly the TCA ordered the investigated companies to deal with Avea in order to terminate the anticompetitive conduct.



## UNITED KINGDOM

### 1. Introduction

To date the Office of Fair Trading (OFT) has made no infringement decisions under the Competition Act 1998 (CA98) with respect to refusal to deal or supply. It has published non-infringement decisions relating to two cases.<sup>1</sup> There have also been non-infringement decisions issued by sectoral regulators with concurrent powers to enforce the CA98.<sup>2</sup> As such there is little case experience to draw on. This submission therefore discusses the general approach adopted by the OFT to cases of abuse of a dominant position and how this is likely to apply to cases of refusal to deal. Finally, it raises some questions for further discussion.

### 2. The OFT's powers and approach to abuse of a dominant position

The Chapter II prohibition of the CA98 prohibits conduct by one or more dominant undertakings which amount to abusive behaviour<sup>3</sup>. The Chapter II prohibition is based on Article 82.

Following the entry into force of EC Regulation 1/2003 on 1 May 2004, the OFT<sup>4</sup> and UK courts are required to apply and enforce Article 82 as well as national competition law when national competition law is applied to an abuse prohibited by Article 82<sup>5</sup>.

The OFT adopts an effects-based approach to assessing abusive conduct. The ultimate aim is to prohibit conduct that directly or indirectly reduces consumer welfare.

The OFT considers that the likely effect of a dominant undertaking's conduct on customers and on the process of competition is more important to the determination of an abuse than the specific form of the conduct in question. Conduct may be abusive when, through the effects of conduct on the competitive

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<sup>1</sup> The two OFT cases were *E.I. du Pont de Nemours & Company and Op. Graphics (Holography) Limited* (9 September 2003), and *Harwood Park Crematorium* (6 August 2004). The latter decision was appealed to the Competition Appeal Tribunal, which substituted its own infringement decision (*ME Burgess, JJ Burgess and SJ Burgess (Trading as JJ Burgess & Sons v OFT 2005 [CAT] 25*).

<sup>2</sup> See, for example, the decisions of the Office of Communications (*Vodafone Limited: disconnection of Floe Telecom Limited's services*, 3 November 2003 and *T-Mobile: disconnection of VIP Communications Limited's services*, 31 December 2003), the Office of Rail Regulation (*Portec Rail Products (UK) Ltd*, 12 August 2005) and the Gas Electricity Markets Authority (*EDF Electricity Metering*, 24 January 2007).

<sup>3</sup> See <http://www.opsi.gov.uk/ACTS/acts1998/80041--c.htm#18>

<sup>4</sup> For a number of industries, the application and enforcement of Articles 81 and 82 in the United Kingdom (and of CA98) is carried out by designated sector regulators concurrently with the OFT. The OFT and the regulators with concurrent competition powers under the Competition Act are designated as NCAs with the power to apply Articles 81 and 82.

<sup>5</sup> Article 82 prohibits an abuse of a dominant position in similar terms as the Chapter II prohibition except that it refers to an abuse of a dominant position within the common market or a substantial part of it in so far as it may affect trade between Member States.

process, it adversely affects consumers directly (for example, through the prices charged) or indirectly (for example, conduct which reduces the intensity of existing competition or potential competition).

The guiding principles underpinning the application of the Chapter II prohibition by the OFT can therefore be summarised as follows:

- an abuse may be exploitative and/or exclusionary;
- the OFT will generally focus on the *effect* rather than the *form* of the abusive behaviour, and will in particular examine the likely effect on customers/consumers and the process of competition;
- the principal objective is therefore to avoid consumer harm – it is recognised that this may be achieved by protecting the competitive process – but this is a means to an end (i.e. to maximize consumer welfare) and not an end in itself (i.e. the objective is not simply to protect competitors); and
- any competition analysis will take full account of the efficiency justification for the conduct under review.

### 3. Refusal to deal

The OECD defines refusal to deal as the practice of refusing or denying supply of a product to a purchaser, usually a retailer or wholesaler. The practice may be adopted in order to force a retailer to engage in resale price maintenance (RPM), i.e., not to discount the product in question, or to support an exclusive dealing arrangement with other purchasers or to sell the product only to a specific class of customers or geographic region. Refusal to deal may also arise if the purchaser is a bad credit risk, does not carry sufficient inventory or provide adequate sales service, product advertising and display, etc. The competitive effects of refusal to deal generally have to be weighed on a case-by-case basis.<sup>6</sup>

A refusal to supply may occur where an undertaking stops supplying an existing customer or withholds supplies from a new customer. A refusal to supply by a dominant undertaking is more likely to be considered an abuse where it results in the elimination of competition, stifles the emergence of a new product, or prevents innovation.

Behaviour which has the same effect as a refusal to supply could also constitute an abuse (sometimes called 'constructive' refusal to supply). For example, a dominant undertaking might supply at such a high price, or at such an inferior level of quality, that customers would effectively be prohibited from purchasing.

Refusal to deal/supply might on occasion result from a vertical restraint. A manufacturer imposing a selective distribution system, for example, would, by definition, be refusing to supply outlets which were not within the system.

As is consistent with its general approach to abuse of a dominant position described above the OFT adopts an effects-based approach to assessing abusive conduct, focusing on consumer welfare when applying Article 82 and the Chapter II prohibition to refusal to deal cases.

A refusal to deal by a dominant undertaking is not necessarily abusive. It is only in exceptional circumstances that competition law should deprive an undertaking of the freedom to determine its trading

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<sup>6</sup> OECD Glossary of Industrial Organisation Economics and Competition Law.

partners. In considering such allegations of abuse, the OFT considers the effect of the refusal to deal. In particular, it considers the effect on competition rather than on individual competitors. The OFT therefore considers that, in some cases, an abuse may be found where a refusal to deal does not eliminate all competition, but is still considered likely to cause substantial harm to competition. Thus, a refusal to deal by a dominant undertaking may be an abuse if there is evidence of likely, substantial harm to competition and if the behaviour cannot be objectively justified.

#### 4. Questions for discussion

The issue of when to intervene in cases where a dominant undertaking refuses to deal with a current or potential purchaser is both controversial and complex. As a general rule, undertakings are free to choose their own trading partners and thus deal, or not deal, with whomever they choose.<sup>7</sup> However there are circumstances where a refusal to deal could constitute an abuse of a dominant position. A number of key questions for enforcers who may receive refusal to deal complaints and which it would be useful to discuss are set out below.

The development of good trading relationships between suppliers and customers, which may require making relationship-specific investments, is an important part of the competitive process. Similarly, investments to increase efficiency, sunk investments in production or distribution facilities, or in innovation which may be protected by intellectual property rights, play an important part in dynamic competition. Intervening to prevent a refusal to deal affects the incentives to make such investments and can harm the competitive process, which suggests that caution should be exercised when setting the threshold for intervention in refusal to deal cases. An important question therefore is whether the trade-off between incentives to invest and the protection of competition should be reflected in a higher threshold for intervention in refusal to deal cases than in other abuse cases; or is the threshold for intervention similar to other abuse cases, with the assessment of the trade-off being carried out on a case-by-case basis, taking into account the other issues raised below?

As with all issues of abuse of a dominant position under UK/EC law an important component is the assessment of dominance. In this assessment an important component can be whether supply from the requested supplier is essential or indispensable to the customer who is the subject of the refusal supply. Where alternative and equivalent sources of supply can be accessed easily by the customer it is unlikely that substantial harm to competition would be the effect of a refusal to deal. Equally, in such a situation where alternative sources of supply are readily available, dominance may be unlikely. On the other hand it is possible that evidence that supply of a product from a particular supplier is indispensable to its customers may be at least indicative of that supplier's dominance. A relevant question here is whether the indispensability of the input is a separate element of, or an integral part of, the dominance test; indeed is indispensability irrelevant if it is shown that the company in question is dominant and the behaviour results in (substantial) harm to competition?

A related question relates to the locus of dominance. For a refusal to deal to be capable of abuse, should it be the case that the undertaking must be dominant on the market in which the refusal operates *and* on any derivative market in which that refusal's effects are felt? Or should dominance only have to be on one of those markets?

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Even aside from competition law, there can be exceptions to this principle. For example, common law limits the freedom of the "common callings" to refuse to deal. Thus a common innkeeper at common law could incur tortious and even criminal liability for refusing to accommodate a guest. Modern intellectual property legislation sometimes includes compulsory licensing provisions and some utility regulation schemes mandate the grant of access to transmission facilities.

Another important question is how substantial does the harm to competition need to be for a refusal to deal to constitute an abuse. It does not have to be the case that all competition is eliminated by the refusal. On the other hand, to safeguard the incentives for investment and the competitive process it is necessary to require that likely harm to competition should be substantial before a finding of abuse is made. What are the elements to take into account, and how is the evidence to be weighed, in determining the likely scale of the harm?

In some cases, the supplier will advance plausible business or economic reasons for the refusal to deal based, for instance, on changing market conditions, new individual business initiatives or priorities or claimed efficiencies in production or supply. In some cases, these reasons may be well supported and there may be little or no evidence of intention to cause harm; in other cases there may be some evidence of intention, whether primary or secondary. In this connection, to what extent can a refusal to deal be objectively justified and what weight should be given to the intention of the dominant undertaking in refusal to deal cases?

Finally, should the analysis of refusal to deal give different treatment to situations where a supplier refuses to deal with an existing customer as opposed to a new customer? On the one hand, the presence of an existing customer relationship may provide indirect (but rebuttable) evidence of the efficiency of the existing relationship between supplier and customer. On the other hand, undertakings – both suppliers and customers -should be encouraged to innovate and to adapt their supply arrangements in response to changing market conditions rather than maintaining and relying on established arrangements. Requiring a supplier to continue to supply an existing customer may discourage new investment or the adoption of new business initiatives or models or increased efficiency on the part of that supplier; it may also have similar effects on the customer.

## UNITED STATES

More than eighty years ago, the Supreme Court set out the fundamental principle that still guides consideration of cases involving refusals to deal in the United States. As the Court stated in *United States v. Colgate*,<sup>1</sup> “in 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 any entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”<sup>2</sup> Accordingly, refusals to deal are actionable only when done by a firm creating or maintaining a monopoly power. Moreover, the refusal must harm, not only the targeted firm, but also the competitive process.<sup>3</sup>

While these are basic principles, the analytical standards to be used in determining whether a monopolist may refuse to deal are not. As discussed below, efficiency considerations and the difficulty of fashioning remedies complicate the consideration of what standards and tests should be applied in determining whether a monopolist’s refusal to deal with a rival should be condemned under the antitrust law, and, indeed, whether a monopolist’s unconditional refusal to deal with a rival should be actionable at all.<sup>4</sup>

In this paper we consider a monopolist’s refusal to deal with rivals, focusing primarily on the policy considerations underlying enforcement policy in this area and the Supreme Court’s recent articulation of those considerations in its most recent case involving refusals to deal, *Verizon Commcs Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

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<sup>1</sup> United States v. Colgate & Co., 250 U.S. 300 (1919).

<sup>2</sup> *Id.* at 307.

<sup>3</sup> See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (“the question whether [the defendant’s] conduct may properly be characterised as exclusionary cannot be answered by simply considering its effect on [the plaintiff]” but must consider its effect on competition); *United States v. Dentsply International*, 399 F.3d 181 (3d Cir. 2005), S. (“there must be proof that competition, and not merely competitors, has been harmed”), *cert. denied*, 126 S. Ct. 1023 (2006); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (act must “harm the competitive process and thereby harm consumers. . .In contrast, harm to one or more competitors will not suffice”).

<sup>4</sup> These difficulties were addressed during the 2006-2007 hearings on unilateral firm conduct sponsored by the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission. One of the hearings specifically considered refusals to deal with rivals. A transcript of that hearing, and transcripts of the other hearings as well as other materials submitted as part of the hearings record are available on the web sites of the Department of Justice (<http://www.usdoj.gov/atr/public/hearings/single-firm/sfctranscripts.htm>) and the Federal Trade Commission (<http://www.ftc.gov/os/sectiontwohearings/>). The Agencies intend to publish a report on the hearings, which will discuss, among other topics, unilateral refusals to deal with rivals, and the analytical standards that the agencies believe should be used in determining when, if ever, such conduct should be actionable under Section 2 of the Sherman Act.

## 1. Leading Supreme Court Decisions

The Supreme Court has held that a monopolist's unilateral refusal to deal with its rival under some circumstances can violate Section 2 of the Sherman Act. For example, in one case, *Otter Tail Power Co. v. United States*,<sup>5</sup> the Court upheld an injunction requiring a firm to sell electric power at wholesale to towns seeking to establish their own municipal power systems and also to transmit electricity generated by other power companies, explaining that the firm's "refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position."<sup>6</sup> In another case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,<sup>7</sup> the Court held that a firm controlling three of the four skiing facilities in Aspen, Colorado violated Section 2 by refusing to continue offering with the operator of the fourth facility a joint lift ticket that could be used at all four facilities. Characterizing the refusal to continue offering a joint ticket as "a decision by a monopolist to make an important change in the character of the market," the Court affirmed a \$7.5 million judgment for the plaintiff, explaining that the evidence permitted the jury to conclude "that there were no valid business reasons for the refusal" and that the firm's actions could be deemed "predatory" if it "has been attempting to exclude rivals on some basis other than efficiency."<sup>8</sup> Finally, in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), the Supreme Court remanded for trial a case involving Kodak's refusal to sell Kodak parts to various independent service operators, explaining that although "it is true 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."<sup>9</sup>

For many years, the Court's analysis of refusals to deal primarily considered whether the defendant was able to offer a valid business justification for its conduct. However, in its most recent decision in *Trinko*, the Court strongly suggested that the courts should exercise additional caution in this area. Interestingly, *Trinko* did not involve a true "refusal" to deal, but rather a claim that the defendant monopolist had provided inadequate interconnection services to its rivals under federal and state telecom regulations. Although the Court did not overrule any of its prior precedents, it declared that *Aspen Skiing* (which it termed the "leading case for §2 liability based on refusal to cooperate with a rival")<sup>10</sup> was "at or near the outer boundary of liability,"<sup>11</sup> and carefully distinguished the facts of *Aspen Skiing* from the those in *Trinko*,<sup>12</sup> stating that the courts should be "very cautious" about recognizing exceptions to the general principle that firms have the right to choose those with which they will deal "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single

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<sup>5</sup> 410 U.S. 366, 368 (1973).

<sup>6</sup> *Id.* at 368.

<sup>7</sup> 472 U.S. 585 (1985).

<sup>8</sup> 504 U.S. 451 (1992).

<sup>9</sup> *Id.* at 486.

<sup>10</sup> 540 U.S. at 408.

<sup>11</sup> 540 U.S. at 409.

<sup>12</sup> In particular, the Court noted that the defendant in *Trinko* had not had a prior voluntary course of dealing which it later terminated, that its actions were not contrary to its short-term economic interest as was the case in *Aspen Skiing*, and that the services at issue in *Trinko*, unlike those in *Aspen Skiing*, were "not marketed or available to the public." *Id.* at 409-410.

firm.”<sup>13</sup> Expanding on this theme, the Court noted that forcing firms to share assets may diminish innovation, lead to collusion and involve the courts in regulatory roles to which they are ill-suited:

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 the antitrust laws, since it may lessen the incentive for the monopolist, the rival, or both to invest in these 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.<sup>14</sup>

Thus, the Court reaffirmed the general rule that 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,”<sup>15</sup> and concluded that there were sound reasons for not creating any additional exceptions to the rule.

Commentators generally view the Court’s 2004 decision in *Trinko* as suggesting an important doctrinal shift away from holding firms—even those with monopoly power—liable for unilateral refusals to deal with rivals except under the rarest of circumstances. Nevertheless, it is also generally recognized that *Trinko* did not provide any concrete guidance as to precisely which standards or tests should be used to determine what those circumstances should be.

In *Trinko*, the Department of Justice and the Federal Trade Commission had filed a joint brief, urging the Court to adopt the “no economic sense” test for evaluating whether refusals to deal with a rival were unlawful. Under that test, “where a plaintiff asserts that the defendant was under a duty to assist a rival. . . conduct is not “exclusionary” or “predatory” unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.”<sup>16</sup> Explaining that such “cases required a sharper focus” because of the dangers posed by false positives and the potential chilling of procompetitive behaviour, the Agencies urged the Court to adopt the more demanding “no economic sense” test for refusals to deal with rivals. While the Court did not adopt the test, it did signal its apparent agreement with the underlying policy concerns highlighted by the Agencies in their joint brief.

## 2. Lower Court Cases

Historically, some lower courts have decided refusal to deal cases under the rubric of the “essential facilities doctrine,” which generally stands for the proposition that the antitrust laws require a firm in control of a facility essential to its competitors to provide reasonable access to the facility if possible.<sup>17</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 540 U.S. at 407-08 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

<sup>16</sup> Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner Verizon Commc’ns, at 15.

<sup>17</sup> *See, e.g.*, *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1129 (9th Cir. 2004); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977); *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1352-53 (D.D.C.

But the Supreme Court has never endorsed that doctrine, and many commentators (including the United States Department of Justice and the Federal Trade Commission) criticize it, noting that it provides no clear answers as to what constitutes such a facility, what makes such a facility essential, and what constitutes a denial of access.<sup>18</sup>

Post-*Trinko* lower court decisions have generally concluded that monopolists have no duty to deal with rivals.<sup>19</sup> Some have interpreted *Trinko* to bar refusal to deal claims in instances in which there was no voluntary prior course of dealing or where the defendant's conduct was profitable.<sup>20</sup> While the lower courts have allowed a few cases to proceed where the defendant has changed a prior course of dealing and acted contrary to its own short-term interest,<sup>21</sup> most commentators and courts view *Trinko* as having articulated a very high bar for finding that a competitor has any kind of duty to deal with its rivals.

*Trinko*, however, did not provide specific guidance on what standards or tests should be used to assess refusals to deal with a rival, and there remains significant uncertainty in this areas as was illustrated by the Agencies recent hearings on unilateral firm conduct. Some of the important policy considerations to be taken into account in determining what those standards should be are considered below.

### 3. Policy Considerations

The uncertainty regarding the legal standards governing allegedly harmful refusals to deal reflects the uncertainty regarding two key policy issues: (1) when, if ever, forcing a firm to deal with a rival is

1982). Probably the most frequently cited formulation of the doctrine is that in *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7<sup>th</sup> Cir. 1983) where the court found AT&T liable for refusing to sell services to MCI, a competitor. There the Court set out the four elements necessary to establish liability under the essential facilities doctrine, namely (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) providing access was feasible.

<sup>18</sup> See, e.g., 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 771c (2d ed. 2002) ("the essential facility doctrine is both harmful and unnecessary and should be abandoned"); Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 *STAN. L. REV.* 1187, 1195 (1999) ("mandatory access remedies, such as the essential facilities doctrine, do not fit comfortably within antitrust law"); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *ANTITRUST L.J.* 841, 841 (1990) (asserting that essential facilities "is less a doctrine than a epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are"); Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 *ST. LOUIS U. L.J.* 433, 480 (1987) ("courts should reject the doctrine"); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 *GEO. L.J.* 395, 402 (1986) (noting "embarrassing weakness" of essential facilities doctrine).

<sup>19</sup> See ABA ANTITRUST SECTION, *ANTITRUST LAW DEVELOPMENTS*, 6<sup>th</sup> ed. at 260 ("Decisions after *Trinko* have recognised that a monopolist does not have a duty to deal with its rivals absent unusual circumstances.") & nn. 220-223 (collecting cases).

<sup>20</sup> *Id.* at 261, & n.222 (collecting cases); see, e.g., *Covad Commc'ns. Co. v. Bell Atl. Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005) ("An antitrust claim based upon the defendant's refusal to cooperate with its competitor can withstand a motion to dismiss only when it is alleged either that the defendant had previously engaged in a course of dealing with its rivals, or [that it] would ever have done so absent statutory compulsion"); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9<sup>th</sup> Cir. 2004) (no antitrust liability where defendant terminated prior course of dealing because that prior course was unprofitable), *cert. denied*, 544 U.S. 1049 (2005).

<sup>21</sup> See *ANTITRUST LAW DEVELOPMENTS*, at 261. None of those cases held that Section 2 was violated.

beneficial and (2) whether the antitrust laws should be used to remedy allegedly harmful refusals to deal with a rival.

Commentators have debated the first issue extensively without achieving consensus. The crucial problem is “the well-known tradeoff between . . . static efficiency benefits . . . on the one side, and the contribution to welfare stemming from the growth deriving from a generous payoff incentive for innovation investment on the other side.”<sup>22</sup>

On the static side of the tradeoff, forced sharing may help consumers through direct effects on price and output. Some firms possess monopoly power, which is “the ability ‘(1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion.”<sup>23</sup> Economists have long maintained that, in a monopoly market, “less is sold than if the market were competitive . . . and society suffers a deadweight loss.”<sup>24</sup> Forcing a monopolist to deal with a rival on terms that would otherwise be unacceptable might counteract that loss by providing greater output at lower cost.

The dynamic side of the tradeoff concerns innovation—whether the creation of new products or new ways to lower costs—and its crucial role in driving economic growth.<sup>25</sup> Innovation often results from investments, and firms make investment decisions based on anticipated returns.<sup>26</sup>

Rules mandating forced sharing on otherwise undesirable terms lowers the anticipated return from valuable assets, thereby decreasing the incentive of firms to make investments designed to create new valuable assets. As one commentator puts it, “[t]he major point is self-evident: if innovators are forced to license their discoveries and to do so at bargain prices, it creates a strong disincentive to investment in the expensive and risky innovation process.”<sup>27</sup> Accordingly, many question whether antitrust rules that require forced sharing will slow the pace of innovation and thus inflict long-run harms eclipsing their short-term benefits.<sup>28</sup>

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<sup>22</sup> WILLIAM J. BAUMOL, *THE FREE-MARKET INNOVATION MACHINE* 121 (2002).

<sup>23</sup> *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (quoting 2A PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 501, at 86 (1995)); *see also* *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (defining monopoly power as “the power to control prices or exclude competition”).

<sup>24</sup> DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 88 (4th ed. 2005).

<sup>25</sup> *See, e.g.*, JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 85-86 (Harper Perennial 1976) (1942) (observing that “competition from the new commodity, the new technology, the new source of supply, the new type of organization” is “the powerful lever that in the long run expands output and brings down prices”); Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 *REV. ECON. STUDIES* 312, 320 (1957) (asserting that, in the United States between 1909 and 1940, “[g]ross output per man hour doubled . . . with 87½ per cent of the increase attributable to technical change”).

<sup>26</sup> The Court explained in *Trinko*, “[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.” *Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

<sup>27</sup> BAUMOL, *supra* note 3, at 217.

<sup>28</sup> *See* discussion *supra* at 4.

The second issue—whether the antitrust laws should be used to remedy allegedly harmful refusals to deal with a rival—concerns the desirability of regulating industrial relations through antitrust litigation as opposed to direct regulation.<sup>29</sup> Many commentators are concerned about the difficulty of regulating industry through antitrust litigation. One view is that forced dealing imposes on courts obligations that they cannot perform:

[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. It is hard enough for courts to determine marginal production costs. How would a court ever assess how much a firm should be fairly rewarded for its creative efforts?<sup>30</sup>

Similarly, Judge Posner advocates “abandon[ing]” the principle that “a unilateral refusal to deal, if monopolistic in its likely effect, is actionable” under United States antitrust law in view of the remedial difficulties raised when firms are forced to cooperate with rivals<sup>31</sup>:

The problem is remedy. A decision enjoining a group refusal to deal . . . does not require anyone to deal with anyone else. An *agreement* among a group of firms not to deal is dissolved, leaving the individual firms comprising the group free to deal or not to deal with the boycotted firm as they wish; no one is ordered to do business with anyone else. 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.<sup>32</sup>

Judge Posner concludes that it “cannot be sound antitrust law that, when Congress refuses or omits to regulate some aspect of a natural monopolist's behaviour, the antitrust court will step in and, by decree, supply the missing regulatory regime.”<sup>33</sup>

Professor Hovenkamp raises the same concern, asserting that forcing a firm to cooperate with rivals is appropriately dealt with through regulation, not the antitrust laws. While acknowledging that forced cooperation has the potential to be beneficial where “firms have extraordinary amounts of very durable market power,”<sup>34</sup> he concludes 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 a price regulator.”<sup>35</sup>

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<sup>29</sup> *Ibid.*

<sup>30</sup> George A. Hay, *A Monopolist's "Duty to Deal": The Briar Patch Revisited*, 3 SEDONA CONF. J. 1, 5 (2002).

<sup>31</sup> RICHARD A. POSNER, ANTITRUST LAW 242 (2d ed. 2001).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 243-44.

<sup>34</sup> HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 158 (2005).

<sup>35</sup> *Id.* at 270.

