Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the
OECD Competition Committee

“Refusals to Deal”*

October 17, 2007

I. Introduction

1. 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.”

2. 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.

II. Under What Circumstances ought a Unilateral Refusal to Deal Give Rise to Competition Law Concerns?

A. Unilateral refusals generally do not warrant antitrust scrutiny

3. As a general matter, the business community supports the proposition that sellers of goods and services should be free to choose their counterparts. 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 every 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.

4. 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.”1

* Paper prepared by Rob Kwinter, Partner, Blake Cassels & Graydon LLP, Toronto, Canada and Paul Lugard, Global Head of Antitrust of Royal Philips Electronics N.V., with substantial contribution from BIAC Competition Committee members.
5. 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. 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)

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).”

B. Brief overview of US and EC Practice

U.S. Practice

6. 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.” 3

7. 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”) 4, 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.

8. The Supreme Court’s 2004 decision in Verizon v. Trinko 5 (“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.”

9. 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.

10. *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.

**EC Practice**

11. 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.

**Overview of EC Landmark Cases**

12. 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.⁶ 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”.

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⁶ 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.
13. In *Commercial Solvents v Commission*\(^7\) (“*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”\(^9\) 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\(^10\).

14. 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.\(^11\) The case law of the ECJ does not seem to provide a solid basis for such a distinction. In *Magill*\(^12\) 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.

15. 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*\(^13\) the Commission

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\(^7\) 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.


\(^9\) Ibid, para 25.


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.14

(iii) Refusal to supply a customer in a market where the dominant firm has no presence

16. 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 rivals15, 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).16

17. *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.17 The economic rational 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.18 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.19 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.

**Comments on the Commission’s approach to refusal to deal in the Discussion Paper**

18. 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. BIAC supports the Commission’s initiative and the need for guidelines in this area.

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14 Ibid. para 19.
18 