#### 4. Refusals to Deal with Customers, Dealers, and Others

Although U.S. antitrust law on refusals to deal specifically addresses refusals to deal with a rival, there are many other practices that can be broadly labelled refusals to deal that do not directly involve agreements to deal (or the lack thereof) between rivals. Any manufacturer who refuses to supply all would-be dealers is refusing to deal with some. U.S. antitrust law rarely, if ever, intervenes when a manufacturer unilaterally, unconditionally refuses to deal with any particular party, including customers. However, to the extent a refusal is conditional (i.e., I will deal with you only if you agree not to deal with my competitor), competitive concerns can arise in particular circumstances. Typically, to violate the antitrust laws, the practice must be imposed by a party with monopoly power, the practice has to involve significant foreclosure, business justifications, if any, for the practice must be rebutted, and the practice must contribute to the maintenance of the monopoly and harm competition, not just one or a group of competitors.

Recently, in *United States v. Dentsply International*,<sup>36</sup> the Third Circuit held that the dominant manufacturer of artificial teeth in the United States violated Section 2 of the Sherman Act by prohibiting its independent distributors from carrying competing brands of teeth. The court determined that access to these independent distributors was critical to competing in the market. After finding that there was no plausible procompetitive justification for the policy, the Court held that Dentsply's conditional refusal to deal with its distributors violated Section 2.

Similarly, in *United States v. Microsoft Corp.*,<sup>37</sup> the Court held that Microsoft's threatened reprisals against customers and suppliers for cooperating with its competitors was unlawful conduct under Section 2. The Court found that Microsoft's conduct had impeded its rivals from being able to distribute and sell their products, thereby harming competition, and that Microsoft had failed to offer any procompetitive justification for its conduct. Accordingly, the Court, using a rule of reason analysis, concluded that the conduct was unlawful under Section 2 since it served to entrench Microsoft's operating system monopoly, and there was no offsetting procompetitive justification.

In most other cases involving unilateral refusals to deal, however, the plaintiffs have been unsuccessful, usually because they have failed to show that the allegedly unlawful conduct harmed competition. Thus, for example, in *Intergraph Corp. v. Intel Corp.*,<sup>38</sup> the Court reversed a lower court ruling holding that Intel's discontinuation of technical assistance and pre-release access to Intel's new products to the plaintiff in retaliation for the plaintiff's filing a patent suit against Intel violated Section 2. The Court explained that "the antitrust laws do not require it to give preferred treatment to a customer that is suing it," and rejected the plaintiff's Section 2 claims because "onerous actions do not in themselves constitute antitrust violations" and because Intel's refusal to deal with a customer did not harm competition.

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<sup>36</sup> 399 F.3d 181 (3d Cir. 2005).

<sup>37</sup> 253 F.3d 34 (D.C. Cir. 2001).

<sup>38</sup> 195 F.3d 1346 (Fed. Cir. 1999).



## EUROPEAN COMMISSION

### 1. Introduction

The starting point for any discussion of the extent to which European competition law may intervene to require a company with market power to supply an input or grant access to its property is to recall the general principle that enterprises should be free to do business – or not to do business – with whomsoever they please, and that they should be free to dispose of their property as they see fit. This general principle derives from the market economy which is the central economic characteristic of the European Union and of each of its Member States, and the principle has been explicitly referred to by the European courts in competition cases<sup>1</sup>.

It is therefore only in the carefully limited circumstances described below that EU law allows this freedom of contract to be over-ridden in the interest of ensuring that competition between enterprises is not unduly restricted to the long-lasting detriment of consumers. Refusal to deal is very often justifiable for good commercial reasons having no anti-competitive intent or effect. Moreover, when it comes to obliging a company to deal with a particular customer, particular attention must be paid to the impact which such an interference might have on the incentives for investment and innovation in the markets concerned. Any adverse impact on those incentives would generally not be likely to be in the long-term interests of consumers. In particular, intervention would not be justified if an obligation to supply would do no more than allow the dominant firm's technology to be duplicated, thereby giving its competitors a "free ride" on its investment.

#### 1.1 Article 82 of the EC Treaty

The basis in European law for intervention against the unilateral conduct of companies enjoying substantial market power is Article 82 of the EC Treaty, which prohibits the "abuse" of a "dominant position". The European Commission and the European courts have interpreted the Article as being principally concerned with ensuring that competition is not distorted at the expense of consumer welfare. More specifically, the legal instrument has been used primarily to tackle unilateral conduct aimed at excluding competitors from a market with a consequent adverse impact on competition and ultimately consumers, but has also been used to address direct exploitation of customers in the form, for example, of imposing excessive prices.

In what is regarded as a seminal ruling, the European Court of Justice has defined the concept of abuse in the following terms: *"The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products*

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<sup>1</sup> In Case T-41/96 *Bayer AG v Commission* (2000) ECR II-3383, par 180, the European Court of First Instance stated that *"The case law of the ECJ indirectly recognizes the importance of safeguarding free enterprise when applying the competition rules of the Treaty where it expressly acknowledges that even an undertaking in a dominant position may, in certain cases, refuse to sell (...) without failing under the prohibition laid down in Article 82"*.

*or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*<sup>2</sup>. In essence, this definition makes it clear that the notion of an abuse is an objective one in the sense that the conduct must be shown to have an anti-competitive effect.

## **2. Defining refusal to deal**

### **2.1 Exclusionary abuse**

Refusal to deal is most accurately categorised as a form of exclusionary abuse in that such a refusal will only be considered unlawful under European law to the extent that it is liable to exclude competitors, thereby seriously undermining effective competition in a market. There is a wide array of commercial conduct that can be classified as refusal to deal. The following is a non-exhaustive list of types of refusal that might be caught by Article 82: refusal to supply key input products and services; refusal to provide essential proprietary information; refusal to license intellectual property rights; refusal to grant access to an essential facility or network, or only doing so on uneconomic terms. The common thread tying these various types of behaviour together is that what is refused – be it a product, service, information, access right, or whatever - is essential for competing in another market.

### **2.2 Effect on competition in a "downstream" market is the primary concern**

The primary competition concern likely to arise as result of a refusal to supply is that competition will be distorted in a market downstream from the (upstream) market for the refused input<sup>3</sup>. If, for example, a port owner refuses access to port facilities to a ferry operator, there may be an anti-competitive impact in the downstream market for ferry services. Such competition problems typically arise where the firm which is dominant on the upstream market for the refused input is at the same time a competitor of the customer it refuses to supply in the downstream market.

However, Article 82 may more rarely constitute a basis for intervention where a refusal to supply also results in an anti-competitive impact on the upstream market where the company refusing to supply is dominant. If, for example, the refusal to supply customers on the downstream market forecloses them as competitors on the downstream market, that foreclosure may have an adverse impact on competition in the upstream market for the refused input by foreclosing access to customers by the dominant company's upstream rivals. This might be characterised as an additional, or secondary, anti-competitive effect to the primary anti-competitive effect in the downstream market. Competition in the upstream market for the refused input might likewise be adversely impacted if the dominant company uses the refusal as a means of foreclosing the potential entry of the downstream customer as a competitor into the upstream market.

### **2.3 Exclusive dealing or tying distinguished**

To the extent that the purpose of the refusal to deal is to punish customers in the downstream market for dealing with upstream competitors of the dominant firm, such conduct is generally categorised as an exclusive dealing or tying abuse<sup>4</sup>. If, for example, a dominant soft drinks supplier refuses to deliver his brands to retailers who also stock the brands of other soft drinks suppliers, this conduct is more usually characterised as exclusive dealing than refusal to deal. Similarly, if a company refuses to supply a

<sup>2</sup> Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 46, para. 91.

<sup>3</sup> In this paper, the term "downstream" is used as shorthand to denote a market in which the product refused by the dominant firm constitutes an input essential for competitors to be able to compete effectively.

<sup>4</sup> Case 27/76 *United Brands*, [1978] ECR 207, para. 192.

customer with a product unless he agrees to purchase it together with another distinct product/s, such conduct is properly categorised as the possible abuse of tying or bundling. These abuses will therefore not be treated as refusal to supply for the purposes of this paper.

#### **2.4 *Constructive refusal***

The concept of a refusal to deal covers not only situations of pure or straightforward refusal, but also instances of agreement by the dominant company to deal but under unreasonable or uneconomic conditions. Charging excessive prices (as well as being potentially abusive in itself), may amount to an effective refusal to deal. In particular, a so-called "margin squeeze" (discussed in more detail below) - whereby the level of the price charged for an essential input does not allow the customer to compete in the downstream market - is properly characterised as a refusal to deal.

The Commission has also acknowledged that inexplicable or unjustified delays in responding to a request for access may constitute an abuse<sup>5</sup>. Likewise, an obligation imposed by a dominant supplier to indicate the geographical destination of the goods supplied and the identity of the final customers may – in appropriate circumstances – be considered as amounting to a constructive refusal, and hence an abuse of a dominant position<sup>6</sup>.

#### **2.5 *De novo refusals versus withdrawal of supply***

A distinction can also be made between a refusal to supply an existing customer and a refusal to supply a potential customer. Put another way, a refusal to deal can take the form both of a refusal to start dealing *de novo*, as well as of the unilateral termination of an ongoing deal, i.e. a withdrawal of supply. While, in conceptual terms, treatment of these two types of situations under Article 82 should be the same, certain inferences may be drawn from the rupture of an existing supply relationship. The existing relationship may, for example, be indicative of the essential or indispensable nature of the input, in particular if the customer had made particular investments in order to use the input. Moreover, it may in such a case be easier to demonstrate that the refusal has given rise – or is likely to give rise – to an anti-competitive effect.

### **3. Conceptual framework**

The conceptual framework for the approach to refusal to deal in European law has developed via a number of important Commission decisions and rulings of the European courts over the years. In essence, the approach developed in this regard provides: *first*, that the firm supplying the refused input must be in a dominant position in relation to the supply of that product; *second*, that the refusal leads or is likely to lead to the elimination of effective competition in the downstream market and hence to long-lasting consumer harm, and; *third*, that the refusal is not objectively justifiable. These three analytical steps are examined in turn below.

#### **3.1 *Dominance on the part of the company refusing to supply***

The *sine qua non* for the application of Article 82 is that the enterprise from whom supply is requested must enjoy substantial market power in the market for the refused input, not simply by reference to its market share but also by taking account of the full range of constraints which it faces, and in particular the ease with which its position may be challenged by existing or potential competitors. It

<sup>5</sup> Notice on the application of the Competition Rules to access agreements in the telecommunications sector (1998) OJ C 265/02, paragraph 95.

<sup>6</sup> *Polaroid/SSI Europe*, European Commission's 13<sup>th</sup> Report on Competition Policy, paragraphs 155-157.

should in this context be added, however, that the refused input need not have been traded previous to the refusal; it is sufficient that there be actual demand for it on the part of potential purchasers.

### 3.2 *Anti-competitive effect and long-lasting consumer harm*

A refusal to deal will only be unlawful if it can be shown that it will have an anti-competitive effect, with consequent long-lasting consumer harm. This does not mean that any competition must be altogether excluded from the market, but rather that *effective competition* is significantly diminished or eliminated. In some cases, the relevant question will therefore be whether there is a sufficient likelihood that competitors, by investing in actual or potential substitutes for the refused input, could counter in the foreseeable future the negative consequences of the refusal on consumer welfare.

Long-lasting consumer harm is in general only likely to arise if the refused product in question is *essential* for the customers to be able to compete effectively in a downstream market. This means that the refused product must constitute an *objectively indispensable input* for such competitors, and not merely a particularly suitable or convenient one. Put another way, there must be no economically viable<sup>7</sup>, actual or potential, alternatives to the refused input.

Typically, the Commission's concern will be that the refusal to supply is likely to lead to consumer harm on a *downstream* market via so-called *input foreclosure*. Such a refusal would normally preclude downstream rivals from obtaining supplies of the input altogether, thereby forcing them to exit the market, or only enable them to do so on terms that would not allow them to compete effectively with the dominant firm.

Concerns may likewise arise where foreclosure on the downstream market also leads to anti-competitive foreclosure on the *upstream* market for the refused input if it gives rise to so-called *customer foreclosure* – in other words, if it becomes more difficult for potential entrants on the upstream market to find customers and the refusal to supply thus raises entry barriers on the upstream market. This in turn may have anti-competitive effects downstream if as a result downstream rivals to the firm face higher input prices and are therefore obliged to charge higher output prices. Another scenario where consumer harm may occur is where the dominant firm uses refusals to supply in order to punish downstream competitors who are trying to enter upstream, and this punishment mechanism is credible in the light of the factual circumstances of the case.

The imposition of an obligation to supply may have an adverse *impact on the incentives of a firm to invest in the supply activity in question*, given the risk that competitors may "free ride" on that investment. At the same time, consumer harm may also arise where the competitors that the dominant firm forecloses are as a result of the refusal prevented from bringing to market innovative goods or services, and the refusal to supply thus stifles *follow-on innovation* to the detriment of consumers. This may be the case if the firm which requests supply does not intend to limit itself to essentially duplicating the goods or services already offered on the downstream market by the dominant firm, but intends to produce new goods or services for which there is a potential consumer demand<sup>8</sup>. Indeed, supplying access to the input may spur incentives to invest and innovate in the downstream market by both the dominant firm and its competitors.

<sup>7</sup> It is not, however, necessary that a substitute for the refused input be as efficient as the refused input. It suffices that it enables effective competition to take place. See Case 7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. K, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, [1998] ECR I-7791, para. 43.

<sup>8</sup> Case C-418/01 *IMS Health, GmbH & Co. OHG v NDC Health GmbH & Co. KG*, [2004] ECR I-5039, paragraph 49.

In some cases, it is rather clear that the incentives for the dominant firm to innovate will not be adversely impacted by the imposition of an obligation to supply, notably where its upstream market position has been developed under the protection of special or exclusive rights or has been financed by State resources and not been purchased by the dominant firm for a price reflecting its real market value. In such cases, the anti-competitive effect of a refusal can be more readily assumed. In other cases, however, an obligation to supply should only be imposed in the presence of exceptional circumstances<sup>9</sup>. In principle, for the refusal to be found abusive it should then be established not only that it is likely to cause competitors to be foreclosed from the market, but that the consumer harm resulting from such foreclosure is likely to be *long-lasting*. In other words, market forces should be unlikely, at least in the foreseeable future, to bring prices, production, quality or innovation to the level where they would have been absent the refusal. Particular attention must therefore be given to the possible long-run effects that imposing an obligation to supply will have on the investment incentives of both the dominant firm and its competitors.

### 3.3 *Objective justification, including an assessment of efficiencies*

A refusal to deal will often be objectively justified on unimpeachable commercial grounds. If this is the case, the refusal does not constitute an abuse of a dominant position. There are numerous possible instances in which a refusal to deal would not give rise to objections. The customer may, for example, not be considered a reliable trading partner, perhaps because of a history of not honouring its debts. The dominant firm may have difficulties in meeting all the demand it faces: it may, for example, be experiencing a shortage of raw materials<sup>10</sup>, production capacity constraints, or its production or distribution capabilities may be disrupted.

A decision by the dominant firm to itself enter a downstream market in which it had not previously been present will not, however, be considered an objective justification for refusing to supply an essential input to an existing customer active in the same downstream market. In its judgment in *Commercial Solvents*<sup>11</sup>, the European Court of Justice held that “*an undertaking being in a dominant position as regards the production of a raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to manufacture these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of [the downstream product] in the common market*”.

More importantly, evidence tending to demonstrate that an obligation to supply will, on balance, have an adverse impact on the incentives or ability of market participants, including those of the dominant firm itself, to innovate must be taken into consideration before deciding whether a refusal to supply is objectively justified. This involves consideration of evidence put forward by the dominant firm regarding any *efficiencies* associated with a refusal, and in particular any evidence showing that the refusal to supply is necessary to allow the dominant firm to realise an adequate return on the investments required to develop the input supply business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account. The refusal may also provide incentives for the dominant firm itself to invest in follow-on innovation on the downstream market.

<sup>9</sup> Joined cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)* [1995] ECR 743, paragraph 50; Case C-418/01 *IMS Health, GmbH & Co. OHG v NDC Health GmbH & Co. KG*, [2004] ECR I-5039, paragraph 35.

<sup>10</sup> In *BP v The Commission*, Case 77/77 [1978] ECR 1513, the European Court of Justice held that it would not be abusive for an oil company to supply regular customers in preference to other customers in the event of a supply shortage.

<sup>11</sup> Cases C-6/73 & 7/73 *Istituto Chemioterapico and Commercial Solvents Corporation v Commission* [1974] ECR 223.

#### 4. Particular instances of refusal to deal

As indicated above, the concept of refusal to deal applies to a variety of types of commercial conduct, some of the principal examples of which are identified and briefly discussed below.

##### 4.1 *Refusal to supply products or services constituting essential inputs*

A refusal to supply will sometimes occur in a market for the supply of intermediate products or services. For example, a dominant company might refuse to supply an *essential input* to a downstream competitor, i.e. an input without which a market participant would have difficulties effectively competing in that downstream market. This type of situation was encountered in *Commercial Solvents*<sup>12</sup>, the first instance in which the European Court of Justice dealt at length with the concept of refusal to deal. In that case, the ECJ held that it was an abuse of a dominant position for the dominant supplier of aminobutanol, a chemical used in the production of ethambutol and drugs based on this component, to terminate an existing supply relationship with a company active in these downstream markets.

##### 4.2 *Refusal to licence intellectual property rights or to supply essential information*

Particular caution is required before intervention should be contemplated in relation to firms whose dominant position results from the possession of intellectual property rights. IP rights grant a temporary monopoly in the technology developed by a firm as a reward for innovation, and hence provide a critical incentive for firms to innovate. However, in exceptional circumstances, European law will permit *intervention to oblige a firm to license its IP rights to competitors*, if a refusal to do so would effectively eliminate competition in a related market, but not one protected by those rights. These exceptional circumstances were first delineated some 20 years ago, when the Commission decided that the British and Irish State broadcasting companies must provide magazine publishers with information concerning TV programs in sufficient time to allow them to produce weekly publications competing with those of the broadcasters. The European Court of Justice agreed with the Commission that a compulsory license limited to the information required to compete in the non-protected market for weekly magazines could not be refused without objective justification, given in particular that the refusal prevented the emergence of a new product for which there was potential consumer demand and that the broadcasters were essentially reserving the non-protected market for themselves<sup>13</sup>.

The same conceptual framework outlined above is applicable in like manner to a *refusal to supply essential proprietary information*, irrespective of whether or not that information is protected by IP rights. In the *Microsoft* decision<sup>14</sup>, the Commission found that interoperability information was needed to allow Microsoft's competitors to compete with it in markets downstream from the market for personal computer operating systems. In a ruling issued on 17 September 2007<sup>15</sup>, the Court of First Instance upheld the Commission's decision finding that Microsoft had abused its virtual monopoly in the market for personal computer operating systems, *inter alia* by seeking to leverage that position into markets for work group operating systems by refusing to give its downstream competitors access to the minimum interoperability information necessary to allow them to effectively compete in those other markets. The Court confirmed that "exceptional circumstances" have to be present before finding an abuse when intellectual property

<sup>12</sup> Cases C-6/73 & 7/73 *Commercial Solvents* [1974] ECR 223.

<sup>13</sup> Joined cases C-241/91 P and C-242/91 *Magill* [1995] ECR 743. This approach has most recently been confirmed by the ECJ in Case C-418/01 *IMS Health* [2004] ECR I-5039.

<sup>14</sup> Commission Decision 2007/53/EC of 24.03.2004.

<sup>15</sup> Judgement of the CFI of 17.09.2007 in Case T-201/04, *Microsoft v Commission*.

rights are involved: *"It follows (...) that the refusal to deal by an undertaking holding a dominant position to licence a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of dominant position within the meaning of Article 82 EC. It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give right to such an abuse"*. The Court goes on to explain that *"It also follows from that case-law that the following circumstances, in particular, must be considered to be exceptional: in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand"*. The judgement is therefore a comprehensive confirmation of the Commission's effects-based approach to exclusionary conduct of this kind.

#### **4.3 Refusal to grant access to essential facilities**

The Commission has defined an essential facility as a "facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means"<sup>16</sup>. In accordance with the application of the general principles applying to other types of refusals to deal, a refusal to grant access to such an essential facility which eliminates competition in a downstream market and which is not objectively justified is prohibited by Article 82. It is not, however, sufficient that the dominant undertaking's control over the facility gives it a competitive advantage; it should give it a genuine stranglehold on the market in question. The duplication of the facility must be either impossible or extremely difficult owing to physical, geographical or legal constraints<sup>17</sup>. As to the latter, it must be shown that it is uneconomical to duplicate the facility, in other words that the total income generated in the market in question would not generate profits from two facilities. It is not however sufficient to demonstrate that it is not economical for a given competitor to duplicate the facility, for example because that competitor has a limited turnover.

#### **4.4 Margin squeeze**

If a dominant firm charges a price for a product on the upstream market which, compared to the price it charges on the downstream market, does not allow a downstream competitor which is as efficient as itself to trade profitably on a lasting basis, this is known as a "margin squeeze" and is liable to constitute an abuse of a dominant position. Before reaching this conclusion, however, the true costs of the dominant firm must be carefully examined. When new products or services are launched, for example, firms may have substantial upfront costs that will only be recovered over time. It may therefore be normal in such a situation to have a period of negative margins until demand expands, in which case it may not be appropriate to characterise the conduct as a margin squeeze.

In a recent decision, for example, the Commission found that the Spanish telecoms provider Telefonica had broken European law by charging a wholesale broadband access price to its competitors which did not allow them to compete effectively in the retail broadband access market: the margin between this wholesale price and the retail price of Telefonica made it impossible for the other providers to operate profitably, despite being at least as cost-efficient as the dominant firm<sup>18</sup>.

<sup>16</sup> Notice on the application of the Competition Rules to access agreements in the telecommunications sector (1998) OJ C 265/02, paragraph 68.

<sup>17</sup> See Case 7/97 *Oscar Bronner* [1998] ECR I-7791.

<sup>18</sup> See European Commission Press Release IP/07/1011 of 4 July 2007.



## CHINESE TAIPEI

### 1. Introduction

This submission summarises Chinese Taipei's approaches to and experiences on the issues of unilateral refusals to deal.

In brief, there is no specific provision in the Fair Trade Act to regulate refusals to deal. The practices concerned have been handled along with other forms of anti-competitive behaviours, and thus never been formally explored and clearly defined. Nevertheless, it is not uncommon for the Fair Trade Commission (the FTC) to come across with refusals to deal, especially when dealing with cases in the nature of abuse of monopolistic position or certain forms of restrictive trade practices, such as boycott, discriminative treatment, tie-ins, exclusive dealing, etc.

Under the Fair Trade Act, unilateral refusals to deal can be handled in two ways. Market position of the parties concerned determines the FTC's choice of appropriate enforcement tools. Article 10 of the Fair Trade Act prohibits monopolistic enterprise to directly or indirectly obstruct any other enterprise from competing by unfair means. Refusals to deal can be considered as an unfair method by a monopolistic enterprise to hinder competitor to enter into the relevant market.

For enterprises own more than 10% of market share but do not fit into the definition of monopoly by the Fair Trade Act, Article 19 of the Fair Trade Act provides legal basis for the FTC to prevent such enterprises to engage in practices which are likely to lessen competition or to impede fair competition:

- Article 19(1)(i) regulates enterprise causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise.
- Article 19(1)(ii) disallows enterprise treating another enterprise discriminatively without justification. Factors shall be taken into account while considering the justification including supply and demand conditions in the market, cost differences, transaction amounts, credit risks, and other reasonable grounds.
- Article 19(1)(vi) prohibits enterprise dealing with its trading counterpart on the condition that unduly restricts that trading counterpart's business activity. Restriction in this provision refers to the circumstances under which an enterprise engages in restrictive activity in regards to tie-ins, exclusive dealing, territory, customers, use, or otherwise. In determining whether the restriction is justifiable, factors as the intent, purposes, and market position of the parties, the structure of the market concerned, the characteristics of the goods traded, and the impact that carrying out such restrictions would have shall be considered.

### 2. Refusing to deal with customers vs. competitors

There is no distinctive difference between vertical and horizontal refusals to deal when the FTC analyses abuse of monopoly cases associated with the said practices. As the law prohibits monopolistic enterprise to directly or indirectly obstruct any other enterprise from competing by unfair means, in the FTC's view, the market concerned includes the market where the monopolistic enterprise is a major player, and upstream and downstream markets where the monopolistic enterprise is capable of exercising its

market power. Same rule applies when the FTC handles with refusals to deal cases engaged by non-monopolistic enterprises.

### **3. Distinguishing harmful RTDs from efficient ones**

Neither monopoly as such nor restrictive trade practices are deemed illegal *per se* under the Fair Trade Act. Certain factors that shall be taken into account are stipulated in the Enforcement Rules and Guidelines to the Fair Trade Act to facilitate the FTC to determine whether refusals to deal in question are harmful to free and fair competition. For example, in examining whether a refusal to deal caused by tie-in breach the law, the FTC shall consider the intent, purposes, and market position of the parties, the structure of the market concerned, the characteristics of the goods traded, and the impact that carrying out such restrictions.

### **4. Sellers' right of autonomy vs. special responsibility of dominant firms**

Under the principle of market economy, enterprises shall have inherent right to contest for and decide their own trading counterparts, unless otherwise specified by laws.

The Fair Trade Act does not literally specify a special responsibility of monopolistic enterprises. Refusals to deal by monopolistic enterprises will be decided as breach of the Fair Trade Act only when the enterprise obstruct any other enterprise from competing by unfair means. In the enforcement and jurisprudence, however, the FTC is in the view that enterprises granted with statutory monopoly, i.e. the incumbents, shall bear with special responsibility to facilitate the government's efforts to introduce competition into the previously closed markets and not to hinder new entrants. Examples can be found as following two cases.

#### **4.1 Case 1: The CPC – Refusal to deal with competing firm**

In October 2000, the FTC decided that Chinese Petroleum Corporation (the CPC) misused its monopolistic position in aviation fuel provision market at the CKS Airport's domestic routes to refuse deal with a new entrant Wen-Chiu Ltd. Co. with undue method.

The CPC was the only body charged with exploring, producing, importing, refining, and marketing petroleum products, including aviation fuel, in Chinese Taipei. In January 1999, the aviation fuel was opened for importation. Nevertheless, before the Formosa Petrochemical Corporation, another petroleum refinery in Chinese Taipei, was established and approved to provide aviation fuel on May 9, 2000, the CPC still owned monopolistic position in aviation fuel provision market.

Wen-Chiu was one of the aviation fuel filling companies which operated in the CKS International Airport. After the aviation fuel provision market for domestic routes at the CKS Airport being opened, Wen Chiu intended to enter this market and thus requested for price quotations from the CPC who was the sole provider. The CPC, however, asserting that it was in the process of studying and developing a pricing structure for domestic aviation fuel, delayed in offering the quotations. Meanwhile, the CPC actively negotiated and concluded the fuel-supply agreements for the year of 2000 with all of airline companies on domestic routes at the CKS Airport. The CPC then, in January 2000, refused to offer quotations to Wen-Chiu, stated there was no need to do so.

The FTC found out, in its investigation, the refining and transportation costs of aviation fuel at the CKS Airport were the same for international and domestic routes. The CPC also admitted that the primary difference between two routes was the taxes assessed, and other costs differed insignificantly. In its conclusion, the FTC decided that the CPC's refuse to offer the price quotations to Wen-Chiu was unjustifiable. The CPC was obligated to facilitate the liberalisation of petroleum products markets. The

refusal to deal with new entrant constituted an undue obstruction to competitor's entrance, maintained its monopolistic position in the aviation fuel provision market, and thus violated the Fair Trade Act.

#### **4.2 Case 2: The CPC – Refusal to deal with downstream LPG dealer**

In February 2002, the FTC prohibited the monopoly in the liquefied petroleum gas (LPG) market, the Chinese Petroleum Corporation (the CPC), from refusing to renew a dealership agreement with a LPG dealer Excel Chemical Corporation (the ECC).

Over half of households in Chinese Taipei use LPG as their primary home-use fuel. In early 1999 year, the LPG market was liberalised for competition from imports. The result was not so satisfying, due to the import costs being much higher than the CPC's production costs, there was not enough incentive for competitors to import LPG. Around mid-1999, the CPC still owned an 89.15% share of the LPG market, i.e. most LPG dealers still had to rely on the CPC to obtain stable provision.

The CPC used to provide all dealers home-use LPG at the officially posted price. After the market opened for competition, the ECC started to purchase LPG from the Formosa Petrochemical Corporation, the only competitor of the CPC in the relevant petroleum products markets, while still maintained its LPG dealership with the CPC but reduced the amount purchased than before. The CPC, for maintaining its monopolistic position, decided to terminate its uniform price policy and provided LPG to dealers other than the ECC at preferential prices that put the ECC at disadvantageous position when competing with other dealers. The ECC lost large numbers of customers consequently. The CPC then refused the ECC's request to renew the agreement while its dealership expired on 30 September 1999, citing poor business performance of the ECC as its reason for refusing the renewal of dealership.

According the FTC's decision, the introduction of competition into the previously monopolised LPG market aimed at increasing the choice of products available to consumers, reducing prices thereof, and thus enhancing consumer welfare. The incumbent CPC took advantage of its monopolistic position in the LPG market to engage in price discrimination against dealers who still had to rely on supplies from the monopoly and tried to exclude competitors from the market. The FTC concluded the refusal to deal by the CPC had jeopardised the liberalisation of the home-use LPG market and thus violated the Fair Trade Act.

#### **5. Same conduct – different analysis?**

As refusal to deal is not stipulated as a type of conduct in the Fair Trade Act, it is always investigated along with other forms of anti-competitive practices. It is not available to tell whether the FTC had analysed the same refusals to deal in different contexts and reached different legal outcomes.

#### **6. Influence of the essential facilities doctrine**

In accordance with the Fair Trade Act, if the establishment of an enterprise or any of the goods or services supplied by such enterprise to a relevant market is subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded, that such enterprise may be deemed by the FTC as a monopolistic enterprise.

In the FTC's view, the above-mentioned definition of monopolistic enterprise unquestionably applies to an enterprise which is an essential facility owner. It is not *vice versa*, though. A monopolistic enterprise does not have to be an essential facility owner. According to the Act, monopolistic enterprise is an enterprise that faces no competition or has a dominant position to enable it to exclude competition in a relevant market. An enterprise other than an essential facility owner can still be qualified as a monopoly.

The Fair Trade Act prohibits monopolistic enterprise to directly or indirectly obstruct any other enterprise from competing by unfair means. In cases described above, examples have been provided to exemplify how refusals to deal by monopolistic enterprises without essential facility still can constitute breaches of the provisions regulating monopolistic behaviours.

The FTC has always been very cautious in deploying the essential facility doctrine to deliberating refusals to deal cases. In determine whether an asset involved can be deemed as an essential facility the FTC used to rely on conceptions in sector specific law such as the Telecommunications Act which clearly stipulates the obligation for the essential facilities owners as well as outside expertise and experiences from foreign competition authorities.

## **7. History of dealing**

Whether there is history of dealing between the parties is not a significant issue to be considered when the FTC investigates misuse of monopolistic position and restrictive trade practices cases.

## **8. Reasonable Justifications**

In the Enforcement Rules and Guidelines to the Fair Trade Act, factors are listed for the FTC to elaborate whether refusals to deal in question are detrimental to competition. For example, in considering a refusal to deal caused by discriminative treatment, the FTC shall take supply and demand conditions in the market, cost differences, transaction amounts, credit risks, and other reasonable grounds.

A refusal to deal case involving environmental protection issue could be used to exemplify the FTC's thought in this regard.

### **8.1 Case 3: The CSC – Refusal to deal with coal chemical enterprises**

In May 2006, the FTC decided that the China Steel Corporation (the CSC) exclusively provided all of its metallurgical coke products to one coal chemical enterprise, the China Steel Chemical Corporation (the CSCC), and refused to deal with the other coal chemical enterprises, did not violate the Fair Trade Act.

The CSC is the only integrated steel mill in Chinese Taipei. Integrated steel mills produce steel from iron ore, coal, and lime, and during the production process, coke will be produced from coal as a by-product. Coke can then be further processed to produce various metallurgical coke products, such as coke dry quenching, dehydrated coke fines, etc., those are important raw materials for coal chemical industry.

In the end of 2004, Ginnin Industrial Co., a coal chemical enterprise, filed a complaint to the FTC, alleging that the CSC illegally signed a 5-year exclusive contract with the CSCC to provide all of its metallurgical coke products and refused to deal with Ginnin. The complainant argued that, the CSC was the only integrated steel mill in Chinese Taipei that can produce metallurgical coke products. The CSC's metallurgical coke products covered one-half of coal chemical enterprises' needs. The products concerned can be imported from China and Japan, though, but high transportation cost will make the complainant at disadvantageous position when competing with the CSCC.

The CSC defended that, huge amounts of coke, along with other by-products from the steel producing process, can cause serious pollution problem if not dealt with properly. To solve the storage and processing issue of those by-products, the CSC invested to establish the CSCC to ensure these potential sources of pollution being processed smoothly at all time. The CSC argued that, the other coal chemical enterprises, including as Ginnin, chose to purchase coke from the CSC or overseas upon the varying prices, they were not reliable for the CSC in solving the potential pollution problem. The CSC cannot afford to storage up the coke products and take the risk of polluting the environment. A long-term contract with a coal chemical

enterprise like the CSCC with properly equipped facilities to handle coke carefully is crucial to the operation of the CSC.

In its conclusion, the FTC was convinced that the CSC's refusal to deal with coal chemical enterprises other than the CSCC was legitimate and did not breach the Fair Trade Act.

## **9. Statutory effectiveness**

Under the Fair Trade Act, unilateral refusal to deal is categorised as abuse of monopolistic position or certain forms of restrictive trade practices, depending on the market status of the enterprise concerned. The existing equipments provided in this Act are considered as effective enough to regulate various anti-competitive practices, including refusals to deal.



## BIAC

### 1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on “Refusals to Deal.”

As directed by the request for submissions, this note focuses solely on unilateral refusals to deal. Refusals in respect of IP are not addressed, and the essential facilities doctrine is not addressed in detail, as this subject has been dealt with extensively in previous Roundtables.

### 2. Under What Circumstances ought a Unilateral Refusal to Deal Give Rise to Competition Law Concerns?

#### 2.1 *Unilateral refusals generally do not warrant antitrust scrutiny*

As a general matter, the business community supports the proposition that sellers of goods and services should be free to choose their counterparties. A unilateral decision by a supplier to refuse to deal with a customer (whether or not that customer is a competitor) typically should not give rise to antitrust concerns. As such, antitrust rules directed at unilateral refusals to deal, ought, at the very least, to be regarded as an exception to this general principle, and, in any event, must be based on a careful analysis that clearly demonstrates that antitrust intervention is warranted in the circumstances to remedy a real and substantial injury to competition.

Dennis Carlton has summarized the position succinctly:

“Unless the industry facts are such that a refusal to deal has a likelihood of adversely affecting competition, there can only be error introduced by demanding that a defendant offer convincing reasons for its business practices.”<sup>1</sup>

In Europe, this position is reflected by the EAGCP Report of July 2005, that stresses the plausible efficiency reasons underlying refusals to deal and that advocates a cautious approach towards these practices<sup>2</sup>. BIAC agrees with following analytical propositions taken from the EAGCP Report:

“..By refusing access to the input good the dominant firm extends its monopoly from the market for the essential input to the potentially competitive downstream market. However, the monopolization of a downstream market need not have anticompetitive effects per se. After all, there is only one final market and only one monopoly profit to be reaped. If the dominant firm is able to capture the monopoly profit of the final market even if there is downstream competition, then monopolization of the downstream market cannot have anticompetitive effects because there is no competition anyway. In this case a refusal to deal with downstream firms is likely to be motivated by efficiency arguments. (p. 43)

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<sup>1</sup> Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal –Why Aspen and Kodak are Misguided*, 68 Antitrust Law Journal No. 3 (2001), at p. 680.

<sup>2</sup> Report by the EAGCP, “An Economic Approach to Article 82,” July 2005, p.43.

..

But even if a refusal to deal harms consumers in the short-run, it may be socially beneficial in the long-run. If the bottleneck is the result of investment or innovation activities of the dominant firm then forcing the firm to give its competitors access to the bottleneck is an expropriation of the returns of the firm's efforts. This may discourage this and other firms from investing in the future, and it may reduce the incentives to innovate. Tolerating a (temporary) monopoly may be the best way to promote investment and innovation incentives and thus dynamic efficiency. (p. 44)

..

Refusal to deal increases the market power of a dominant firm only if it was unable to fully exploit its monopoly power over the bottleneck good beforehand. For example, this is the case if the dominant firm has a problem committing to charging all the downstream firms the monopoly price. The reason is that once the monopolist has contracted with one downstream firm on the supply of the essential good, he has an incentive to supply the other firms at more favourable conditions in order to further increase his profits at the expense of the first downstream firm, which then has to compete with the other firms on the downstream market. However, the downstream firms anticipate such opportunistic behaviour by the upstream firm and will buy the essential good only at a discount. This reduces the profits of the monopolist. He may restore his monopoly power only if he manages to eliminate competition on the downstream market altogether. In such a case, refusal to deal could have anticompetitive effects. (p. 45)..”

## 2.2 *Brief overview of US and EC Practice*

### 2.2.1 *US Practice*

Under U.S. antitrust law, the basic concept that traders should be free to choose with whom they deal is not new. In 1919, for example, the U.S. Supreme Court held in *Colgate*:

“...in the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal.”<sup>3</sup>

However, the judicial treatment of refusals to deal as matters of antitrust concern has undergone a fundamental reassessment in the U.S. over the last 20 years or so. In its 1985 decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (“*Aspen*”)<sup>4</sup>, the U.S. Supreme Court found in favour of the plaintiff, a ski area operator (Aspen Highlands), whose competitor (Aspen Skiing) had discontinued a joint multi-day, multi-mountain ski pass. In sum, the rule articulated in *Aspen*, establishing the law in U.S. courts for the next twenty years, was that a monopolist has a duty to deal with its rival, unless it has valid business reasons for the refusal. As such, *Aspen* suggests a comparatively broad scope for antitrust intervention where a firm with market power refuses to deal with a rival, particularly where there have been prior dealings between the parties.

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<sup>3</sup> United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

<sup>4</sup> 472 U.S. 585 (1985).

The Supreme Court's 2004 decision in *Verizon v. Trinko*<sup>5</sup> ("*Trinko*") signalled a change in the Court's approach to single firm refusals to deal. That case alleged an effective refusal by an incumbent local monopoly exchange carrier to provide adequate access to elements of its network to new entrants who required such access in order to compete effectively. The Court in *Trinko* dismissed the plaintiff's claim, holding:

"The activity of which respondent complains does not violate pre-existing antitrust standards. The leading case imposing §2 liability for refusal to deal with competitors is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U. S. 585, in which the Court concluded that the defendant's termination of a voluntary agreement with the plaintiff suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Aspen* is at or near the outer boundary of §2 liability, and the present case does not fit within the limited exception it recognized."

Whereas *Aspen* heralded broader scope for antitrust scrutiny of single firm refusals to deal, *Trinko* reins in the potential scope of that exception suggesting that judicial intervention in such cases should only occur in exceptional circumstances where the immediate competitive harm is evident.

*Aspen* and *Trinko* have fuelled a vigorous debate among antitrust commentators and economists regarding the appropriate antitrust treatment of single firm refusals to deal. Among a broad array of perspectives, it has been suggested that i) the Court wrongly decided *Aspen* (without reference to *Trinko*), citing an errant conclusion with respect to market definition; ii) that *Trinko* itself was wrongly decided and, that appropriately considered, the conduct at issue in that case should have been viewed as giving rise to real competitive harm; and iii) that *Trinko* went too far in its condemnation of *Aspen* and in taking possible factors in assessing competitive impact (such as prior dealing, and willingness to sacrifice profits), and improperly elevating them to fixed requirements for establishing antitrust liability.

### 2.2.2 *EC Practice*

Under EC competition law, refusals to deal have from the outset attracted attention, in particular by the EC Commission. The case law under Article 82 is, however, limited and, more importantly, has been subject to criticism in the literature that it is not in line with the latest economic thinking and lacks a proper conceptual framework. As a result, there is a significant amount of legal uncertainty that may discourage dominant firms from competing aggressively, even where such aggressive competition may not result in harm to competition.

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<sup>5</sup> 540 U.S. 398 (2004).

## Overview of EC Landmark Cases

In the Community Courts case law on Article 82, the following types of refusal to deal cases can be distinguished: (i) refusal to supply a (potential or actual) downstream competitor, (ii) refusal to supply a (potential or actual) competitor in the upstream market, and (iii) refusal to supply a customer in a market where the dominant firm has no presence.<sup>6</sup> BIAC agrees with the Secretariat's observation in the Background Note that "While still not quite as transparent as they could be, the ECJ's RTD decisions show a marked shift in focus toward effects on competition and consumers instead of on a lone competitor, as well as a willingness to consider factors that might justify the conduct".

Refusal to supply a (potential or actual ) downstream competitor<sup>7</sup>

In *Commercial Solvents v Commission*<sup>8</sup> ("*Commercial Solvents*"), the ECJ established that a refusal to supply an existing customer and downstream competitor could, in some circumstances, amount to an abuse of a dominant position. It ruled that it is an infringement of Article 82 for an undertaking in a dominant position to refuse to supply a competitor in a downstream market where the effect of doing so would be to eliminate competition in the downstream market. The ECJ speaks of conduct that "*risks eliminating all competition on the part of this customer*"<sup>9</sup> According to the *Commercial Solvents* judgment, the focus appears to be on the protection of the existing customer who is dependent on supplies from a dominant supplier, rather than on maintenance of competition in the downstream market. The decision has been criticized for failing to address the anticompetitive harm that was likely to be caused by the refusal and the possible efficiencies that might have resulted from the supplier's decision to vertically integrate<sup>10</sup>.

The question is whether in refusal to supply cases a distinction needs to be drawn between supply to existing customers and supply to new customers is highly debated in economic and legal literature.<sup>11</sup> The

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<sup>6</sup> This is not an exhaustive enumeration. Other types of refusal to deal cases can be distinguished, for instance refusal to deal in times of shortage; in *BP v Commission* (Case 77/77 [1978] ECR 1513, [1978] 3 CMLR 174) the ECJ accepted that it is not an abuse if, in times of shortage, a supplier chooses to supply regular customers over more occasional ones. The ECJ however did make clear that in such a situation it would be abusive for a dominant firm to treat comparable customers in a discriminatory manner without objective justification.

<sup>7</sup> The duty to deal with a downstream competitor under Article 82 has a strong parallel with the "essential facilities" doctrine that is as such not being dealt with in this paragraph. Under this doctrine, a single firm, or group of firms, controlling an input at an upstream level of production that is essential for competitors on a downstream market may be obliged to deal with third parties where a refusal to do so would eliminate competition on the relevant downstream market. In *Bronner* (Case C-7/97 [1998] ECR I-7791) the ECJ clarified that in order for a duty to deal to arise in such cases the following conditions need to be fulfilled: (i) the refusal will eliminate all competition in the relevant market by the requesting party, (ii) the refusal cannot be objectively justified, and (iii) the requested product is indispensable for the requesting party to carry on its business.

<sup>8</sup> Cases 6/73 & 7/73 [1974] ECR 223, [1974] 1 CMLR 309.

<sup>9</sup> *Ibid*, para 25.

<sup>10</sup> See e.g. A. Jones, "A Dominant Firm's Duty to Deal: EC and US Antitrust Law Compared", in *Handbook of Research in Transatlantic Antitrust* (Philip Marsden, ed. 2006), p. 249.

<sup>11</sup> See e.g.: R. Donoghue, A.J. Padilla, *The Law and Economics of Article 82 EC* (2006), p. 458-463; V. Hatzopoulos, "Case Notes on IMS" (2004) 41 CMLR 1613; R. Subiotto, R. Donoghue, "Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC" (2003) 12 ECLR, 683.

case law of the ECJ does not seem to provide a solid basis for such a distinction. In *Magill*<sup>12</sup> the ECJ had to rule on the legality of the refusal to supply a new customer. In its decision the ECJ did not distinguish between the discontinuation of supply to existing or new customers and ruled with reference to the *Commercial Solvents* doctrine that the refusal by RTE and ITP to grant Magill licences for the publication of weekly television listings was abusive. There does not seem to be any reason why the approach in a non-IP related case would be different.

#### Refusal to supply a (potential or actual) competitor in the upstream market

A refusal to supply a purchaser who tries to enter the upstream market in competition with the supplier may be deemed to be abusive under EC law, in particular when the refusal is used as an exclusionary tactic. In *BBI / Boosey & Hawkes: Interim Measures*<sup>13</sup> the Commission decided that a dominant firm is entitled to take reasonable steps to protect its commercial interests, but that such measures must be a fair and proportionate response to the threat.<sup>14</sup>

#### Refusal to supply a customer in a market where the dominant firm has no presence

A refusal to supply by dominant firms may further constitute a violation of Article 82 when it is used as a disciplinary measure against customers. For instance, discontinuing supplies to punish a distributor for dealing with rivals<sup>15</sup>, and refusing to supply buyers that do not agree to exclusive dealing or tying arrangements may be deemed to be abusive. According to the EC's 2005 Discussion Paper on the application of Article 82 to exclusionary abuses, the refusal to supply in such cases is best viewed as an instrument to achieve another purpose, such as exclusive dealing or tying and should therefore be analysed as part of a single branding or tying practice (sections 7 and 8 of the Discussion Paper).<sup>16</sup>

*Obiter* statements in Article 82 case law suggest that no duty to deal can arise where the dominant firm is not itself present on the market for which access to the input is sought.<sup>17</sup> The economic rationale for this is that if the dominant firm is not present on the downstream market, it is not foreclosing rivals or restricting competition in favour of its own business. The Discussion Paper also focuses on this particular type of refusal to deal.<sup>18</sup> It is however unclear how this position relates to the non-discrimination clause in Article 82 EC. In contrast with U.S. antitrust law, Article 82(c) EC contains a broad non-discrimination clause. With reference to this clause it may be argued that, if the dominant firm is not vertically integrated, but has made one contract – whether compulsory on the basis of Article 82 or voluntary – similarly situated customers may be able to claim further contracts.<sup>19</sup> The Discussion Paper is silent on this issue and it is therefore uncertain whether such a claim may be successful. BIAC would welcome clarification from the Community Institutions on this point.

<sup>12</sup> Cases T-69/89 etc. RTE v Commission [1991] ECR II-485, [1991] 4 CMLR 586, upheld by the ECJ Cases 241/91 P etc. RTE and ITP v Commission [1995] ECR I-743, [1995] 4 CMLR 718.

<sup>13</sup> OJ [1987 L 286/36, [1988] 4 CMLR 67.

<sup>14</sup> Ibid. para 19.

<sup>15</sup> Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429.

<sup>16</sup> Paragraph 208 of the Discussion Paper.

<sup>17</sup> Case T-504/93, [1997] ECR II-923, para 130.

<sup>18</sup> Paragraphs 208 and 209 of the Discussion Paper.

<sup>19</sup> Donoghue, Padilla, *The Law and Economics of Article 82 EC* (2006), p. 465.

## Comments on the Commission's approach to refusal to deal in the Discussion Paper

The recent modernization of both the substance and procedure of Article 81 and the amendment of the Merger Regulation have left Article 82 as the last non-modernised area of Community competition law. However, the Commission began in 2005 a reflection on the policy underlying Article 82 and the way in which it should enforce that policy. In 2005 the Commission published the Discussion Paper seeking public comment. The Discussion Paper describes a general framework for analysing abusive exclusionary conduct by a dominant company. BIAAC supports the Commission's initiative and the need for guidelines in this area.

Chapter 9 deals with refusal to deal.<sup>20</sup> The refusals to deal chapter in the Discussion Paper starts from the premise that dominant undertakings have in principle the right to determine whom to supply, and that an obligation to supply can be established only after a close scrutiny of the factual and economic context. The finding of abuse is, according to the Commission, highly dependent on the specific economic and regulatory context.<sup>21</sup> Accordingly, on its face, the Discussion Paper suggests a movement by the Commission towards an approach closer to that of the U.S.

In paragraph 213 of the Discussion Paper the Commission states that the main purpose of forcing companies to supply is to improve the competitive situation in the downstream market (protecting allocative efficiency), but that effects on investments (dynamic efficiency) are also taken into account. BIAAC supports the view that in addition to the competitive situation in the downstream market, the dominant company's incentive to invest should be taken into account. Perhaps somewhat surprisingly however, the Commission intends to not only take into account the dominant company's incentives to invest, which may suffer as a result of forced dealing, but also those of other firms, i.e. the dominant company's rivals' incentives to invest "*in, for instance, follow-on research and development that would otherwise not be possible or profitable*".<sup>22</sup> It is a concern that this approach, if adopted, may in some cases too easily tip the balance in favour of an antitrust intervention on the basis of highly speculative incentives.

In the Discussion Paper, the Commission – for the first time – makes a clear distinction between the termination of an existing supply relationship and a refusal to supply a new customer. According to the Commission, four conditions "normally" have to be fulfilled in order for the termination of an existing supply relationship to be abusive. The conditions are:

- the behaviour must be properly characterised as a refusal to supply;
- the supplier must be dominant;
- the refusal must be likely to have market distorting foreclosure effects; and
- the refusal must not be justified objectively or by efficiencies.

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<sup>20</sup> Paragraph 215 distinguishes between the following four types of refusal to deal: (a) a refusal to supply an existing customer (discontinuation of supply), (b) a refusal to supply a new customer with input for the first time, (c) a refusal to start supplying a new customer with an input covered by intellectual property rights; and (d) a refusal to supply information needed for interoperability. This paper only deals with the first two types of refusal to deal.

<sup>21</sup> Paragraphs 207 and 214 of the Discussion Paper.

<sup>22</sup> Paragraph 213 of the Discussion Paper.

If the dominant supplier has not previously supplied the input to the customer, an additional criterion is added: the input must be “indispensable” to carry on normal economic activity in the downstream market. Thus, according to the Discussion Paper, the termination of an existing relationship is clearly more likely to be abusive than a refusal to deal with a new customer. Illustrative of the distrusting attitude of the Commission towards discontinuation of supply is the following quotation from the Discussion Paper:

“That the dominant company in the past has found it in its interest to supply an input to one or more customers shows that the dominant company at a certain point in time considered it efficient to engage in such supply relationships. This and the fact that its customers are likely to have made investments connected to these supply relationships create a rebuttable presumption that continuing these relationships is pro-competitive.”<sup>23</sup>

However, the Discussion Paper’s approach with regard to discontinuation of supply gives rise to serious concerns and uncertainty. The approach, if applied, may make it difficult for a dominant supplier to terminate existing supply contracts. This may have unwanted effects since it may lead dominant suppliers to reconsider the merits of entering into supply contracts in the first place (“chilling effect”). The risk that any fixed term supply contract which the dominant supplier may wish to enter into will become a *de facto* indefinite supply relationship may create significant problems for dominant companies doing business in Europe, as well as for their potential customers.

The Commission claims it is adopting an “effects-based” approach in the Discussion Paper. However, such an approach should reflect the fact that the effects on competition resulting from a refusal to supply a new customer will, absent other factors, be identical to the effects of a termination of an existing supply arrangement. If the party that has been refused supplies, or the party that has had its supply contract terminated, has access to alternative sources of supply which will allow it to carry on normal economic activity in the downstream market, they will not be foreclosed from that downstream market. The Commission has pointed out that it may be more difficult for a dominant supplier to provide an objective justification for the termination of an existing supply arrangement unless the dominant firm can demonstrate that the circumstances relating to the supply arrangement have changed since it entered into the supply contract. However, the fact that a customer has an existing supply contract should have no further importance.

There is still some uncertainty, however, under EC competition law with regard to the precise required effects for exclusionary conduct to be abusive within the meaning of Article 82. In this respect, the Discussion Paper fails to adequately define the notion of “market distorting foreclosure effects.” The recent judgment of the CFI in the *Microsoft* case does not resolve that question<sup>24</sup>. BIAC is of the opinion that the international business community would be served if this key criterion were to be elucidated. In particular it should be clear that market distorting effects should mean direct and foreseeable harm to competition in either the upstream or downstream market to the detriment of ultimate consumers.

#### Conclusion on EC

The refusal to deal chapter in the Discussion Paper gives the impression that the Commission is advocating a more interventionist and formalistic approach, at least with regard to discontinuation of supply cases. BIAC believes that there is no legal or economic justification for such an approach, because it is not in line with current economic thinking and would contradict the landmark cases of the Community

<sup>23</sup> Paragraph 217 of the Discussion Paper.

<sup>24</sup> Case T-201/04, *Microsoft c.s.*, not yet published. See in particular paragraphs 560- 564 (refusal to supply interoperability information) and 1031-1090 (tying).

courts. Regrettably the Discussion Paper does not clarify and appropriately circumscribe the role of Article 82(c) in refusal to deal cases.

### **3. Comments on Additional Questions Posed in the Request for Submissions**

#### **3.1 *Vertical vs. Horizontal* Refusals to Deal**

The relationship between a supplier and its customer is necessarily a “vertical” relationship<sup>25</sup>. As such, all refusals to deal are properly characterized as vertical restraints, whether or not the refused purchaser is a competitor of the supplier. Accordingly, it is unhelpful to distinguish between “vertical” and “horizontal” refusals to deal if to do so is to suggest that a refusal to deal with a competitor is “horizontal” conduct and therefore subject, for that reason, to stricter antitrust scrutiny. The most that can be said is that a refusal to deal with a competitor may, all else being equal, be more suggestive of an anticompetitive purpose than a refusal to deal with a non-competitor, but in neither case is there necessarily an anticompetitive effect. In any event, BIAC agrees with the observation in the Background Note that, “Ultimately, the vertical and horizontal labels do not seem to matter a great deal because the labels themselves do not contribute substantially to a better understanding of how to determine whether an RTD is harmful to competition”.

It can generally be assumed that a rational supplier will always seek to maximize profits and will therefore supply as much of its product to as many outlets as will best achieve that objective. Where a supplier refuses to deal with a customer who is not a rival and where such refusal will have no impact on the supplier’s competitors, it is reasonable to assume that the refusal is either in the supplier’s reasonable commercial interest (i.e. by enhancing profit), or that the supplier has made a poor business decision. Either circumstance is unlikely in and of itself to give rise to any antitrust concern; this is so even though the refusal may have material negative effects on the party refused. An issue could potentially arise if the refusal to deal results in a significant impact on competition in the market in which the party refused carries on business, but such effect should be required to be established by evidence and ought not to be presumed.

As indicated above, there may be an inclination to assume anticompetitive intent from the refusal of a supplier to deal with a competitor. It would be an error, however, to presume an anticompetitive effect in all such cases and to be quick, therefore, to presume the need for antitrust remedies to address such refusals. Antitrust principles generally discourage agreements between competitors; it is a hallmark of competition for market participants to act contrary to the interests of their competitors. It is therefore incongruous, on the one hand, to discourage competitor collaboration as potentially anticompetitive and on the other to presume actionable antitrust injury from the refusal of a supplier to deal with a competitor.

BIAC agrees with those who reject the notion (reflected, for example in the holding in *Aspen*) that antitrust injury can be presumed from the refusal of a firm (even one with market power) to deal with a competitor, unless the firm can provide a business justification for the refusal. In BIAC’s view the burden should be on those challenging the refusal to establish a significant effect on competition warranting remedial action, and not on the supplier to justify the refusal.

The Canadian *Competition Act* includes a specific provision (section 75) that addresses refusal to deal as a non-criminal, reviewable trade practice. The Competition Tribunal can require a supplier to accept a

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Except in the situation discussed on page 43 EAGCP paper, see note 2 above.

party as a customer where the requirements of that provision are met<sup>26</sup>. Section 75 does not expressly address refusals to supply a competitor, but the provision (which refers to “suppliers” and “customers”) is broad enough to reach such refusals.

As originally drafted in 1986, this provision did not require proof of an anticompetitive effect, the sole focus of the provision was on the effects on the party refused. An order could issue where the party refused was “substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms” and the other requirements of the provision were met. In 2002, however, the provision was amended to add a competitive effects requirement; for an order to issue it must now also be shown that, “the refusal to deal is having or is likely to have an adverse effect on competition in a market.”

The competitive effects test in section 75 is expressed in different terms than in the Act’s other reviewable trade practices (for example, Section 79, Abuse of Dominant Position and Section 91, Mergers) where the language requires proof of a “substantial lessening of competition”. It remains to be seen whether the competitive effects required to obtain relief under Section 75 will be judicially determined to be less, or at least different than, those required in respect of the other reviewable trade practices. There can be no sound basis for treating refusals to deal as a particularly pernicious form of conduct that therefore warrants prohibition on the basis of lesser demonstration of harmful competitive effects than other forms of anticompetitive conduct. To the contrary, as indicated above, there are those who consider that refusals to deal are less likely to result in real competitive harm than other practices and that the burden on those seeking remedial relief in such circumstances should, if anything, be higher.

### 3.2 *Same conduct – different analysis?*

There is little to be gained by focusing on the precise form of the “refusal” required to constitute a potentially actionable refusal to deal. The focus should properly be on whether or not there is a competitive restraint that is having a sufficiently significant impact on competition to warrant intervention and not on the form of the restraint. A refusal to deal can arise in a variety of circumstances. For example, one party may refuse to deal with another because the first party is subject to an exclusive dealing arrangement with a third party; a supplier who engages in tied selling may “refuse to deal” with a purchaser unwilling to accept the terms of the tie. In all such cases, the nature, scope and extent of the “refusal” is less relevant than its real competitive impact. It may be that the nature of the refusal diminishes or increases the probable competitive impact and it will be appropriate for such considerations to be taken into account in determining whether or not remedial action is required. It would, however, be inappropriate to dismiss consideration of a particular refusal to deal out of hand, because the form of the refusal did not meet a particular definition. At the same time, a course of prior dealings should not give rise to a presumption that such dealings would continue to be economically rational for the dominant party.

### 3.3 *History of Dealing*

The U.S. Supreme Court in *Trinko* suggested that intervention in a refusal to deal case should not be warranted where the supplier had not previously dealt with the refused party. A history of prior dealings also figured prominently in Canadian refusal to deal cases, such as *Xerox*<sup>27</sup> and *Chrysler*.<sup>28</sup> In Europe, for

<sup>26</sup> In addition, Section 61 of the *Competition Act* creates a criminal offence for refusing to deal with a person because of that person’s “low pricing policy”. That provision, however, is intended to address resale price maintenance concerns and is therefore beyond the scope of the issues relevant to this Roundtable.

<sup>27</sup> *Canada (Director of Investigation and Research) v. Xerox Canada Inc.*, [1990] 33 C.P.R. (3d) 83 (Comp. Trib.).

example, both *Commercial Solvents* and *United Brands* involved cessation of supply to existing customers. Certainly the concept that a supplier ought not to be required to deal with a person with whom it has not previously dealt is consistent with the principal already referenced that a party ought to generally be permitted to choose its counterparties. Subject, however, to explicit or implicit contractual obligations, a supplier's essential freedom to deal with whom the supplier chooses should extend to both parties with whom the supplier has and has not previously dealt. As such, provided that due regard is given in any refusal to deal case to the basic principal that suppliers should be free to deal with whom they choose, the fact, or not, of prior dealing ought not to be determinative of the outcome of any given case. The core issue is the probable competitive effects of the refusal. It is not self-evident that a party who has previously dealt with a supplier is in any better position to establish significant harm to competition (as opposed to harm to the party refused) than a party who has not previously dealt with the supplier. As such, except to the extent that a history of past dealing impacts on the assessment of the probable competitive impact of the refusal, such dealings ought not in and of themselves to be considered a pre-condition to advancing a refusal to deal complaint.

### 3.4 *Reasonable Justifications*

As indicated above, it is not considered that suppliers should have to justify their decisions to refuse to deal with particular purchasers. There are, however, circumstances that can justify a refusal to deal that would otherwise be found to have a significant anticompetitive effect. A logical extension of the principle that a firm should generally be free to deal with whom it chooses, is the point that a supplier should not be required to deal with a counterparty where to do so would impair the supplier's business (provided that there is an objective basis for the supplier's concerns). Accordingly, if the refused party represents an unacceptable credit risk or has a record of poorly supporting or servicing products that it has been supplied by the instant supplier or others (such that the customer might reasonably be expected to harm the supplier's reputation), the supplier should be free to refuse to accept the customer, regardless of the suggested impact on competition at large. The refusal to deal provision of the Canadian *Competition Act*, for example, captures this concept, in part, insofar as it requires, as a condition of its application, that the refused party be prepared to comply with the supplier's "usual trade terms". In other words, regardless of the anticipated impact on competition, a supplier will not be required to deal with a customer who is not prepared to accept the supplier's usual terms of trade.

### 3.5 *Essential Facilities*

As indicated at the outset, a detailed consideration of the essential facilities doctrine is beyond the scope of this paper. Certainly that doctrine, like the appropriate antitrust treatment of unilateral refusals to deal, is not without controversy. Undoubtedly, the U.S. Supreme Court added fuel to that controversy when it stated in *Trinko*, "We have never recognized such a doctrine [essential facilities], and we find no need either to recognize it or to repudiate it here<sup>29</sup>". As indicated throughout this paper, BIAC's view is that a key focus in determining the appropriate antitrust treatment of refusals to deal is an assessment of the competitive effect of the conduct. It is not obvious that an "essential facilities" doctrine is necessary to undertake that assessment. By the same token, if the refused party has alternative sources of supply available to it, it may be difficult as a practical matter to demonstrate the need for remedial action. In other words, unless the supply refused is "essential" to the party seeking supply, there may be no basis for complaint at all. On the other hand, the fact that refused supply is essential to the party refused may say something about the probable impact of the refusal on the affected party, but it may say nothing about the effect of the refusal on competition. Certainly to the extent that the essential facilities doctrine as

<sup>28</sup> *Canada (Director of Investigation and Research ) v. Chrysler Canada Ltd.* , [1989] 27 C.P.R. (3d) 1 (Comp. Trib.).

<sup>29</sup> *Trinko supra* at note 5, p. 410

developed in case law does not require proof of an anticompetitive effect, the doctrine is flawed. Any consideration of “essential facilities” must take into account the competitive impact of either denying or mandating access, as well as the implications for incentives to invest in the facility deemed essential of mandating access.

#### 4. Conclusion

BIAC’s position can be summarized as follows:

- The Background Note represents a balanced and helpful summary of the law and principles surrounding refusals to deal. BIAC also agrees with the Secretariat’s observation that:

“Despite the different standards that the US and EU use to evaluate RTD’s, the overall trend is the same in both jurisdictions. The highest courts have shown an increasing reluctance to force dominant firms to deal with their competitors.”

- BIAC also supports the EAGCP’s call for an economics-based approach to the application of Article 82 in general and refusals to deal in particular, that “implies that the assessment of each specific case will not be undertaken on the basis of the form that a particular business practice takes (for example, exclusive dealing, tying, etc.) but rather will be based on the assessment of the anti-competitive effects generated by business behaviour”. Moreover, it supports the suggestion of the EAGCP that the competition agency should carefully assess the anticompetitive “mechanism” at work.
- As a general matter, in the absence of likely demonstrable and significant competitive harm, firms should be free to choose with whom they deal without attracting antitrust scrutiny, or being required to justify the basis for the refusal;
- There is no sound basis for a presumption that unilateral refusals to deal warrant antitrust intervention. To the contrary, if anything, unilateral refusals to deal are unlikely to give rise to material competitive concerns, and should therefore be regarded as likely to be benign, except in exceptional cases;
- Whether or not the party refused supply is a competitor, a thorough analysis to determine whether there is any significant harm to competition is necessarily likely to arise from the refusal is required before determining whether remedial action is required;
- A prior history of dealing between the supplier and the party refused may be of some factual relevance in a given case, but in and of itself is not determinative of the likelihood of significant harm to competition as a result of the refusal and should neither be taken as proof of competitive harm or be required as a precondition to a complaint;
- Regardless of the probable competitive effect, a supplier ought not to be required to deal with a party where to do so would materially impair the supplier’s business, provided that there is some subjective basis for the supplier’s concern;
- Recognition of an “essential facilities doctrine” is unnecessary to the assessment of the appropriate antitrust treatment of unilateral refusals to deal. While a refused party may have to show that the desired supply is “essential” (i.e. that it cannot obtain supply elsewhere) to even advance a complaint, the fact that supply is essential to the party refused is not determinative of the likelihood of competitive harm and therefore

determinative of the need for antitrust intervention; what is required is an overall assessment of the likely competitive effects of the refusal to deal.

## SUMMARY OF DISCUSSION

*by the Secretariat*

Competition Committee Chairman Frédéric Jenny welcomed Professor George Hay, an economist who served as an expert for the roundtable.

Professor Hay noted that his reflections on the following questions on the problem of refusals to deal (“RTDs”) led him to a somewhat extreme conclusion, even though he is not a Chicago-school economist:

The first question is as follows. Assume there is a dominant firm in an upstream market but the firm isn’t vertically integrated, *i.e.*, it doesn’t serve or seek to serve the downstream market. Would we ever impose antitrust liability if that firm charged a non-discriminatory monopoly price to downstream customers? The answer in general is no, unless there is some fairly specific regulation involving that particular industry. If a firm is not in the downstream market, it can usually charge a non-discriminatory monopoly price with no risk of liability.

Now suppose the dominant upstream firm is also active in the downstream market where it has actual or potential competitors. Should this firm risk antitrust liability if it charges a non-discriminatory monopoly price to its downstream rivals? In response to those who would answer yes to this last question, Prof Hay asked two further sub-questions.

The first sub-question is the following: Would imposing liability distort the incentives of the firm to vertically integrate? Under that scenario, if the company does not participate in the downstream market it can charge essentially whatever it wants to charge. But as soon as it decides to put a foot in the downstream market it would be subject to some form of price regulation? Would that not distort its incentive to vertically integrate?

The second sub-question is whether a court can determine whether a price is greater than a reasonable price? Professor Hay emphasized that he was not talking about *ex ante* regulation where the regulator meets with the regulated firm, reviews cost data and then announces the price that it has decided is reasonable. Prof Hay was very pessimistic about both the ability of courts to determine a reasonable price and the effect such uncertainty will have on dominant firms.

The third main question, assuming that the answer to the second question should be no (*i.e.*, even a vertically integrated firm should be allowed to charge a non-discriminatory monopoly price), is: Is it realistic to expect courts to be able to impose liability for charging prices that are above the monopoly price? The monopoly price is simply an economist’s concept, not something that can typically be found in data. And if no one is able to conclude with any confidence that a price is too high (*i.e.*, above the profit maximizing level) then as a practical matter a firm can charge any price it wants to. Professor Hay suggested there is no point in clinging to the notion that a duty to deal at some kind of “reasonable price” should be imposed upon dominant firms.

Competition laws might still be used to provide some solace to unintegrated, downstream competitors who claim that they’re being forced to pay too much for a necessary input. In this case we should not look at the price being paid for inputs but rather at the price that the integrated firm is charging for its output. The key question would be whether the downstream operation of the integrated firm could afford to buy inputs at the price its upstream affiliate is charging everyone else and still sell in the downstream market at

a profit. This question is similar to one that courts are used to dealing with, *i.e.*, predatory pricing – not that predatory pricing cases are easy, but it is at least within the traditional competence of courts to determine whether a firm's imputed (not accounting) cost would include as one of its components the price that others are being charged for the same input.

### **1. Are RTDs treated as unfair practices or as anticompetitive practices?**

The Chairman asked whether RTDs are treated as unfair practices or as anticompetitive practices and, in countries where they can be challenged as either type of practice, is there a clear distinction between the two. In Japan, for example, RTDs can be attacked either as unfair practices or as practices that restrain competition.

A delegate from Japan noted that the Fair Trade Commission's basic philosophy is that a firm is free to decide its potential buyers. In principle, if a firm decides not to sell to a certain customer there would be no problem under the Antimonopoly Act. However, if a unilateral RTD tends to impede fair competition it could be considered an unfair trade practice. The JFTC guidelines on distribution and business practices provide two examples of cases in which there is a tendency to impede fair competition. First, a firm might refuse to deal as a means of complementing other conduct that is illegal under the Antimonopoly Act. Second, a firm might refuse to deal as a means of achieving other anticompetitive aims such as excluding competitors from a market.

Alternatively, if the anticompetitive effect is found to be a substantial restraint on competition in any particular field of trade, the RTD can be prohibited as a private monopolization. Under the Antimonopoly Act, a substantial restraint of competition is regarded in general as more harmful than a tendency to impede fair competition. The JFTC takes a case by case approach to analysing whether a refusal to deal could constitute private monopolization, considering factors such as the nature of the conduct, its effect, the firm's market share and the market situation.

The *Nipro* case was a private monopolization case that was concluded in 2006. The case involved 3 parties - Nipro, an upstream distributor of medical glass pipes with a market share in western Japan of 100 percent (excluding foreign glass pipes), Nippon Electric Glass (NEG), the only producer of glass pipes in Japan, which provided such pipes exclusively to Nipro in western Japan, and Naigai – a downstream distributor that bought glass pipes from Nipro. Naigai's subsidiary produced small glass bottles and sold them to pharmaceutical companies.

Naigai began to import glass pipes from other countries. Nipro asked Naigai to stop importing glass pipes, but Naigai refused. Nipro's response was to discriminate against Naigai by raising its prices, changing the acceptable payment methods and refusing to accept some of Naigai's orders. The JFTC found that Nipro committed these acts with the intention of blocking further imports and imposing sanctions in retaliation for what Naigai did manage to import. The JFTC recognised that Nipro's conduct as a whole substantially restrained competition in the glass pipe market of western Japan and therefore decided that it constituted private monopolization.

The Chairman observed that Canada's contribution gave the impression that the government should not waste its time pursuing RTDs even though Canada's competition law has a wealth of provisions that could be used against RTDs. There has, however, been a change in the law that raised the standards for challenging this type of conduct. The Chairman asked Canada to explain whether the different provisions are complementary and whether, as a matter of policy, the Bureau is pursuing RTDs.

A delegate from Canada replied that before 2002 there was a specific RTD provision in the competition law (section 75), although it was oriented more towards unfair practices than anticompetitive

acts. In 2002, an “adverse effect on competition” test was added to the section, which shifted the focus more toward anticompetitive effects, and the effect on competition rather than on competitors. This was the existing test used by the Competition Tribunal, but this statutory change made it more explicit. The test’s threshold is somewhat easier to meet than the test used in merger reviews or abuse of dominance cases, where one looks for a substantial lessening of competition.

There was a second amendment to the competition law at the same time that allowed private access to the Tribunal. Prior to this time, only the Commissioner could bring actions under sections 75, 77, and 79 of the legislation. The amendment stipulated that if a private action was brought the Commissioner could intervene before the Tribunal. As a consequence, the Bureau elaborated several criteria describing when it would be likely to intervene in private actions brought under Section 75 – including criteria such as: the effect on competition; when the significance went beyond the parties; and whether the case would bring about a new development either from an economic or jurisprudential perspective. There have now been 15 private cases brought under Section 75 and the Bureau has yet to intervene in one of those actions. In effect, pure RTD cases have passed into the realm of private action.

When the Bureau looks at such cases it does so under Section 79, which sets out Canada’s abuse of dominance provisions. That section incorporates a traditional economic test that looks for a substantial lessening of competition in the market. The Bureau is not anticipating that the Tribunal will be very open to RTD cases. Of the 15 cases that were brought as private actions, only a few were granted leave. Of those, only one became a contested proceeding and that party lost.

The Chairman summarized Ireland’s contribution as follows: (i) there are lots of complaints; (ii) they are all unsuccessful, (iii) the competition authority believes that it should intervene only when there is a real competition issue; and (iv) it believes that that rarely occurs, and when it does it is only in sectors that are otherwise regulated, therefore it doesn’t have to deal with them.

A delegate from Ireland noted that it is not necessarily a good idea to regulate sectors in which RTDs occur. There is already extensive regulation in Ireland in sectors such as financial services, energy, communications, and broadcasting. Many RTDs overlap with other practices, such as tying and other potentially abusive conduct. Everyone is looking for a grand principle that not only deals with RTDs but with all other aspects of unilateral conduct by dominant players. This search will keep us occupied for many decades to come.

Ireland is investigating a few such cases very seriously. One group of cases involves selective distribution. Another group includes cases where there is a state monopoly, perhaps a licensing authority, who tells a company that it will not grant it a license. The third kind of case involves vertically-integrated state enterprises and whether they have an objective justification for refusing to supply someone in the downstream market.

## **2. What is the proper standard for assessing RTDs?**

The Chairman observed that a variety of wording is used to describe the standard for evaluating RTDs. In some court decisions RTDs are considered illegal if they eliminate all competition, in others they are illegal if they eliminate effective competition, and in still others they are illegal if they eliminate some competition. The standard does not seem to be very precise.

This is particularly the case in Europe where there are two leading decisions. In *Bronner* the Court of Justice said that in order to be illegal, an RTD must eliminate all competition. But in *Microsoft* the Court of First Instance said that the elimination of all competition isn’t necessary, just the elimination of effective competition. Is that a different concept? Does it mean that there has been a change in the interpretation?

A delegate from the European Commission noted that Article 82 does not allow the Commission to pursue an RTD case unless the firm concerned has substantial, durable market power in a particular market. Regarding the special responsibility of dominant firms, the Court interprets that simply as the reality that a dominant firm should know that, if it is dominant, its practices can be scrutinized under Article 82. If the second stage of an investigation shows that there is durable harm to consumers through an RTD then of course there can be liability.

As far as RTD vs. refusing to continue to deal is concerned, if you distinguish between the two then you influence behaviour by corporations who could easily reason: "If I'm liable only for refusing to continue to deal then maybe I shouldn't deal in the first place." The most important aspect is the effect on the incentives of the firm concerned. The defendant may argue that its incentive to invest in innovation would be less if it is required to continue dealing, but that argument is weaker than it would be in a situation where the defendant is required to deal with a firm it has never dealt with before.

The Commission concentrates on the defendant's capacity to exclude. Therefore, in relation to Prof. Hay's questions, the EC would be concerned about the extent to which there is any exclusionary conduct behind the symptom of exploitative prices. Exclusionary differences between wholesale prices and retail prices would be described as a margin squeeze. It is not necessary to prove predation in order to conduct a case based upon that squeezing between the wholesale and retail prices.

Regarding the court's jurisprudence in *Bronner* and *Magill*, the focus of these judgments was on the issue of indispensability of access to the input – in *Bronner* it was access to a newspaper distribution network. The criteria for indispensability set out by the court are very strict. One has to demonstrate that the creation of an alternative system – like, for example, a nationwide home delivery system for daily newspapers - isn't a realistic potential alternative and that access to the existing system is therefore indispensable. It is not enough to argue that it is not economically viable due to the small circulation of the daily newspapers or newspapers to be distributed. For access to be regarded as indispensable it would be necessary at the very least to establish that it's not economically viable to create a second scheme for delivery of daily newspapers in general. On the basis of *Bronner* and subsequent decisions, the Commission has applied a strict test on whether competitors can find realistic alternatives for the refused input and compete on neighbouring and downstream markets. This is necessary to avoid detrimental effects on investment incentives.

In *Microsoft*, the court made it clear that once it is established that competitors on the downstream or adjacent markets are unable to find alternatives for the refused input, the Commission is not required to wait until all competition is eliminated. That would thwart the purpose of the law. But as these cases are relatively specific, opportunities to investigate these RTDs only arise in very exceptional circumstances.

In the *Microsoft* case the Court of First Instance held that Microsoft had failed to demonstrate that interoperability information was not indispensable for effective competition. Microsoft also submitted that even if interoperability information were indispensable the refusal would not exclude all competition on the secondary market and therefore there was not an abuse. The Court found that "Article 82 doesn't apply only from the time when there is no more or practically no more competition. If the Commission were required to wait until competitors were eliminated before being able to set action this would run counter to the objective of that provision which is to maintain undistorted competition". It also stressed that the Commission had all the more reason to apply Article 82 before the elimination of competition in the relevant market had become a reality, because that market was characterized by significant network effects and the elimination of competition would therefore be very difficult to reverse.

The Commission collected a very significant amount of customer evidence showing that it was the artificial interoperability advantage that Microsoft reserved for its product via the refusal to supply that

drove Microsoft's rapid gain in market share and prevented other vendors of workgroup server operating systems from viably competing. The Court concluded that Microsoft's refusal to supply had the consequence of confining its competitors' products marginal or unprofitable positions. The fact that there may be marginal competition in the market does not invalidate the Commission's argument that all effective competition was at risk of being eliminated on that market.

A BIAC delegate noted their position that, exceptionally, it is quite possible that dominant firms abuse their dominant position by refusing to deal. But they also emphasized it is very important to look at the precise theory of harm and for courts and agencies to examine the facts of the case to determine what causes the firm not to deal or not continue dealing with a particular competitor or other firm.

On the proper standard for assessing a RTD, BIAC noted that the combined effect of *Microsoft* and *Magill* is that at least in Europe there is still significant uncertainty as to precisely when an agency or a court would be able to intervene. It is important for the international business community to know precisely how much harm to competition must be inflicted before it can expect an agency or court to intervene, especially in light of possible efficiency considerations.

The Chairman summarized the current position as being that eliminating one competitor is probably not enough, while eliminating all competition, or all except marginal competition, is a ground for intervention. Between these two extremes there is a wide scope for interpretation. The UK contribution states: "an important question is how substantial the harm to competition needs to be for refusal to deal to constitute an abuse". The UK contribution goes on to say that the "substantial harm to competition" is probably the correct threshold. How do we define "substantial harm to competition" in practice?

A delegate from the United Kingdom observed that there is not a significant history of RTD cases in the UK despite the fact that it has had an abuse of dominance law (consistent with Article 82) for the last seven years. There are a number of reasons for this; primarily the lack of substantive complaints, but also the debate within the EU about the evolution of Article 82 and the evolving case law of the court. There have been only two RTD cases, neither of which was deemed to involve infringements of Chapter 2.

These cases are immensely difficult and there is a significant risk of errors and inappropriate intervention which actually penalize dominant companies and chill innovation. There is also a risk of giving advantage to complainants who are disinclined to innovate and invest. There can be adverse effects on investment and that can harm the competitive process.

### **3. Outright refusals to deal and constructive refusals to deal**

The Chairman turned to the question of what constitutes a RTD. The contributions cite many cases in which there has not been an outright RTD but rather conditions have been imposed that amount to a RTD. These are sometimes referred to as "constructive refusals to deal". Mexico is a country where the law has a strict definition of RTD; it only applies to outright RTDs. Mexico's contribution makes the point that this doesn't seem to be a limitation.

A delegate from Mexico explained that they have seen a strong correlation between unconditional RTDs and vertical integration. In those cases, the RTD is designed to favour a firm's own downstream division and to extend upstream market power to the downstream market. Conditional RTDs tend to arise in Mexico in firms that are not necessarily integrated downstream and when the intention is to displace competitors.

An outright RTD can be easily handled under the relevant provisions in the Mexican competition law. In addition, a constructive RTD can usually be prosecuted under the rules against discrimination. The real problem arises when the refusing firm is vertically integrated and it treats all other firms differently to its

own downstream division. Conceivably, in this circumstance, a problem of not being able to apply the Mexican competition law could arise - neither the provisions against outright RTDs nor the non-discrimination provisions.

In practice, the authority has been fortunate in that there has not been complete integration between the upstream and downstream. That is, although there has been a link, they have slightly different shareholders upstream and downstream. In these cases you can apply the non-discrimination provisions in the Mexican law, which otherwise couldn't be addressed by the very limited RTD provisions.

It hasn't happened yet, but conceivably you could have a case where the upstream and downstream firms are totally integrated. In this case, there is no direct measure of the price at which the firm sells to itself. In this case, we could examine whether or not the price at which the firm sells to outside firms would allow the firm's own downstream unit to operate at a profit - to distinguish a possibly legitimate commercial activity from pricing with the intention of excluding competitors.

The Chairman introduced a case of constructive RTD in Finland, where an integrated firm imposed conditions in the upstream market which made it very difficult for rivals to be present on a downstream market. The contribution states that this case is "a good example of how, in certain sectors, it is possible by making minute changes in 'productisation' to create a situation of de facto refusal to deal with serious consequences". Finland's contribution suggests that even though these cases are complicated it is necessary to tackle them because the imagination of business people is such that there are many ways in which they can refuse to deal.

A delegate from Finland described the case of Lännen Puhelin Oy ("LP"), a firm that was dominant in the regional broadband Internet market. LP was the local fixed line incumbent in a part of Finland. The broadband market started to boom in 2001-2. Between 2002 and 2004 LP didn't provide a broadband access product that could be used to provide broadband connections to consumers.

LP stated that they were doing better than the other fixed line incumbents because they actually provided two wholesale products with which rivals could potentially enter the market. One was an ATM-based wholesale product. The problem with this product was that it didn't pass the margin squeeze test. The monthly rents for this product were clearly above the retail prices that LP itself received in the retail market. The other product was an IP-based wholesale product. But the technical specifications of that product were such that competitors were not able to use it to provide retail services.

As a result, LP's market share in the retail market remained at 90% for the whole period of this abuse. One competitor built its own network - but it was very limited in scope. LP had 128 points of presence in the area while the competitor only had 4. This period of abuse ended when LP lowered the price of the ATM wholesale product in such a way as to eliminate the margin squeeze.

The Finnish competition authority learned from these cases that, even in the absence of the market squeeze problem, small changes in the product definition meant that the product was not commercially viable. One issue concerned the allocation of IP addresses to consumers who used rivals' Internet connection. LP stated that a competitor could invest in its own server to allocate IP addresses. The authority considered that this would restrict competition because it involved considerable investment. Subsequently LP offered to allocate competitors IP addresses from their own server. But the competitors and the technical advisors responded that competitors would not tolerate allowing the IP addresses to be handled by the incumbent because it would cause significant technical difficulties. LP then offered a third solution, which involved installing a relay agent and reserving capacity from their own router so IP addresses could be dealt with by other competitors in their area. Again, competitors and technical experts

said that this plan would not work. This case highlighted the difficulty of running a case when the incumbent holds the technical expertise.

It is difficult to determine whether this case constitutes a RTD or not. In court (where this case is still pending), LP have argued that they didn't know the product wasn't good for competitors until very late in the process. The competition authority, on the other hand, has argued that LP knew from the start that it wasn't suitable.

The Chairman summarized the position so far as follows:

- The legal treatment of RTDs varies considerably across countries;
- The standards to be used to assess RTDs are unclear and there is no consensus on what these standards should be;
- The definition of what constitutes a RTD is very uncertain.

#### **4. Do dominant firms face a special responsibility?**

The Chairman asked whether or not dominant firms have a special responsibility not to refuse to deal with others because of their market power? Germany has a very clear statement in its contribution: the greater the market power of the supplier the more restricted is its freedom to refuse to deal. The contribution explains that it uses a sliding scale when it deals with those issues and it presents an old case, the 1999 Scandlines Deutschland GmbH case. This case involved competing ferry companies trying to get access to a ferry terminal. Germany's contribution states that "legal and physical obstacles stood in the way of the construction of a new terminal whereas the shared use of the existing terminal facilities by an additional ferry operator was possible following appropriate construction and organizational modifications". It was therefore considered that there had been an illegal RTD. The Chairman asked who was supposed to bear the additional cost of modifying the terminal. Was it the ferry company which was asking for access or was it the operator of the terminal because it had a special responsibility to make this terminal open to others?

A delegate from Germany began by emphasizing that their approach is not unique – it is shared by France, Korea, and most European countries and is in line with the case law of the European Court of Justice. In all three cases mentioned in the submission Germany applied the so-called "indispensable" criterion and also the standard of "eliminating any competition in the downstream market". The German approach is not an exceptional or aggressive one but a rather common and well balanced approach.

With respect to the Scandlines case, the 1999 decision addressed only the general refusal of Scandlines to grant access to the harbour. The question of who was to pay for the construction and organizational modifications was left to the parties. The decision didn't address the more detailed question of what would be the appropriate access fee, either. These questions were left open because at that time there was perceived to be a reasonable chance for a negotiated agreement between the parties on these issues. The decision of the Bundeskartellamt was overturned in the Court of Appeal but was largely confirmed by the Federal Supreme Court. In the proceedings following the Supreme Court judgment the ferry company that wanted access to the harbour was required to pay for the appropriate construction modifications as well as an appropriate fee for using the harbour.

Professor Hay asked Germany the following question: if the defendant ferry company had come to the German competition authority and indicated it was happy to deal with the complainant and the only dispute

was over the price at which access would be granted, what advice would the authority have given them as to what the law permits them to charge?

A delegate from Germany replied that the German competition law requires that access be provided at an appropriate fee. This raises the question as to what “appropriate” means. That is a very difficult question. There are different possible approaches – such as looking at costs, or looking at the prices charged in comparable markets. The authority did not want to get involved in this question and preferred to leave it to the parties to negotiate an appropriate fee. The authority is presently involved in the process of determining an appropriate fee via the comparable market test and via an analysis of costs.

A delegate from Brazil observed that in discussing RTDs the delegates have brought in to the conversation all the different forms of unilateral abuse of dominance - predatory pricing, raising rivals costs, margin squeeze, etc.

In Brazil, in the telecommunications industry, incumbent operators of the last mile infrastructure can enter into settlement agreements with the competition authority. These agreements require the incumbent to charge the same price to its own downstream company as it does to rivals. To monitor this requirement, there are provisions requiring these firms to publish the prices. But the competition authority is concerned that this has helped the market players to facilitate coordination on prices. The delegate asked if any other countries have suggestions as to how to resolve this dilemma.

A delegate from the EC emphasized the problems faced by competition authorities in regulating terms and conditions of access. We can try to leave the question of terms and conditions to be determined by the companies themselves, as Germany suggested, but some form of arbitration mechanism is then necessary to ensure that the parties come to an agreement at fair and reasonably non-discriminatory terms. We can't get around the need to intervene in the terms and conditions of supply through some mechanism.

When it comes to setting prices, the delegate noted that the Commission's inclination would be to avoid that like the plague because it is extremely difficult. In the Microsoft case the solution was to appoint a monitoring trustee to arbitrate competing requests. This is similar to the issues faced by the American authorities in the AT&T Consent Decree.

The Chairman suggested there is a need for some kind of communication on Article 82 to give some guidance. Similar to Germany, Korea states in its contribution that “market dominant firms have a special obligation to begin or continue transactions in most cases”. In Korea there is a safe harbour against RTD violations, but the market share required to fall within that safe harbour is quite small (ten percent). The Chairman asked whether a firm with 20 percent market share that refuses to deal would create a major competition problem.

A delegate from Korea stated that RTDs can be controlled under two provisions of the Korean competition law. One provision relates to abuse of dominant position and the other relates to unfair transactions. The latter aims to regulate unfair methods of competition by non-dominant undertakings. This is to prevent non-dominant undertakings from becoming dominant and obtaining market power by unjustifiable RTDs.

The safe harbour provisions apply to the unfair transaction clauses only, not to the abuse of a dominant position. The KFTC considered different possible values for the market share threshold for the safe harbour. If an undertaking falls within the safe harbour every RTD by that undertaking is totally exempted from further examination. It was necessary to approach the matter conservatively, so the KFTC chose the ten percent threshold.

In contrast, the Chairman noted, the US takes a relatively benign view of RTDs by dominant firms.

A delegate from the US agreed that it believes there should be a presumption that RTDs are not unlawful absent extraordinary circumstances. “Extraordinary circumstances” does not mean never. There have been successful prosecutions in the US in recent years, such as the *Dentsply* and *Microsoft* cases. In the *Dentsply* case, over a period of 10 years, Dentsply (the dominant manufacturer of artificial teeth in the US) refused to deal with wholesalers who dealt with competitors. As a result, Dentsply held more than 80 percent of the market and retained this market share year after year despite the innovation and efforts of potential entrants.

When trying to determine whether or not a practice by a dominant firm might be anti-competitive, the first question to ask is whether a firm that isn’t dominant might engage in the same practice. Refusing to deal is an extremely common practice for very good reasons. A firm might refuse to deal with another firm and say anything from ‘you don’t pay your bills on time’ to ‘you don’t provide good service and take care of my products’ to ‘I don’t like you, I want my brother-in-law to distribute this product in this particular geographic area’. In the US cases on dealer termination, courts routinely reject the complaints of rejected dealers. Even though the dealer himself may feel it’s terribly unfair, typically it’s not harming competition. As long as there are plenty of other dealers and plenty of competitors, consumers are not affected.

When it comes to setting the terms and conditions at which firms must deal, competition authorities need to be modest in their abilities to “get it right”. The US courts – with the agencies in agreement – have decided to adopt the presumption that a RTD, even by a dominant firm, is lawful unless there are extraordinary circumstances, for three reasons:

1. If a firm knows that the more successful it is, the greater the chance it will be required to share its investment with a competitor, the less willing it will be to make the investment to innovate.
2. The US courts and antitrust agencies don’t want to be in the business of regulating private contracts between businesses. In some instances this has to be done, but it is not something that the courts or the agencies want to do very often.
3. There is a concern about cartels and agreements between rivals. On the one hand, competition authorities spend time trying to keep competitors apart and not working together. It is inconsistent, on the other hand, to say to a dominant firm that it must have on-going dealings with a competitor.

What are the “extraordinary circumstances” in which a RTD might violate antitrust law? Although it is desirable to be as clear as possible to provide guidance for business, it is not possible to list all the possible circumstances in advance. But it is clear that a very high market share will be relevant. All the recent cases have involved firms with a market share in the 80 - 95 percent range. Not many companies fall into that category.

Another delegate from the US raised the question whether requiring a dominant firm to deal might diminish incentives for entrants to invest in their own facilities. Is it preferable to lock in a dominant position by making that facility available to everybody else or would you rather create an incentive for somebody else to build a new facility? This is an issue in the telecommunications industry in the US where telecom companies are investing millions of dollars in fibre optic cable into the last mile right now. The incentives for these companies to invest should be preserved.

Competition authorities and courts are not very good at administering regulatory regimes. In some circumstances it can be preferable to establish a regulatory framework and carry out full-fledged conventional public utility regulation rather than try to regulate through the antitrust laws.

The delegate also distinguished conditional RTDs. For that type of conduct, administering a remedy is more straightforward since one can often simply prohibit the condition without necessarily regulating all the terms and conditions of dealing. It's not always that simple but the distinction is important.

A delegate from South Africa described a case in which that country's largest gold mine brought the steel monopoly Mittal to the Competition Tribunal. The charge was excessive pricing, which is a *per se* violation of South Africa's competition law when carried out by a dominant firm. Mittal discriminated between the domestic and export markets by charging a price X to domestic steel merchants/traders and a price X – n (n being a fairly large figure) to the single steel trader entitled to export steel. It also imposed a condition on that trader to prevent it reselling that steel in the domestic market. Mittal also segmented the market in various other ways – for example, selling at a lower price to the automobile industry.

In effect, Mittal imposed a RTD requirement on its international merchant to segment the market for steel and to preserve a discriminatory pricing structure. The remedy imposed by the Tribunal was a fine of \$1,000,000 USD (very large by South African standards) and a restriction preventing Mittal from imposing resale conditions on their merchants.

## **5. Refusal to deal or refusal to continue dealing?**

The Chairman noted that delegates were divided over whether we should treat RTDs and refusals to continue to deal in the same way. For example, Germany's submission observes: "In the case law it also makes an important difference whether the refusal to deal amounts to the termination of a previously existing supply relationship or rather to not starting a supply relationship. The termination of an existing supply relationship is less likely to be objectively justified than the refusal to start supplying".

In contrast, the submission from Hungary says that the competition authority makes no distinction between cases in which there is a history of dealing and those where there is no history of dealing.

A delegate from Hungary argued that Hungary's position cannot really be contrasted with Germany's. The Hungarian competition authority's approach in RTD cases is to focus on the effect of the behaviour on competition and on consumers. Unless real negative effects can be observed on the market, the competition authority sees no basis to intervene. The termination of an existing supply is not, in itself, a harm to competition that should be avoided. Even if the behaviour has consequences for consumers the competition authority would not intervene if there are legitimate commercial objectives from the behaviour that are sufficiently justified. The authority does not put much emphasis on the fact that the parties had a previous relationship. This is taken into account in assessing whether or not there are objective commercial justifications for the refusal or not.

The Chairman observed that Switzerland has a policy of examining cases involving a breaking-off of an existing relationship more closely than cases involving a refusal to start a new relationship. The Chairman invited Switzerland to describe a case involving a firm which made, amongst other things, "blanks" for watchmakers. This firm decided to phase-out the manufacturing of blanks over three years and instead to focus on manufacturing assembled mechanisms. Watchmakers complained to the Swiss Competition Commission. The Commission viewed this as an illegal refusal to continue existing dealings and imposed a number of conditions. The Chairman asked whether this case is better viewed as an application of competition law or industrial policy.

A delegate from Switzerland replied that the Swiss competition authority has no role in industrial policy but only applies the competition law. This case had widespread implications for consumers around the world –it is likely that 98 percent of the mechanical watches in the conference room have a mechanism made by ETA (the company involved in this case).

Three factors in this case influenced the authority's decision. First, the industrial group Swatch has subsidiaries active at all level of production and distribution of watches, from the production of blanks to luxury watches. The subsidiary ETA held a particularly dominant position, with 95 percent of the world market. Second, contracts are written in this market with terms of 2-3 years. The decision of ETA Swatch to phase out production of blanks was going to have repercussions for all contracts written in the subsequent 3-5 years. Third, this monopolistic market was in the process of becoming more competitive. The buyers of blanks (who were hindered for decades by their dependence on ETA) had begun to develop their own facilities for manufacturing blanks. The Commission found itself in a position similar to the EC's in the Microsoft case. If it had done nothing, there was a risk that nascent competition would be eliminated.

The Commission acted quickly (within four weeks of the complaint) to protect the emergence of competition. Ultimately, the provisional measures were reaffirmed, largely unchanged, in the final decision. The measures last for a certain period of time, reflecting the business plans of the entrants presented to the authority. The objective is that in a few years Swatch will face effective competition.

This case did not involve industrial policy but a decision between acting *ex ante* (when competition albeit limited exists and has potential to grow) and acting *ex post* (when no competition exists). The authority acted *ex ante* to ensure effective competition operating by 2010.

The authority required the Swatch group to continue to deliver the same number of millions of blanks to buyers up to the point where the production of blanks of the new entrants is adequate to provide competition to Swatch. An arbitral tribunal has been put in place to determine questions of cost and price – the competition authority has no role in setting these prices.

The Chairman emphasised that the remedy does not prevent Swatch from discontinuing production of blanks but merely requires that they do so more slowly and only when certain conditions are fulfilled. He then noted that France is another country in which time is an important factor in whether one may break an existing commercial relationship. In France there are rules prohibiting the abrupt ending of a commercial relationship. The Chairman asked France to explain the economic reasoning behind the control over the speed at which relationships can be ended. Has the Conseil de la Concurrence had to intervene under the abuse of dominance provisions to force an enterprise to continue commercial dealings for a period of time?

A delegate from France stated that there is no minimum notice period (for the cessation of relations) required by law. But an "abusive" cessation of a commercial relationship may be prohibited. In such cases the judge will take into account the notice period in a case-by-case assessment which takes into account other factors such as the length of the relationship between the parties. The law does not prevent immediate cessation of relations in the event of fault on either side. In regard to the economic justification for these rules, the delegate observed that provisions such as these encourage a climate of confidence in the relationship on both sides, which encourages pro-competitive, relationship-specific investments.

The Conseil de la Concurrence has only very rarely held that the cessation of commercial relations was an abuse, and only then in the context of other anti-competitive practices, such as when it has been used as a tool for the enforcement of an exclusivity clause, or to enforce tacit collusion.

## **6. Refusal to deal and the essential facilities doctrine**

The Chairman turned to the relationship between RTDs and the essential facilities doctrine. Is refusing to deal only illegal when there is in fact an essential facility or is there scope for an abusive RTD even when alternatives are available? Belgium's submission states: "The essential facility doctrine has if anything extended the concept of an abusive refusal to deal to refusal to deal in respect of goods or services that the refusing supplier doesn't regularly offer on the market."

But, in the *Magill* case, the product or service wasn't something that was regularly offered on the market, yet *Magill* was found to have abused its dominant position even without the essential facility doctrine.

A delegate from Belgium agreed that the essential facilities terminology wasn't used in *Magill* but subsequently there was reference to *Magill* in a couple of other cases where essential facilities were mentioned. The delegate further noted that for a long time literally all abuse of dominance cases were about RTDs. Even today about 40 percent of all competition cases are about RTDs. Not all are found to be abuses, of course, mostly due to the absence of market dominance. *Bronner* and *Magill* both involved the refusal to sell a product or service that the firms were not currently selling to anybody. The delegate referred to this as an extension of the RTD concept. In these cases the authority should be more prudent than in other cases.

A delegate from the EC emphasized the extent of agreement around the table. For example no delegations have talked about using the law on abusive market power or monopolization for any purpose other than to protect the competitive process and consumers (including prices, choice, innovation, quality, etc.). Second, no delegation has spoken of *per se* legality and certainly not *per se* illegality – rather there is a strong presumption of legality which has to be disproved in relation to particular conduct. Third, there is widespread agreement on the need for strong deference to the freedom of enterprises to do business or refuse to do business with whomever they wish.

But there may be some difference across countries in analysis of the possible effects on incentives to innovate and incentives to invest. There is likely to be a common view that some RTDs are better handled through conventional regulation. This is not a general prescription, but when you are intervening on prices and terms and conditions, conventional regulation tends to be more acceptable. On the other hand as competition authorities we know that conventional regulation is extremely intrusive and has a significant impact on incentives. In fact, any remedy we impose in these cases has an effect on incentives. But there is a question as to whose incentives to take into account. Is it simply the incentives of the dominant company? Or should we also take into account the incentives of the actual or potential competitors?

The delegate also emphasized that RTDs should constitute a breach of competition law only in exceptional situations. BIAAC may want more clear guidance, but this approach certainly gives business an orange light for most commercial practices. That orange light may turn to red, however, if in specific exceptional circumstances the durable impact on the competitive process will result in little or no competition in the longer term to the detriment of consumers.

The Chairman asked the Czech Republic to describe a case involving access to a bus terminal. In that case, the competition authority found that the terminal was not an essential facility since competitors could operate, although at a disadvantage, without access. But the competition authority still determined that there had been an abuse. In contrast, in the *Oscar Bronner* case, the presence of substitutes (albeit imperfect) for the facility was enough to decide that there was no abuse.

A delegate from the Czech Republic reported that in 2005 the company CSAD Liberec, the only bus operator in the city of Liberec, refused use of the bus station to rival company Student Agency, which operated a bus line from Prague to Liberec, even though other companies operating the same line were allowed to use the station. The Czech competition authority identified that the capacity of the bus station was not fully used and CSAD Liberec was not able to objectively justify the refusal.

The competition authority examined whether there were other sites in Liberec which Student Agency could use instead of the bus station. Some potential sites were identified but none of them was an adequate substitute, especially from the consumer/passenger point of view. Nevertheless, the authority concluded

(and the district court confirmed) that the bus station was not an essential facility because even without access to it the Student Agency could compete on the market, though with difficulty. With this conclusion, the Czech competition authority could not hold the behaviour of CSAD Liberec to be an abuse of dominance in the form of denying access to essential facilities but, following the instruction of the court, the authority instead applied a general clause prohibiting the abuse of dominance to the detriment of another competitor.

The Czech competition authority took into account the decision in the *Oscar Bronner* case but concluded there were some essential differences. The sole objective of the behaviour of CSAD Liberec was to eliminate its competitor on the downstream market. To achieve this objective CSAD Liberec took advantage of its dominant position as the only operator of the bus station in Liberec. Such behaviour caused serious detriment to the competition and at the same time to consumers/passengers.

The Chairman contrasted the CSAD Liberec case with a case mentioned in Turkey's contribution in which the existence of substitutes was enough to vindicate the defendant's RTD, even though those substitutes imposed some inconvenience on the target of the refusal.

A delegate from Turkey reported that in the *Anadolu Cam/Mercan Solmaz* case, the Turkish competition authority ("TCA") did not consider the RTD by Anadolu Cam to constitute an abuse. This case involved two relevant markets – the upstream "glass package market" and the downstream "glass home product market". Anadolu Cam is dominant operating in the upstream market. Mercan Solmaz operates in the downstream market. It purchases certain intermediary products produced by Anadolu Cam such as bottles, cups etc. Mercan Solmaz uses those products in manufacturing glass home products. At the same time Paşabahçe, an affiliate of Anadolu Cam, operates in the "glass home products market" in competition with Mercan Solmaz.

Mercan Solmaz claimed that Anadolu Cam refused to supply glass package products either by not supplying the products or supplying less of the products than needed by Mercan Solmaz with the aim of driving Mercan Solmaz out of the glass home products market.

The TCA investigated whether the practice constituted an abuse of Article 6 of the Turkish competition law under the following criteria: (a) whether Anadolu Cam was dominant or not; (b) whether there was a RTD or not (taking into account the history of relations between the firms); (c) whether there was any objective justification or not; (d) whether competition was restricted or not. The TCA found that Anadolu Cam did hold a dominant position, there was an explicit RTD by Anadolu Cam, and Anadolu Cam did not have sufficient objective justification for its actions.

In addition, the TCA sought to determine whether the RTD had a negative effect on competition in the market where Solmaz Mercan operates. The investigation demonstrated that the refusal did not have a negative effect on competition and thereby did not restrict competition. During the period in which the RTD took place, Solmaz Mercan found two alternative sources of supply: imports and Marmara Cam, a competitor of Anadolu Cam. These two alternatives were less convenient than Anadolu Cam, particularly in terms of quality. Solmaz Mercan argued that these alternatives were not adequate substitutes for the products of Anadolu Cam. The TCA held that the inconvenience to Solmaz was not sufficient to conclude that competition was impaired, and therefore did not consider the RTD to be an abuse.

The TCA did not directly address the question of how imperfect substitutes need to be to condemn conduct as an abuse. However, by mining the reasoning of in this decision, we might concluded that the action of Anadolu might have been held to be an abuse if (a) if the prices of the alternative sources were so high as to make it impossible for Solmaz Mercan to operate in the market, or (b) if the quality and quantity

of supply of the alternatives sources was too low to allow Solmaz Mercan to properly continue its operation in the market.

## 7. On the role of competitors in RTD analysis

The Chairman invited the EC to comment on how the Commission would reconcile *Bronner* (referring to need for the RTD to eliminate all competition before an abuse can be found) with the recent statement of the Court of First Instance in *Microsoft* that the elimination of *all* competitors was not necessarily required, but merely the elimination of *effective* competition.

A delegate from the EC explained that jurisprudence in *Bronner*, *Magill* and *Commercial Solvents* made reference to the elimination of all competition, but the focus of these judgments was on the issue of indispensability of access to an input (in *Bronner* to a newspaper distribution network).

The criteria for indispensability set forth in *Bronner* were very strict. To demonstrate that the creation of an alternative system was not a realistic alternative and that access to the existing system was therefore indispensable, it was not enough to argue that it was not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed. For access to be regarded as indispensable, it would be necessary to establish that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme. The Commission consequently applies a rather strict test on whether competitors can realistically find alternatives for the refused input and compete on neighbouring or downstream markets. This is necessary to avoid detrimental effects on the incentives of the respective market participants.

However, in *Microsoft* the Court made it very clear that – once it is established that competitors on downstream or adjacent markets are indeed unable to find alternatives for the refused input – the Commission is not required to wait until all competition is eliminated. Otherwise its intervention would come too late and there would be a risk of long lasting harm to consumers.

The CFI held that Microsoft had not demonstrated that the interoperability information was not indispensable. Microsoft argued that even if interoperability information were indispensable the refusal at issue would not exclude all competition on the “work group server operating systems market”. Therefore, there was no abuse. The Commission, by contrast, had considered whether the refusal gave rise to a ‘risk’ of the elimination of competition on the work group server operating systems market. Microsoft contended that that criterion is not sufficiently strict, since according to the case law on the exercise of an intellectual property right, the Commission must demonstrate that the refusal to license an intellectual property right to a third party is ‘likely to eliminate all competition’, or, in other words, that there is a ‘high probability’ that the conduct in question will have such a result.

The Court found that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision (to maintain undistorted competition in the common market) and, in particular, to safeguard the competition that still exists on the relevant market. The Court added that the Commission had all the more reason to apply Article 82 EC *before* the elimination of competition on the work group server operating systems market had become a reality because that market is characterised by significant network effects and therefore the elimination of competition would be difficult to reverse.

Finally, the Court concluded that it is not necessary to demonstrate that all competition on the market would be eliminated. What matters is that the refusal at issue is likely to eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.

## **8. On the economic justifications for RTDs**

The Chairman contrasted a case from Finland with a case from Chinese Taipei. In the first case the Finnish Telephone Number Service (Suomen Numeropalvelu Oy1 or “SNOY”), was the only firm that kept a national database of telephone subscriber information and was a subsidiary of two major firms active in the catalogue service market. SNOY refused to deliver information from this database to rival companies offering catalogue services to end customers. SNOY’s main justification for the refusal was that it had a duty to see that the information it submitted to its customers would not be used in a manner that violated legislation on data and privacy protection.

The Finnish competition authority rejected SNOY’s justification because “it is not the business of a dominant firm to confirm that the actions of its customer companies comply with the law; the implementation of the relevant acts and the monitoring of the firms’ activities are done by the appropriate authorities”.

In contrast, in the case from Chinese Taipei, the China Steel Corporation (“CSC”) was the only integrated steel mill in Chinese Taipei producing coke as a by-product. CSC provided all of its metallurgical coke products exclusively to one coal chemical enterprise, the China Steel Chemical Corporation (“CSCC”) while refusing to deal with other coal chemical enterprises. In May 2006, the FTC decided that CSC’s RTD did not violate the Fair Trade Act. The CSC argued that coke can cause a serious pollution problem if not dealt with properly and that it had entered into an exclusive contract for five years with the CSCC to ensure these potential sources of pollution were handled correctly. It was held that the other coal chemical enterprises were not sufficiently reliable to solve the potential pollution problem. The FTC decided that CSC’s RTD was legitimate. The Chairman asked Chinese Taipei to explain how preventing pollution could be seen as a legitimate commercial justification for restricting competition.

A delegate from Chinese Taipei responded that in examining whether a RTD has breached the law, the FTC considers the intent, purposes, and market position of the parties, as well as the characteristics of the goods traded and the impact from carrying out such restrictions.

Coke is a by-product of steel production. CSC is the only integrated steel mill in Chinese Taipei that can produce metallurgical coke products. CSC’s production accounts for one-half of the needs of coal chemical enterprises with the rest supplied by overseas companies at varying international prices.

Improper processing or storage of coke could cause a serious pollution problem. Through its subsidiary, CSCC, CSC can ensure that this potential source of pollution is handled correctly at all times. For example, CSC had entered into an exclusive long-term contract with CSCC to prevent CSCC from renegeing on its obligation to process coke when the prices for coke products drop. In addition, CSCC has installed a pipeline directly connected to CSC to reduce the transportation costs as well as the risk of pollution from improper handling of coke. Moreover, through its managerial control of CSCC, CSC can eliminate the possibility that the processing company will engage in strategic behaviour such as demanding lower purchasing prices for coke during contract renegotiation periods and thereby unduly prolonging the completion of the contract. This is a legitimate justification for products that are highly polluting and, as a result, require proper, prompt and uninterrupted storage and processing.



## COMPTE RENDU DE LA DISCUSSION

### *du Secrétariat*

Le Président du Comité de la concurrence, Frédéric Jenny, souhaite la bienvenue au Professeur George Hay, économiste, participant en tant qu'expert à la table ronde.

Le Professeur Hay précise que ses réflexions à propos des questions suivantes concernant le problème du refus de vente l'ont amené à une conclusion quelque peu extrême bien qu'il n'appartienne par à l'École de Chicago.

La première question est la suivante. Supposons qu'il existe une entreprise dominante sur un marché en amont mais que cette entreprise ne soit pas intégrée verticalement, c'est-à-dire qu'elle ne desserve pas ou ne cherche pas à desservir le marché en aval. Établirions-nous une responsabilité en vertu du droit de la concurrence si l'entreprise appliquait un prix de monopole non discriminatoire aux clients en aval ? En général, la réponse est négative sauf s'il existe une réglementation relativement spécifique concernant ce secteur particulier. Si une entreprise n'est pas présente sur le marché en aval, elle peut normalement appliquer un prix de monopole non discriminatoire sans aucun risque d'engager sa responsabilité.

Maintenant supposons que l'entreprise dominante en amont participe également au marché en aval où elle a des concurrents réels ou potentiels. Cette entreprise risquerait-elle d'engager sa responsabilité en vertu du droit de la concurrence en appliquant un prix de monopole non discriminatoire à des concurrents en aval ? À ceux qui répondraient par l'affirmative à cette dernière question, le Professeur Hay pose deux questions subsidiaires.

La première question subsidiaire est la suivante : est-ce qu'établir une responsabilité fausserait les incitations de l'entreprise à s'intégrer verticalement ? Dans ce scénario, si l'entreprise ne participe pas au marché en aval, elle peut en principe appliquer le prix qu'elle veut. Mais dès lors qu'elle décide de pénétrer le marché en aval, ne va-t-elle pas être soumise à une sorte de réglementation des prix ? Cela ne fausserait-il pas son incitation à s'intégrer verticalement ?

La deuxième question subsidiaire est de savoir si un tribunal est en mesure de décider si un prix donné est plus élevé qu'un prix raisonnable ? Le Professeur Hay souligne qu'il ne parle pas de réglementation *ex ante*, dans le cas où l'autorité de tutelle rencontre l'entreprise réglementée, examine les données relatives aux coûts et indique ensuite le prix qu'elle juge raisonnable. Le Professeur Hay est très pessimiste quant à l'aptitude des tribunaux à décider d'un prix raisonnable et à l'incidence de cette incertitude sur les entreprises dominantes.

La troisième grande question en cas de réponse négative à la deuxième question (à savoir que même une entreprise intégrée verticalement devrait pouvoir appliquer un prix de monopole non discriminatoire) est la suivante : est-il réaliste de s'attendre à ce que les tribunaux soient en mesure d'établir une responsabilité en ce qui concerne l'application de prix supérieurs au prix de monopole ? Le prix de monopole est purement et simplement un concept forgé par les économistes et pas un élément qui puisse normalement être tiré de données précises. Si personne n'est en mesure de parvenir à la conclusion qu'un prix est trop élevé (supérieur au niveau d'optimisation du bénéfice) alors, concrètement, une entreprise peut appliquer le prix qu'elle veut. Le Professeur Hay laisse entendre qu'il n'y a pas lieu de s'accrocher à l'idée qu'il faut imposer aux entreprises dominantes l'obligation de traiter à une sorte de « prix raisonnable ».

Le droit de la concurrence devrait continuer à être utilisé pour apporter un réconfort aux concurrents en aval non intégrés qui affirment être contraints de payer trop cher un moyen de production indispensable. Alors, ce n'est pas le prix payé pour les moyens de production en question mais plutôt le prix que l'entreprise intégrée applique à ses produits que nous devrions examiner. La question essentielle serait de savoir si la division aval de l'entreprise intégrée a la capacité financière d'acheter les moyens de production en question au prix appliqué par la filiale en amont à toutes les autres entreprises et continue à écouler ses produits sur le marché en aval en réalisant un bénéfice. Cette question ressemble à celle que les tribunaux ont l'habitude de trancher concernant l'application de prix d'éviction, non pas que les affaires de prix d'éviction soient simples mais il appartient au moins traditionnellement aux tribunaux de décider si le coût imputé (pas comptable) par une entreprise prend en compte l'élément qui correspond au prix appliqué aux autres entreprises pour le même moyen de production.

### **1. Le refus de vente est-il considéré comme une pratique déloyale ou une pratique anticoncurrentielle ?**

Le Président demande si le refus de vente est considéré comme une pratique déloyale ou une pratique non conforme au droit de la concurrence et si, dans les pays où il peut être contesté comme l'une ou l'autre pratique, on établit une distinction nette entre ces deux pratiques. Au Japon, par exemple, on peut s'opposer au refus de vente soit en tant que pratique déloyale soit en tant que comportement qui restreint la concurrence.

Un délégué du Japon indique que le principe fondamental pour la Fair Trade Commission est que l'entreprise soit libre de décider qui sont ses acheteurs potentiels. En principe, le fait qu'une entreprise décide de ne pas traiter avec un client particulier ne soulève aucun problème au regard de la loi antimonopole. Cela étant, si un refus de vente unilatéral a tendance à entraver la libre concurrence il peut être considéré comme une pratique commerciale déloyale. Les orientations formulées par la Commission sur la distribution et les pratiques commerciales citent deux types de cas dans lesquels il y a une tendance à entraver le libre jeu de la concurrence. Premièrement, l'entreprise peut opposer un refus de vente qui s'ajoute à un autre comportement illicite en vertu de la loi antimonopole. Deuxièmement, l'entreprise peut se servir du refus de vente comme d'un moyen lui permettant d'atteindre d'autres objectifs non conformes au droit de la concurrence comme, par exemple, exclusion du marché certains concurrents.

Par ailleurs, si l'on considère que l'effet anticoncurrentiel restreint la concurrence de manière substantielle dans un quelconque domaine, le refus de vente peut être prohibé en tant que monopolisation privée. D'après la loi antimonopole, une limitation substantielle de la concurrence est généralement considéré plus préjudiciable qu'une tendance à entraver la concurrence loyale. La Commission a opté pour la méthode de l'examen au cas par cas pour les refus de vente pouvant être considérés comme monopolisation privée, prenant en compte des éléments tels que la nature du comportement, ses répercussions, la part de marché de l'entreprise et l'état du marché.

L'affaire *Nipro* a été considérée comme un cas de monopolisation privée dans la décision rendue en 2006. Trois parties étaient impliquées dans cette affaire : Nipro, distributeur en amont de tubes de verre à usage médical détenant une part de marché de 100 % dans l'Ouest du Japon (hors verres de baromètres importés), Nippon Electric Glass (NEG), seul fabricant de tubes en verre au Japon et fournisseur exclusif de Nipro pour ce type de tubes dans l'Ouest du Japon, et Naigai, distributeur en aval s'approvisionnant en tubes en verre auprès de Nipro. La filiale de Naigai fabriquait des petites bouteilles de verre et les vendait aux sociétés pharmaceutiques.

Naigai s'est mis à importer des tubes en verre d'autres pays. Nipro a demandé à Naigai de mettre un terme à ses importations de tubes en verre mais Naigai a refusé. La réaction de Nipro a été de mener une action discriminatoire à l'égard de Naigai en augmentant ses prix, en modifiant les modalités de règlement

qui étaient acceptables auparavant et en refusant d'accepter certaines commandes de Naigai. La Fair Trade Commission a conclu que le comportement de Nipro avait pour but d'empêcher de nouvelles importations et d'imposer à Naigai des sanctions en représailles pour avoir réussi à importer des tubes. La Commission a considéré que le comportement de Nipro globalement restreignait considérablement la concurrence sur le marché des tubes en verre dans l'Ouest du Japon et a décidé par conséquent qu'il constituait une monopolisation privée.

Le Président note que la contribution du Canada semble indiquer que les pouvoirs publics ne perdent pas leur temps à engager des poursuites contre le refus de vente même si le droit de la concurrence du Canada contient de multiples dispositions susceptibles d'être appliquées à l'encontre du refus de vente. Cela étant, une modification de la législation a renforcé les normes en vigueur permettant de contester ce type de comportement. Le Président demande au Canada d'indiquer si les différentes dispositions sont complémentaires et si le Bureau a pour principe d'engager des poursuites contre le refus de vente.

Un délégué du Canada répond qu'avant 2002, la loi sur la concurrence comportait une disposition particulière réprimant le refus de vente (article 75), bien que davantage axée sur les pratiques déloyales que les comportements anticoncurrentiels. En 2002, on a ajouté à cet article un critère supplémentaire qui était « l'effet de nuire à la concurrence » ce qui impliquait qu'on accordait une plus grande importance aux effets anticoncurrentiels et aux répercussions sur la concurrence qu'aux rivaux. C'était le critère appliqué par le Tribunal de la concurrence mais cette modification de la législation a permis de le définir plus précisément. Le seuil prévu est dans une certaine mesure plus facilement atteint que dans le cas du critère utilisé pour les examens de fusions ou les affaires d'abus de position dominante dans lesquelles on s'attend à une réduction substantielle de la concurrence.

En même temps, une deuxième modification de la loi sur la concurrence a autorisé les recours privés. Auparavant, seul le Commissaire pouvait engager des poursuites en application des articles 75, 77, et 79 de la loi. Selon cette modification, en cas de recours privé, le Commissaire peut intervenir devant le Tribunal. Ainsi, le Bureau a défini plusieurs critères d'intervention possible dans le cas de recours privés en vertu de l'article 75, notamment des critères tels que l'effet sur la concurrence, en cas de répercussions allant au-delà des parties concernées, ou si l'affaire implique une nouvelle évolution sur le plan économique ou jurisprudentiel. D'ores et déjà, 15 recours privés ont été plaidés en application de l'article 75 et le Bureau prévoit une nouvelle intervention dans une procédure engagée. Il est vrai que les affaires de refus de vente ont basculé dans le domaine des recours privés.

Lorsque le Bureau se penche sur ce type d'affaires, il intervient en vertu de l'article 79 qui contient les dispositions relatives à l'abus de position dominante. Cet article inclut un critère économique classique qui est de déceler une réduction substantielle de la concurrence sur le marché. Le Bureau ne prévoit pas que le Tribunal se montre très ouvert aux affaires de refus de vente. Parmi les 15 affaires déférées devant la justice dans le cadre de recours privés, seules quelques-unes ont été considérées comme recevables. Parmi celles-ci, une seule a abouti à une procédure contradictoire et le requérant a été débouté.

Le Président résume la contribution de l'Irlande de la façon suivante : (i) les plaintes sont nombreuses, (ii) elles sont tous rejetées, (iii) l'autorité de la concurrence considère qu'elle ne doit intervenir que s'il existe un réel problème de concurrence et (iv) rares sont les cas où elle estime que cela se produit, et si c'est le cas cela ne concerne que des secteurs réglementés par ailleurs, ce qui implique qu'elle n'a pas à s'en occuper.

Un délégué de l'Irlande fait observer qu'il n'est pas forcément judicieux de réglementer les secteurs dans lesquels des refus de vente se produisent. En Irlande, des secteurs comme ceux des services financiers, de l'énergie, des communications ou de la radiodiffusion sont déjà très réglementés. De nombreux refus de vente se confondent avec d'autres pratiques telles que les ventes liées ou d'autres

comportements potentiellement abusifs. Tout le monde souhaiterait qu'on définisse un grand principe qui ne se limiterait pas au refus de vente mais engloberait toutes les autres dimensions du comportement unilatéral des acteurs en position dominante. Cela demandera encore beaucoup de temps.

L'Irlande procède à des enquêtes approfondies uniquement dans un nombre de cas très restreint. Certaines affaires portent sur la distribution sélective. Une autre rubrique concerne des affaires dans lesquelles il existe un monopole d'État, éventuellement une instance qui délivre des autorisations et qui peut refuser l'octroi d'une licence à une société. Un troisième type d'affaires concerne les entreprises publiques intégrées verticalement et la question de savoir s'il est objectivement justifié qu'elles refusent d'approvisionner une quelconque entreprise sur le marché en aval.

## 2. Quel est le critère d'évaluation adéquat du refus de vente ?

Le Président fait observer qu'il existe diverses formulations pour définir la norme d'évaluation du refus de vente. Dans certaines décisions de justice, le refus de vente est considéré comme illicite s'il élimine toute concurrence, dans d'autres il est illicite s'il élimine une concurrence effective et, dans d'autres encore, il est illicite s'il élimine une certaine concurrence. La norme ne semble pas être très précise.

C'est le cas, en particulier, en Europe où il existe deux décisions de principe. Dans l'affaire *Bronner*, le tribunal indiquait que pour être illicite, le refus de vente devait éliminer toute concurrence. En revanche, dans l'affaire *Microsoft*, le Tribunal de première instance a indiqué que l'élimination de toute concurrence n'était pas une condition nécessaire mais que l'élimination d'une concurrence effective était une condition suffisante. S'agit-il d'un concept différent ? Cela signifie-t-il qu'un changement d'interprétation a eu lieu ?

Un délégué de la Commission européenne précise que l'article 82 n'autorise pas la Commission à engager des poursuites dans une affaire de refus de vente, sauf si l'entreprise concernée a une puissance commerciale importante et durable sur un marché spécifique. Pour ce qui est de la responsabilité particulière des entreprises en position dominante, le tribunal considère simplement qu'une entreprise dominante doit savoir que, compte tenu de sa position dominante, ses pratiques peuvent faire l'objet d'un examen approfondi en vertu de l'article 82. Si la deuxième étape d'une enquête révèle qu'un refus de vente est à l'origine d'un préjudice durable pour les consommateurs, alors la responsabilité de l'entreprise peut être engagée.

Pour ce qui est du refus de vente par opposition au refus de poursuivre des relations commerciales, établir une distinction entre les deux influe sur le comportement des entreprises qui pourraient aisément parvenir au raisonnement suivant : « Si j'engage ma responsabilité uniquement en refusant de poursuivre des relations commerciales, il faut peut-être tout simplement ne pas nouer de relations du tout. » Ce qui importe c'est l'incidence sur les incitations de l'entreprise concernée. Le défendeur indiquera sans doute qu'il est moins incité à investir dans l'innovation s'il est obligé de maintenir des relations commerciales mais l'argument est moins déterminant que si le défendeur est obligé de traiter avec une entreprise avec laquelle il n'a jamais été en relation auparavant.

La Commission européenne se concentre sur la capacité du défendeur à exclure. C'est pourquoi, en liaison avec les questions posées par le Professeur Hay, la Commission cherche à savoir dans quelle mesure le symptôme des prix abusifs témoigne d'une volonté d'exclusion. Les écarts entre prix de gros et prix de détail ayant un caractère d'exclusion impliqueraient une compression de marge. La preuve de l'éviction n'est pas une condition nécessaire pour engager des poursuites sur la base de cette compression de marge entre prix de gros et prix de détail.

En ce qui concerne la jurisprudence dans les affaires *Bronner* et *Magill*, les décisions rendues ont insisté sur le caractère indispensable de l'accès au moyen de production, dans l'affaire *Bronner* il s'agissait de l'accès à un réseau de distribution de journaux. Le tribunal a défini de manière très rigoureuse les critères d'évaluation de ce caractère indispensable. Il faut démontrer que la création d'un système de substitution, par exemple un système de distribution à domicile à l'échelle nationale pour les quotidiens, ne constitue pas une solution réaliste et que l'accès au système existant est par conséquent indispensable. Il ne suffit pas d'avancer comme argument que cette solution n'est pas viable économiquement en raison de la faible diffusion, actuelle ou future, des quotidiens concernés. Pour que l'accès soit considéré comme indispensable, il faudrait au minimum établir que la création d'un deuxième système de distribution de quotidiens, de manière générale, n'est pas économiquement viable. Sur la base du jugement rendu dans l'affaire *Bronner* et de décisions ultérieures, la Commission applique des critères d'évaluation stricts pour déterminer si les concurrents sont en mesure de trouver des solutions de substitution réalistes pour le moyen de production qui fait l'objet du refus en vue de rivaliser sur les marchés en aval ou voisins. Il convient d'éviter les répercussions préjudiciables sur les incitations à investir.

Dans l'affaire *Microsoft*, le tribunal a indiqué que s'il est établi que les concurrents sur les marchés en aval ou adjacents ne peuvent pas trouver de substitut au moyen de production faisant l'objet du refus de vente, la Commission n'est pas obligée d'attendre que toute concurrence soit éliminée. Cela serait contraire à l'objet de la loi. Mais ces affaires étant relativement spécifiques, il n'est possible de procéder à une enquête sur le refus de vente que dans des circonstances très exceptionnelles.

Dans l'affaire *Microsoft*, le tribunal de première instance a considéré que Microsoft n'avait pas pu démontrer que l'information sur l'interopérabilité n'était pas indispensable pour assurer une concurrence efficace. Microsoft a fait valoir également que, même si l'information sur l'interopérabilité est indispensable, le refus de vente n'exclut pas toute la concurrence sur le marché secondaire et que, de ce fait, il n'existe aucune pratique abusive. Le tribunal a conclu que « l'article 82 ne s'applique pas uniquement à partir du moment où il n'existe plus, ou presque plus, de concurrence. Si la Commission devait être obligée d'attendre que les concurrents soient éliminés avant de pouvoir intervenir, cela irait à l'encontre de l'objectif de cette disposition qui est de préserver une concurrence non faussée ». Il a également insisté sur le fait que la Commission avait absolument raison d'appliquer l'article 82 avant que l'élimination de la concurrence sur le marché en cause ne se réalise puisque ce marché se caractérise par des effets de réseau importants et qu'il serait par conséquent très difficile de revenir sur cette élimination de la concurrence.

La Commission a rassemblé une quantité d'informations très importante sur la clientèle prouvant que c'est l'avantage artificiel lié à l'interopérabilité que Microsoft procurait à son produit du fait du refus de vente qui avait entraîné une augmentation rapide de la part de marché de Microsoft et empêché une concurrence viable d'autres fournisseurs de systèmes d'exploitation pour serveurs de groupe de travail. Le Tribunal a conclu que le refus de vente de Microsoft avait pour effet de maintenir les produits de ses concurrents dans une position marginale et non rentable. La possibilité d'une concurrence marginale sur le marché ne remet pas en cause l'argumentation de la Commission selon laquelle on risquait d'éliminer toute concurrence effective sur ce marché.

Un délégué du BIAC précise que, pour le Comité, il est fort possible qu'exceptionnellement, à travers un refus de vente, l'entreprise dominante abuse de sa position dominante. Mais, selon le BIAC, il est très important d'examiner la théorie précise du préjudice et, en ce qui concerne les tribunaux et autorités, d'étudier les circonstances de l'espèce afin de déterminer ce qui incite l'entreprise à refuser de nouer des relations commerciales ou de les poursuivre avec un concurrent spécifique ou une autre entreprise.

À propos du critère d'évaluation adéquat en matière de refus de vente, le BIAC remarque que l'effet conjugué des affaires *Microsoft* et *Magill* était qu'il continuait à y avoir, au moins en Europe, une grande

incertitude quant au moment précis où pouvait intervenir une autorité ou un tribunal. Il est important pour les milieux d'affaires au niveau international de savoir exactement quelle ampleur doit atteindre le préjudice causé à la concurrence avant de devoir s'attendre à ce qu'une autorité ou un tribunal intervienne, plus spécialement à la lumière d'éventuelles considérations d'efficience.

Le Président résume la situation actuelle dans laquelle l'élimination d'un concurrent ne constitue sans doute pas une condition suffisante alors que l'élimination intégrale de la concurrence, ou de toute la concurrence sauf une concurrence marginale, justifie une intervention. Entre ces deux extrêmes beaucoup d'interprétations sont possibles. La contribution du Royaume-Uni indique : « Il est important de savoir quelle ampleur doit atteindre le préjudice causé à la concurrence pour que le refus de vente constitue une pratique abusive ». La contribution du Royaume-Uni précise ensuite qu'il est certainement judicieux de retenir comme seuil « le préjudice important causé à la concurrence ». Quelle est concrètement la définition d'un tel préjudice ?

Un délégué du Royaume-Uni note que malgré la législation pléthorique en matière de position dominante (conforme à l'article 82) adoptée ces sept dernières années, il existe au Royaume-Uni un historique peu étoffé d'affaires de refus de vente. Plusieurs raisons expliquent cette situation, tout d'abord l'absence de plaintes importantes mais aussi le débat au sein de l'UE sur la modification de l'article 82 et l'évolution de la jurisprudence. On ne compte que deux affaires de refus de vente qui n'ont été considérées ni l'une ni l'autre comme des infractions au chapitre 2.

Ces affaires sont extrêmement complexes et le risque d'erreur ou d'intervention injustifiée n'est pas négligeable ce qui pénalise en fait les entreprises dominantes et freine l'innovation. Le risque d'avantager des requérants peu enclins à innover ou investir existe également. Cela peut avoir des répercussions préjudiciables sur l'investissement ou nuire à la concurrence.

### **3. Refus de vente purs et simples et refus de vente implicites**

Le Président en vient à la nature du refus de vente. Les contributions évoquent de nombreuses affaires qui ne sont pas à proprement parler des refus de vente mais comportent plutôt des conditions imposées pouvant être assimilées à un refus de vente. On les appelle parfois des « refus de vente implicites ». Le Mexique est un pays où la législation donne une définition stricte du refus de vente ; elle ne s'applique qu'au refus de vente proprement dit. La contribution du Mexique note que cela ne semble pas être une restriction.

Un délégué du Mexique fait observer qu'il existe une relation étroite entre refus de vente inconditionnel et intégration verticale. Dans ces affaires, le refus de vente a pour but de favoriser la propre division en aval de l'entreprise en question et d'élargir au marché en aval la puissance commerciale en amont. Le refus de vente conditionnel a tendance à survenir au Mexique dans des entreprises qui ne sont pas nécessairement intégrées en aval ou désireuses de supplanter des concurrents.

Il est facile de traiter le refus de vente pur et simple en vertu des dispositions de la législation mexicaine sur la concurrence. Par ailleurs, il est possible en principe d'engager des poursuites contre un refus de vente implicite en vertu des dispositions réprimant la discrimination. Un vrai problème se pose si l'entreprise opposant le refus est intégrée verticalement et qu'elle applique à toutes les autres entreprises un traitement différent de celui qu'elle applique à sa propre division en aval. Il n'est pas impossible dans ce cas de se heurter au problème de ne pas pouvoir appliquer le droit mexicain de la concurrence, c'est-à-dire ni les dispositions à l'encontre du refus de vente pur et simple ni les dispositions relatives à la non-discrimination.

Concrètement, l'autorité a de la chance que l'intégration entre l'amont et l'aval ne soit pas complète, c'est-à-dire qu'il existe effectivement un lien mais que les actionnaires en amont et en aval soient légèrement différents. Dans ce cas, il est possible d'appliquer les dispositions de la législation mexicaine relatives à la non-discrimination, sinon il ne serait pas possible d'appliquer les dispositions relatives au refus de vente qui sont très restrictives.

Cette situation ne s'est pas encore produite mais on peut envisager la possibilité d'être confronté à une affaire dans laquelle les entreprises en amont et en aval sont totalement intégrées. Dans ce cas, on ne dispose d'aucune évaluation directe du prix que l'entreprise s'applique à elle-même. On pourrait alors examiner si le prix que l'entreprise applique aux entreprises externes permet ou non à sa propre division en aval de dégager un bénéfice, afin de distinguer entre l'activité commerciale éventuellement légitime et la fixation de prix censés exclure des concurrents.

Le Président présente une affaire de refus de vente implicite en Finlande dans laquelle une entreprise intégrée a imposé des conditions sur le marché en amont qui rendent très difficile la présence de concurrents sur le marché en aval. La contribution finlandaise indique que cette affaire est « un bon exemple de la façon dont il est possible dans certains secteurs, en apportant des modifications mineures au niveau de la « production », de créer une situation de refus de vente de fait qui a de graves conséquences ». La contribution de la Finlande suggère que, même si ces affaires sont complexes, il faut les traiter parce que les commerciaux n'ont pas de mal à inventer de multiples possibilités de refuser une entrée en relation.

Un délégué de la Finlande présente l'affaire Lännen Puhelin Oy (« LP »), entreprise dominante sur le marché Internet régional à large bande. LP était l'opérateur historique local des lignes fixes dans une partie de la Finlande. Le marché à large bande a commencé à être en forte expansion en 2001-02. De 2002 à 2004, LP n'a fourni aucun produit d'accès à large bande susceptible d'être utilisé pour fournir aux consommateurs des connexions à haut débit.

LP a déclaré qu'elle faisait mieux que les autres opérateurs historiques de lignes fixes puisqu'elle offrait en fait deux produits de gros qui pouvaient permettre aux concurrents d'entrer sur le marché. L'un des deux était un produit de gros en mode ATM. Le problème que posait ce produit était de ne pas satisfaire au critère de compression des marges. Les redevances mensuelles prélevées pour ce produit étaient nettement supérieures aux prix de détail que LP obtenait elle-même sur le marché de détail. L'autre produit était un produit de gros en mode IP. Mais les spécifications techniques de ce produit étaient telles qu'il était impossible aux concurrents de l'utiliser pour fournir des services aux particuliers.

Ainsi, sur le marché des particuliers la part de marché de LP est restée de 90 % tant qu'a duré cette pratique abusive. Un concurrent a créé son propre réseau, mais son étendue était très limitée. Dans la région, LP comptait 128 points de présence alors que son concurrent n'en comptait que 4. Cette pratique abusive a cessé lorsque LP a baissé le prix du produit de gros en mode ATM pour éliminer cette compression des marges.

L'autorité de la concurrence finlandaise a tiré les leçons de ces affaires dans lesquelles, même s'il n'existait pas de problème de contraction de marché, de petites modifications dans la définition des produits signifiaient que le produit n'était pas commercialement viable. Un de ces problèmes a concerné l'attribution d'adresses IP aux consommateurs qui utilisaient la connexion Internet proposée par des concurrents. LP a déclaré que le concurrent avait la possibilité d'investir dans un serveur qui lui serait propre et lui permettrait d'attribuer des adresses IP. L'autorité a estimé qu'il s'agissait d'une limitation de la concurrence dans la mesure où cela supposait un investissement considérable. Ensuite, LP a proposé d'attribuer aux concurrents des adresses IP à partir de son propre serveur. Mais, les concurrents et les conseillers techniques ont répondu qu'il n'était pas acceptable pour les concurrents que ce soit l'opérateur historique qui traite les adresses IP étant donné les problèmes techniques importants que cela impliquait.

LP a ensuite proposé une troisième solution qui était l'installation d'un agent relais avec une réserve de capacité à partir de son propre routeur de sorte que les autres concurrents de la région puissent traiter les adresses IP. Les concurrents et les experts techniques ont indiqué à nouveau que ce n'était pas une solution satisfaisante. Cette affaire montre quelle est la difficulté de parvenir à une bonne solution lorsque c'est l'opérateur historique qui détient l'expertise technique.

Il est difficile de décider si l'affaire constitue ou non un refus de vente. Devant le tribunal (l'affaire est encore en cours), LP a prétendu ne pas savoir que ce produit n'était pas satisfaisant pour les concurrents jusqu'à un stade avancé du processus. Par contre, l'autorité de la concurrence a estimé que LP savait dès le départ qu'il n'était pas adapté.

Le Président résumé ainsi la situation actuelle.

- Le traitement juridique des refus de vente varie considérablement selon les pays.
- Les normes qui servent à évaluer les refus de vente ne sont pas claires et aucun consensus ne s'est dégagé sur ce qu'elles devraient être.
- La définition de ce qui constitue un refus de vente est très floue.

#### **4. Les entreprises dominantes doivent-elle assumer une responsabilité particulière ?**

Le Président demande si, oui ou non, les entreprises dominantes assument une responsabilité particulière qui les empêche de refuser d'entrer en relation avec d'autres entreprises du fait de leur puissance commerciale ? L'Allemagne affirme très clairement dans sa contribution que plus la puissance commerciale du fournisseur est importante plus sa liberté de refuser de vendre est limitée. La contribution allemande précise qu'elle utilise une échelle mobile pour traiter ce type de cas et elle présente une affaire ancienne qui remonte à 1999, l'affaire Scandlines Deutschland GmbH. Elle concernait des compagnies de ferry concurrentes cherchant à avoir accès à un terminal de ferry. La contribution de l'Allemagne indique que « des obstacles juridiques et physiques empêchaient la construction d'un nouveau terminal alors qu'il était envisageable de partager l'utilisation des installations du terminal existant avec le nouvel opérateur de ferry à condition d'apporter des modifications correspondantes à sa construction et son organisation ». C'est la raison pour laquelle il a été décidé qu'il s'agissait d'un refus de vente illicite. Le Président demande qui devait supporter les coûts supplémentaires liés à la modification du terminal. La société de ferry qui demandait l'accès ou l'opérateur du terminal dans la mesure où il serait plus spécialement responsable de l'ouverture de ce terminal aux autres compagnies ?

Un délégué de l'Allemagne précise tout d'abord que cette approche n'est pas spécifique puisqu'elle est appliquée par la France, la Corée et la plupart des pays européens et qu'elle est conforme à la jurisprudence de la Cour de justice européenne. Dans les trois affaires citées dans sa contribution, l'Allemagne utilise le critère du « caractère indispensable » et la norme de « l'élimination de toute concurrence sur le marché en aval ». La démarche allemande n'est ni exceptionnelle ni draconienne, mais c'est au contraire une approche très répandue et équilibrée.

En ce qui concerne l'affaire Scandlines, la décision de 1999 portait uniquement sur le refus, en général, de Scandlines d'accorder un accès au port. Il appartenait aux parties de décider qui devrait prendre en charge les coûts liés aux aménagements de la construction et de l'organisation. La décision ne portait pas non plus sur la question plus spécifique d'une redevance d'accès appropriée. Ces questions étaient laissées ouvertes parce qu'à cette date on pensait que les parties pourraient raisonnablement parvenir à un accord sur ces différents points. La décision du Bundeskartellamt a été annulée par la Cour d'appel mais en grande partie confirmée par la Cour fédérale de justice. Les procédures engagées après le jugement rendu

par la Cour fédérale ont obligé la compagnie de ferry qui voulait avoir accès au port à prendre en charge le coût justifié de la modification de la construction et une redevance justifiée pour l'utilisation du port.

Le Professeur Hay pose la question suivante à l'Allemagne : si la compagnie de ferry contrevenante s'était adressée à l'autorité de la concurrence allemande en lui indiquant qu'elle aurait bien voulu entrer en relation avec le requérant et que le seul point de litige entre eux concernait le prix auquel serait accordé l'accès, quel conseil lui aurait alors donné l'autorité concernant le montant de la redevance que la loi l'autorise à appliquer ?

Un délégué de l'Allemagne répond que d'après le droit allemand de la concurrence, l'accès est assuré en contrepartie d'une redevance appropriée. La question se pose alors de savoir ce qu'on entend par « approprié ». Il est difficile d'y répondre. Deux approches différentes sont possibles : soit on examine les coûts, soit on examine les prix appliqués sur des marchés comparables. L'autorité ne souhaitait pas être mêlée à cette question, préférant que les parties se chargent de négocier entre elles une redevance appropriée. L'autorité participe désormais à la fixation d'une redevance appropriée par le biais du critère du marché comparable et par une analyse des coûts.

Un délégué du Brésil note que pendant le débat sur le refus de vente, les délégués ont évoqué toutes les formes d'abus unilatéral de position dominante : les prix d'éviction, l'augmentation des coûts pour les concurrents, la compression des marges, etc.

Au Brésil, dans le secteur des télécommunications, les opérateurs historiques des infrastructures du dernier kilomètre peuvent conclure des accords de règlement avec l'autorité de la concurrence. Ces accords obligent l'opérateur historique à appliquer le même prix à sa propre entreprise en aval qu'aux concurrents. Pour s'assurer que cette condition est respectée, des dispositions prévoient que les entreprises rendent publics les prix qu'elles appliquent. Mais l'autorité de la concurrence redoute que cela contribue à faciliter une coordination sur les prix entre les acteurs du marché. Le délégué demande si d'autres pays ont des propositions à faire pour résoudre ce dilemme.

Un délégué de la CE souligne les difficultés rencontrées par les autorités de la concurrence concernant la réglementation des conditions générales d'accès. Il est possible de laisser les entreprises décider elles-mêmes des questions de conditions comme l'a proposé l'Allemagne mais alors il faut adopter une sorte de mécanisme d'arbitrage permettant de garantir que les parties parviennent bien à un accord, à des conditions équitables et autant que possible non discriminatoires. Nous ne pouvons pas échapper à la nécessité d'intervenir à travers un mécanisme quelconque en ce qui concerne les conditions de fourniture.

Pour ce qui est de fixer des prix, le délégué indique que la Commission évite le plus possible de le faire, en général, parce que c'est extrêmement difficile. Dans l'affaire Microsoft, l'option choisie a été de nommer un mandataire chargé d'arbitrer entre les requêtes concurrentes. Cette situation est comparable aux problèmes rencontrés par les autorités américaines en ce qui concerne le jugement d'expédient dans l'affaire AT&T.

Le Président indique qu'une certaine communication serait nécessaire à propos de l'article 82 afin de donner des orientations. Comme l'Allemagne, la Corée a noté dans sa contribution que « les entreprises dominantes sur le marché ont une obligation particulière d'entrer en relation ou de poursuivre des relations commerciales dans la plupart des cas ». En Corée, il existe un régime d'exemption vis-à-vis des infractions de refus de vente, mais la part de marché nécessaire pour que ces dispositions soient applicables est relativement faible (10 %). Le Président demande si un refus de vente par une entreprise détenant une part de marché de 20 % poserait un problème majeur de concurrence.

Un délégué de la Corée indique qu'il était possible de contrôler les refus de vente en vertu de deux dispositions du droit coréen de la concurrence. L'une concerne l'abus de position dominante et l'autre les transactions déloyales. Cette dernière vise à réglementer les méthodes déloyales appliquées par des entreprises non dominantes en matière de concurrence, de façon à éviter que des entreprises non dominantes ne parviennent, par le biais de refus de vente injustifiés, à devenir dominantes et n'obtiennent une puissance commerciale.

Il existe des dispositions de protection qui s'appliquent uniquement aux clauses de transactions déloyales, pas à l'abus de position dominante. La Fair Trade Commission a étudié plusieurs seuils possibles de part de marché à ne pas dépasser pour bénéficier du régime d'exemption. Si l'entreprise relève de ce régime, tout refus de vente opposé par l'entreprise est totalement exempté d'examen plus approfondi. Cette question nécessite de la prudence c'est la raison pour laquelle la Commission a opté pour un seuil de 10 %.

D'un autre côté, le Président note que les États-Unis faisaient preuve d'une certaine tolérance envers les refus de vente opposés par des entreprises dominantes.

Un délégué des États-Unis déclare que l'idée était qu'il fallait partir du principe que les refus de vente ne sont pas illicites en l'absence de circonstances extraordinaires. Cela ne signifie pas que ces « circonstances extraordinaires » ne se produisent jamais. Aux États-Unis, des poursuites engagées au cours des dernières années ont abouti dans les affaires *Dentsply* et *Microsoft*, en particulier. Concernant l'affaire *Dentsply*, Dentsply (fabricant dominant de prothèses dentaires aux États-Unis) a opposé pendant plus d'une dizaine d'années un refus de vente aux grossistes qui traitaient avec ses concurrents. De ce fait, Dentsply détenait plus de 80 % du marché et conservait sa part de marché au fil des années en dépit des efforts accomplis par des entrants potentiels, entre autres, en matière d'innovation.

Lorsque l'on cherche à déterminer si une pratique exercée par une entreprise dominante est ou non anticoncurrentielle, la première question à se poser est de savoir si une entreprise qui ne serait pas dominante pourrait se livrer aux mêmes pratiques. Le refus de vente est une pratique extrêmement courante pour de très bonnes raisons. Une entreprise peut opposer un refus de vente à une autre entreprise en invoquant n'importe quel prétexte, par exemple « vous ne payez pas vos factures dans les délais » ou « vous ne fournissez pas un bon service et vous ne vous occupez pas de mes produits » ou encore « je ne vous apprécie pas, je souhaite que ce soit mon beau-frère qui distribue ce produit dans cette région en particulier ». Dans les affaires de résiliation de distributeurs plaidées aux États-Unis, les tribunaux déboutent systématiquement les distributeurs qui sont écartés. Bien que le distributeur puisse considérer que c'est affreusement déloyal, cela ne nuit pas à la concurrence en général. Tant qu'il y aura beaucoup de distributeurs et beaucoup de concurrents les consommateurs ne seront pas touchés.

S'agissant de définir les conditions générales de vente applicables aux entreprises, les autorités de la concurrence doivent faire preuve de modestie quant à leur aptitude à « bien maîtriser les choses ». Les tribunaux des États-Unis, en accord avec les agences, ont décidé d'adopter comme principe qu'un refus de vente, même s'il est opposé par une entreprise dominante, est licite, excepté dans des circonstances extraordinaires, pour trois raisons :

1. Si une entreprise pense que plus elle réussit, plus elle risque de devoir partager ses investissements avec un concurrent, elle sera alors d'autant moins incitée à investir pour innover.
2. Les tribunaux et les autorités de la concurrence ne souhaitent pas s'occuper de réglementer les contrats privés entre entreprises. Dans certains cas, ils doivent le faire mais ce n'est pas une tâche à laquelle les tribunaux et les agences veulent s'adonner très souvent.

3. Le problème, ce sont les ententes et autres accords entre concurrents. D'un côté, les autorités de la concurrence passent leur temps à essayer d'isoler les concurrents et éviter qu'ils collaborent. D'un autre côté, il ne serait pas logique d'obliger une entreprise dominante à entretenir des relations permanentes avec un concurrent.

Quelles sont ces « circonstances extraordinaires » qui font que le refus de vente peut constituer une infraction au droit de la concurrence ? Il est certes recommandé d'être aussi précis que possible lorsque l'on donne un conseil à une entreprise, mais il est impossible d'établir à l'avance une liste exhaustive de ces circonstances éventuelles. À l'évidence, cependant, détenir une part de marché très importante est un élément à prendre en considération. Toutes les affaires récentes concernaient des entreprises qui détenaient une part de marché de 80 à 95 %. Il n'y a pas beaucoup d'entreprises qui entrent dans cette catégorie.

Un autre délégué des États-Unis se demande si le fait d'imposer à l'entreprise dominante certaines relations commerciales ne risque pas de diminuer l'incitation des entrants à investir dans leurs propres installations. Est-il préférable de pérenniser une position dominante avec des installations disponibles pour tous ou d'inciter un autre acteur à créer une nouvelle installation ? C'est un problème auquel se trouve confronté le secteur des télécommunications aux États-Unis dans lequel il existe aujourd'hui des sociétés de télécommunications qui investissent sur le dernier kilomètre des millions de dollars dans des fibres optiques. Il faut que ces entreprises continuent d'être incitées à investir.

Les autorités de la concurrence et les tribunaux ne savent pas très bien administrer des dispositifs réglementaires. Dans certains cas, il est sans doute préférable de définir un cadre réglementaire et de mettre en œuvre une réglementation traditionnelle des entreprises de service public en général plutôt que de vouloir réglementer le secteur par le biais du droit de la concurrence.

Le délégué distingue également les refus de vente conditionnels. Face à ce type de comportement, la chose la plus simple est de prendre une mesure correctrice d'autant plus qu'il suffit souvent d'interdire la condition en question sans qu'il soit nécessaire de réglementer toutes les conditions générales de vente. Ce n'est pas toujours aussi simple mais cette distinction est importante.

Un délégué de l'Afrique du Sud décrit l'affaire dans laquelle Mittal, sidérurgiste en situation de monopole, a été déféré devant le Tribunal de la concurrence par la plus grande mine d'or du pays. Mittal était accusé d'avoir fixé des prix excessifs ce qui constitue *per se* une infraction au droit sud-africain de la concurrence dans le cas où ils sont appliqués par une entreprise dominante. Mittal a établi une distinction entre le marché intérieur et le marché à l'exportation en appliquant un prix X aux marchands/négociants d'acier sur le marché national et un prix X-n (n étant un chiffre relativement important) à l'unique négociant autorisé à exporter de l'acier. Il a également imposé une condition spéciale à ce négociant pour l'empêcher de revendre cet acier sur le marché intérieur. Mittal a également segmenté le marché d'autres manières, notamment par des ventes à l'industrie automobile à un prix réduit.

C'est effectivement pour segmenter le marché de l'acier et maintenir une structure de prix discriminatoires que Mittal imposait à son négociant international l'obligation de refuser certaines ventes. La réparation imposée par le Tribunal a été une amende de 1 000 000 USD (très importante pour l'Afrique du Sud) et une restriction qui empêche Mittal d'imposer des conditions de revente à ses négociants.

## **5. Refus de vente ou refus de maintenir des relations commerciales ?**

Le Président fait observer que les délégués sont divisés sur la question de savoir s'il fallait traiter de la même manière le refus de vendre et le refus de poursuivre des relations commerciales. Par exemple, la contribution de l'Allemagne indique : « Dans la jurisprudence, ce n'est pas la même chose si le refus de vente implique la résiliation d'un contrat de vente existant ou s'il implique de ne pas établir une nouvelle

relation. La résiliation d'un contrat de vente existant a moins de chances d'être objectivement justifiée que le refus d'établir une nouvelle relation ».

Par contre, la contribution de la Hongrie indique que l'autorité de la concurrence établit une distinction entre les affaires dans lesquelles il y a des antécédents de relations commerciales et celles qui n'en ont pas.

Un délégué de la Hongrie affirme qu'il n'y a pas lieu d'opposer la position de la Hongrie à celle de l'Allemagne. L'approche de l'autorité de la concurrence hongroise dans les affaires de refus de vente se concentre sur les effets du comportement sur la concurrence et sur les consommateurs. L'autorité de la concurrence considère qu'aucun fondement ne justifie une intervention, sauf si de réels effets négatifs peuvent être observés sur le marché. La résiliation d'un contrat de vente existant ne constitue pas en soi un préjudice causé à la concurrence qu'il faudrait éviter. Même dans le cas où ce comportement aurait des conséquences pour le consommateur, l'autorité de la concurrence n'interviendrait pas si ce comportement répondait à des objectifs commerciaux légitimes suffisamment justifiés. L'autorité n'accorde pas une grande importance au fait que les parties entretenaient auparavant des relations commerciales. Cet élément est pris en considération dans l'évaluation qui montre s'il existe ou non pour ce refus des justifications commerciales objectives.

Le Président note que la politique de la Suisse consiste à examiner de plus près les affaires qui impliquent une rupture de relations commerciales que celles qui concernent le refus d'établir une nouvelle relation. Le Président invite la Suisse à présenter l'affaire concernant l'entreprise qui fabriquait, entre autres, des « ébauches » pour les horlogers. Cette entreprise a décidé de supprimer progressivement, sur une période de trois ans, la fabrication d'ébauches pour privilégier, à la place, la production de mécanismes assemblés. Les horlogers ont saisi la Commission de la concurrence suisse. La Commission a considéré qu'il s'agissait d'un refus illicite de poursuivre un contrat de vente existant et a imposé plusieurs conditions. Le Président se demande s'il vaut mieux considérer cette affaire comme une application du droit de la concurrence ou de la politique industrielle.

Un délégué de la Suisse répond que l'autorité de la concurrence suisse ne joue aucun rôle dans la politique industrielle et se limite à appliquer le droit de la concurrence. Cette affaire a eu d'amples implications pour les consommateurs au niveau mondial – il est vraisemblable que 98 % des montres mécaniques portées dans la salle de conférence possèdent un mécanisme fabriqué par ETA (la société impliquée dans cette affaire).

Trois éléments dans cette affaire ont influencé la décision de l'autorité. Premièrement, le groupe industriel Swatch a des filiales qui opèrent à tous les niveaux de la production et commercialisation des montres, de la fabrication d'ébauches aux montres de luxe. Sa filiale ETA a une position particulièrement dominante qui représente 95 % du marché mondial. Deuxièmement, les contrats sont conclus sur ce marché pour des durées de 2 à 3 ans. La décision d'ETA Swatch de supprimer progressivement la fabrication d'ébauches devait avoir des répercussions sur tous les contrats qui seraient conclus au cours des 3 à 5 années à venir. Troisièmement, ce marché monopolistique était en train de devenir plus concurrentiel. Les acheteurs d'ébauches (qui, en raison de leur dépendance vis-à-vis d'ETA, en avaient été empêché pendant des décennies) avaient commencé à mettre en place leurs propres installations pour fabriquer des ébauches. La Commission s'est trouvée dans une position comparable à celle de la Commission européenne dans l'affaire Microsoft. Si elle n'avait rien fait, le danger était de voir la concurrence naissante éliminée.

La Commission de la concurrence est intervenue rapidement (dans un délai de quatre semaines après le dépôt de la plainte) pour protéger la concurrence naissante. Au bout du compte, la décision finale a confirmé les mesures conservatoires, restées en grande partie inchangées. Ces mesures sont applicables

durant une certaine période qui tient compte des projets d'entreprise des entrants soumis à la Commission. L'objectif est que dans quelques années Swatch soit confrontée à une réelle concurrence.

Dans cette affaire il ne s'agissait pas de politique industrielle mais d'une décision à prendre entre l'intervention *ex ante* (lorsque la concurrence, bien que limitée, existe et peut se développer) et l'intervention *ex post* (lorsqu'il n'existe pas de concurrence). L'autorité est intervenue *ex ante* pour faire en sorte qu'une véritable concurrence s'exerce en 2010.

L'autorité a imposé au groupe Swatch de continuer de livrer le même nombre de millions d'ébauches aux acheteurs jusqu'à ce que la production d'ébauches des nouveaux entrants puisse rivaliser avec Swatch. Un tribunal arbitral a été mis en place pour statuer sur les questions de coûts et de prix – l'autorité de la concurrence n'a aucun rôle à jouer dans la fixation des prix.

Le Président insiste sur le fait que cette solution n'empêche pas Swatch d'arrêter la production d'ébauches mais qu'elle exige simplement que cela se fasse plus lentement et seulement si certaines conditions sont respectées. Il note ensuite que la France est un autre pays où le temps compte aussi lorsqu'il s'agit de déterminer si on peut ou non interrompre des relations commerciales. En France, il existe un règlement qui interdit la rupture brutale de relations commerciales. Le Président demande à la France d'exposer le raisonnement économique que sous-tend ce contrôle de la vitesse à laquelle on peut rompre des relations commerciales. Le Conseil de la concurrence a-t-il été amené à intervenir en vertu des dispositions sur l'abus de position dominante et à imposer à une entreprise la poursuite de relations commerciales pendant un certain temps ?

Un délégué de la France déclare que la loi ne prévoit pas de préavis (en cas de cessation de relations commerciales). Mais il est possible d'interdire la rupture « abusive » de relations commerciales. Dans ce type d'affaires, le juge prend en compte un préavis qui est défini au cas par cas en fonction d'autres éléments tels que la durée des relations entretenues entre les parties. La loi n'empêche pas la cessation immédiate de relations commerciales en cas de faute de l'une ou l'autre partie. Quant à la justification économique de ces règles, le délégué fait observer que de telles dispositions favorisent un climat de confiance réciproque dans les relations entretenues ce qui encourage les investissements pro concurrentiels liés à ces relations commerciales.

Très rares sont les cas où le Conseil de la concurrence a considéré comme abusive la cessation de relations commerciales, et seulement en liaison avec d'autres pratiques anticoncurrentielles, par exemple si elle permettait d'imposer une clause d'exclusivité ou une collusion tacite.

## **6. Le refus de vente et la doctrine des installations essentielles**

Le Président en vient à la relation entre le refus de vente et la doctrine des installations essentielles. Le refus de vente est-il uniquement illicite dans le cas où il existe effectivement une installation essentielle ou peut-on parler de refus de vente abusif même s'il existe des alternatives ? La contribution de la Belgique indique : « En tout cas, la doctrine des installations essentielles a étendu le concept de refus de vente abusif au refus de vente concernant des biens et services qui ne sont pas offerts régulièrement sur le marché par le fournisseur opposant le refus ».

Dans l'affaire *Magill*, le produit ou service en question n'était pas offert régulièrement sur le marché et cependant, sans qu'il soit question de la doctrine des installations essentielles, on a déclaré que *Magill* avait abusé de sa position dominante.

Un délégué de la Belgique confirme que dans l'affaire *Magill*, l'expression « installations essentielles » n'était pas employée mais que plusieurs autres affaires qui avaient suivi faisaient référence à des installations essentielles. Le délégué ajoute que, pendant longtemps, littéralement toutes les affaires

d'abus de position dominante concernaient des refus de vente. Aujourd'hui encore, 40 % environ de toutes les affaires plaidées en matière de concurrence concernent des refus de vente. Évidemment, ils ne sont pas tous considérés comme des pratiques abusives, le plus souvent du fait de l'absence de position dominante. Les affaires *Bronner* et *Magill* concernaient l'une et l'autre le refus de vendre un produit ou un service que ces entreprises ne vendaient à personne à cette date. Le délégué a parlé d'une extension du concept de refus de vente. Dans ces affaires, l'autorité doit faire preuve de plus de prudence encore que dans les autres.

Un délégué de la Commission européenne souligne l'ampleur du consensus qui se dégage autour de la table. Aucune délégation, par exemple, n'a parlé d'appliquer la législation sur l'abus de puissance commerciale ou la monopolisation dans un autre but que de protéger la concurrence ou les consommateurs (à savoir les prix, les possibilités de choix, l'innovation, la qualité, etc.). Deuxièmement, aucune délégation n'a parlé de légalité *per se* et évidemment pas d'illégalité *per se* ; il s'agit plutôt de réfuter une forte présomption de légalité concernant le comportement incriminé. Troisièmement, un large consensus se dégage sur la nécessité de respecter scrupuleusement la liberté des entreprises de faire des affaires avec qui elles veulent ou de s'y refuser.

En revanche, l'analyse des implications éventuelles sur les incitations à innover ou les incitations à investir risque d'être différente selon les pays. Il existe probablement une position commune qui est que le meilleur moyen de traiter certains refus de vente est de recourir à la réglementation traditionnelle. Ce n'est pas une prescription générale mais si l'intervention porte sur les prix ou les conditions générales de vente, la réglementation traditionnelle a tendance à être mieux acceptée. Toutefois, en tant qu'autorités de la concurrence, nous savons que la réglementation traditionnelle est extrêmement envahissante et a une influence considérable sur les incitations. En fait, n'importe quelle mesure correctrice que nous imposons dans ces affaires a un impact sur les incitations. Mais quels sont les acteurs dont les incitations sont à prendre en compte ? Faut-il se limiter aux incitations de l'entreprise dominante ? Ou faut-il également prendre en compte les incitations des concurrents réels ou potentiels ?

Le délégué souligne que les refus de vente ne doivent constituer une infraction au droit de la concurrence que dans des cas exceptionnels. Le BIAC souhaite certainement des orientations plus précises mais cette approche indique de toute évidence à l'entreprise que le feu est à l'orange pour la majorité des pratiques commerciales. Cela étant, le feu orange peut passer au rouge si, dans des conditions particulières exceptionnelles, l'impact durable sur la concurrence entraîne une limitation de la concurrence ou une absence de concurrence à long terme au détriment des consommateurs.

Le Président demande à la République tchèque de présenter une affaire concernant l'accès à un terminal de bus. Dans cette affaire, l'autorité de la concurrence a décidé que le terminal n'était pas une installation essentielle étant donné que les concurrents, bien que désavantagés, pouvaient exercer leur activité sans cet accès. L'autorité de la concurrence a conclu néanmoins qu'il s'agissait d'un abus de position dominante. Par contre, dans l'affaire *Oscar Bronner*, le fait qu'il existe des substituts (bien qu'imparfaits) à l'installation en question a été considéré comme suffisant pour décider qu'il n'existait pas de pratique abusive.

Un délégué de la République tchèque signale qu'en 2005 la société CSAD Liberec, seul opérateur de services d'autobus de la ville de Liberec, refusait l'accès à la gare routière à la société concurrente, Student Agency, qui gérait une ligne d'autocars de Prague à Liberec alors que d'autres sociétés exploitant la même ligne étaient autorisées à utiliser la gare. L'autorité de la concurrence tchèque a établi que la capacité de la gare routière n'était pas pleinement exploitée et que CSAD Liberec ne pouvait pas objectivement justifier ce refus.

L'autorité de la concurrence a examiné si Student Agency avait la possibilité d'utiliser d'autres sites de Liberec que la gare routière. Plusieurs sites possibles ont été repérés mais aucun d'entre eux ne

constituait un substitut adéquat, plus particulièrement du point de vue du consommateur ou passager. Néanmoins, l'autorité a conclu (et le tribunal du district a confirmé) que la gare routière n'était pas une installation essentielle puisque, même sans accès, la Student Agency pouvait pénétrer le marché, bien que difficilement. Étant donné cette conclusion, l'autorité de la concurrence ne pouvait considérer le comportement de CSAD Liberec comme un abus de position dominante, sous la forme du refus opposé à l'utilisation d'une installation essentielle, mais l'autorité a suivi les prescriptions du tribunal et appliqué à la place une clause générale interdisant l'exploitation abusive d'une position dominante au détriment d'un autre concurrent.

L'autorité tchèque de la concurrence a pris en compte la décision rendue dans l'affaire *Oscar Bronner* mais elle est parvenue à la conclusion qu'il existait des différences essentielles. L'unique objectif du comportement de CSAD Liberec était d'éliminer son rival sur le marché en aval. Pour atteindre son objectif, CSAD Liberec a tiré parti de sa position dominante en tant qu'opérateur unique de la gare routière de Liberec. Ce comportement a gravement nuit à la concurrence et en même temps aux consommateurs ou passagers.

Le Président oppose l'affaire CSAD Liberec à une affaire citée dans la contribution de la Turquie dans laquelle l'existence de substituts n'a pas été considérée comme un élément suffisant pour justifier le refus de vente du défendeur, même si ces substituts imposaient certains désagréments à l'entreprise ayant été la cible du refus.

Un délégué de la Turquie indique que dans l'affaire *Anadolu Cam/Mercan Solmaz*, l'autorité turque de la concurrence n'a pas considéré que le refus de vente opposé par Anadolu Cam constituait une pratique abusive. Cette affaire concernait deux marchés importants, en amont le marché du conditionnement en verre et en aval le marché des produits domestiques en verre. Anadolu Cam détient une position dominante sur le marché en amont. Solmaz Mercan opère sur le marché en aval. Celui-ci achète certains produits intermédiaires fabriqués par Anadolu Cam tels que des bouteilles, des tasses, etc. Solmaz Mercan utilise ces produits pour la fabrication de produits domestiques en verre. En même temps, Paşabahce, filiale d'Anadolu Cam, opère sur le marché des produits domestiques en verre, rivalisant avec Solmaz Mercan.

Solmaz Mercan s'est plaint du refus d'Anadolu Cam de l'approvisionner en produits de conditionnement en verre, soit en ne livrant pas ces produits soit en livrant une quantité insuffisante par rapport aux besoins de Solmaz Mercan, dans le but d'évincer Solmaz Mercan du marché des produits domestiques en verre.

L'autorité turque de la concurrence a mené une enquête pour déterminer s'il s'agissait d'une pratique abusive en vertu de l'article 6 de la législation turque sur la concurrence en fonction des critères suivants : (a) Anadolu Cam était-il en position dominante ou non (b) était-ce ou non un refus de vente (compte tenu des relations commerciales qu'entretenaient les entreprises), (c) existait-il une justification objective ou non, (d) la concurrence était-elle restreinte ou non. L'autorité turque de la concurrence a conclu qu'Anadolu Cam n'était pas en position dominante, avait opposé un refus de vente, et n'apportait pas une justification objective suffisante de son comportement.

Par ailleurs, l'autorité turque de la concurrence a cherché à déterminer si le refus de vente avait une incidence négative sur la concurrence sur le marché sur lequel opérait Solmaz Mercan. L'enquête a montré que ce refus n'a pas eu d'incidence négative sur la concurrence et n'a donc pas restreint la concurrence. Au moment où est survenu le refus de vente, Solmaz Mercan a trouvé deux sources d'approvisionnement de substitution, l'importation et Marmara Cam, un concurrent d'Anadolu Cam. Ces deux solutions convenaient moins bien que l'approvisionnement par Anadolu Cam, notamment sur le plan de la qualité. L'autorité turque de la concurrence a considéré que le désagrément causé à Solmaz n'était pas suffisant

pour conclure que cela portait atteinte à la concurrence et n'a donc pas considéré ce refus de vente comme une pratique abusive.

L'autorité turque de la concurrence n'a pas abordé directement la question du degré requis d'imperfection des substituts pour condamner le comportement en question en tant que pratique abusive. Cela étant, en poursuivant le raisonnement que sous-tend cette décision, nous pourrions parvenir à la conclusion que le comportement d'Anadolu aurait pu être considéré comme un abus si (a) les prix appliqués par les sources d'approvisionnement de remplacement avaient été si élevés que Solmaz Mercan n'aurait pas pu opérer sur ce marché ou (b) si la qualité et la quantité de ces approvisionnements avaient été insuffisantes pour permettre à Solmaz Mercan de continuer à opérer sur ce marché de manière adaptée.

## 7. À propos du rôle des concurrents dans l'analyse du refus de vente

Le Président invite la Commission européenne à exposer comment elle parviendrait à faire la synthèse entre l'affaire *Bronner* (indiquant qu'avant de pouvoir conclure qu'il s'agissait d'une pratique abusive il fallait que le refus de vente ait éliminé toute concurrence) et la décision récente du Tribunal de première instance dans l'affaire *Microsoft* selon laquelle l'élimination de *tous* les concurrents n'était pas obligatoirement nécessaire mais seulement l'élimination d'une *réelle* concurrence.

Un délégué de la Commission européenne explique que la jurisprudence dans les affaires *Bronner*, *Magill* et *Commercial Solvents* faisaient référence à l'élimination intégrale de la concurrence mais que l'élément primordial de toutes ces décisions était le caractère indispensable de l'accès au moyen de production (dans l'affaire *Bronner* au réseau de distribution des journaux).

Les critères énoncés dans l'affaire *Bronner* permettant d'établir ce caractère indispensable étaient très rigoureux. Pour démontrer que la mise en place d'un autre système n'était pas une alternative réaliste et que l'accès au système existant était de ce fait indispensable, il ne suffisait pas de faire valoir que cette solution n'était pas viable économiquement en raison de la faible diffusion du quotidien ou des quotidiens qui devaient être distribués. Pour que l'accès soit considéré comme indispensable, il fallait établir qu'il n'était pas économiquement viable de créer un deuxième système de distribution à domicile de quotidiens ayant une diffusion comparable à celle des quotidiens distribués dans le cadre du système en place. La Commission applique donc un critère relativement rigoureux concernant la question de savoir s'il existe pour les concurrents une possibilité réaliste de trouver des substituts au moyen de production auquel l'accès leur est refusé et de rivaliser sur les marchés voisins ou en aval. C'est nécessaire afin d'éviter les répercussions préjudiciables sur les incitations des acteurs participant aux marchés en cause.

Toutefois, dans l'affaire *Microsoft* le Tribunal a bien montré que dès lors qu'il est établi que les rivaux sur des marchés adjacents ou en aval ne peuvent effectivement pas trouver de substituts au moyen de production auquel ils n'ont pas accès, la Commission n'est pas obligée d'attendre que la concurrence soit intégralement éliminée. Sinon son intervention serait trop tardive et les consommateurs risqueraient de subir pendant longtemps un préjudice.

Le Tribunal de première instance a considéré que Microsoft n'avait pas démontré que les informations relatives à l'interopérabilité n'étaient pas indispensables. Microsoft a fait valoir que même si les informations relatives à l'interopérabilité étaient indispensables le refus en question n'exclurait pas toute concurrence sur le « marché des systèmes d'exploitation pour serveurs de groupe de travail ». C'est pourquoi il n'existait pas de pratique abusive. La Commission, en revanche, avait examiné si le refus entraînait un « risque » d'élimination de la concurrence sur le marché des systèmes d'exploitation pour serveurs de groupe de travail. Microsoft a fait valoir que ce critère n'était pas suffisamment rigoureux étant donné que conformément à la jurisprudence relative à l'exercice d'un droit de propriété intellectuelle, la Commission doit démontrer que le refus d'accorder un droit de propriété intellectuelle à un tiers est

« susceptible d'éliminer toute concurrence » ou en d'autres termes qu'il existe une forte probabilité que le comportement en question ait un tel résultat.

Le Tribunal a conclu que l'article 82 CE ne s'applique pas uniquement à partir du moment où il n'existe plus, ou presque plus, de concurrence sur le marché. Si la Commission devait être obligée d'attendre que les concurrents soient éliminés du marché, ou qu'une telle élimination soit suffisamment imminente, avant de pouvoir intervenir en vertu de l'article 82 CE, cela irait manifestement à l'encontre de l'objectif de cette disposition (qui est de préserver une concurrence non faussée dans le marché commun) notamment de protéger la concurrence encore existante sur le marché en cause. Le Tribunal a ajouté que la Commission avait toutes les raisons d'appliquer l'article 82 *avant que* l'élimination de la concurrence sur le marché des systèmes d'exploitation pour serveurs de groupe de travail ne se concrétise parce que ce marché se caractérise par des effets de réseau importants et que, par conséquent, l'élimination de la concurrence serait difficile à inverser.

Enfin, le Tribunal a décidé qu'il n'était pas nécessaire de démontrer que toute la concurrence sur le marché serait éliminée. Ce qui importe c'est que le refus en question est susceptible d'éliminer toute véritable concurrence sur le marché. Il faut bien comprendre que la conservation par les concurrents de l'entreprise en position dominante d'une présence marginale sur certains créneaux du marché ne peut pas suffire à établir l'existence d'une telle concurrence.

## **8. À propos des justifications économiques du refus de vente**

Le Président oppose une affaire finlandaise à une affaire du Taipei chinois. Dans la première affaire, le Service finlandais des numéros de téléphone (Suomen Numeropalvelu Oy1 ou « SNOY ») était l'unique entreprise qui établissait une base de données nationale des abonnés du téléphone et elle était une filiale de deux grandes entreprises opérant sur le marché des services liés à des catalogues. SNOY a refusé de fournir des informations issues de cette base de données à des entreprises concurrentes offrant des services liés à des catalogues aux consommateurs finals. La principale justification du refus opposé par SNOY était qu'elle avait l'obligation de veiller à ce que les informations qu'elle communiquait à ses clients ne soient pas exploitées d'une manière non conforme à la législation sur la protection des données et de la vie privée.

L'autorité finlandaise de la concurrence a rejeté la justification donnée par SNOY parce que « ce n'est pas l'affaire d'une entreprise dominante de s'assurer que le comportement des entreprises qui sont ses clients est conforme à la loi ; l'application des dispositions pertinentes et le contrôle de l'activité des entreprises sont assurés par les autorités compétentes ».

Par contre, dans l'affaire du Taipei chinois, la Société chinoise de l'acier était la seule aciérie intégrée du Taipei chinois qui produisait du coke comme sous-produit. Elle fournissait tous ses produits de coke métallurgique exclusivement à une entreprise de carbochimie, la Société chimique de la sidérurgie chinoise, refusant de traiter avec d'autres entreprises du secteur de la carbochimie. En mai 2006, l'autorité de la concurrence a décidé que ce refus de vente ne constituait pas une infraction à la Loi sur la libre concurrence. La Société chinoise de l'acier a fait valoir que le coke peut causer un grave problème de pollution s'il n'est pas traité de manière adéquate et qu'elle avait conclu un contrat exclusif pour cinq ans avec la Société chimique de la sidérurgie chinoise pour garantir que ces éventuelles sources de pollution soient traitées correctement. On a considéré que les autres entreprises de carbochimie n'étaient pas suffisamment fiables pour faire face au problème de pollution qui pouvait survenir. L'autorité de la concurrence a décidé que le refus de vente de la Société chinoise de l'acier était légitime. Le Président a demandé au Taipei chinois d'expliquer comment la prévention de la pollution pouvait être considérée comme une justification commerciale légitime permettant de restreindre la concurrence.

Un délégué du Taipei chinois répond que dans son examen destiné à déterminer si le refus de vente constituait une infraction à la législation en vigueur, l'autorité de la concurrence avait pris en compte l'intention, les objectifs et la position de marché des parties ainsi que les caractéristiques des biens négociés et l'impact de l'application de telles restrictions.

Le coke est un sous-produit de la sidérurgie. La Société chinoise de l'acier est la seule aciérie intégrée du Taipei chinois qui peut produire du coke métallurgique. Sa production représente la moitié des besoins des entreprises de la carbochimie, le reste étant fourni par des sociétés étrangères à des prix internationaux variables.

Le traitement ou stockage inapproprié du coke pourrait causer un grave problème de pollution. Par le biais de sa filiale (Société chimique de la sidérurgie chinoise), la Société chinoise de l'acier peut garantir que cette pollution potentielle sera toujours traitée correctement. Par exemple, elle avait conclu un contrat exclusif à long terme avec sa filiale pour empêcher celle-ci de revenir sur son obligation de traiter le coke lorsque les prix des produits issus du coke baissent. Par ailleurs, la filiale a installé une canalisation directement reliée à la Société chinoise de l'acier pour réduire les coûts de transport ainsi que le risque de pollution lié à un traitement du coke inapproprié. De plus, à travers le contrôle qu'elle exerce sur la gestion de la Société chimique de la sidérurgie chinoise, la Société chinoise de l'acier peut éviter que la société de transformation adopte un comportement stratégique qui serait par exemple d'exiger des prix d'achat plus bas pour le coke durant les périodes de renégociation des contrats, prolongeant ainsi indûment la durée d'exécution du contrat. Il s'agit d'une justification légitime pour les produits qui sont hautement polluants et qui exigent, par conséquent, un stockage et un traitement propres, rapides et ininterrompus.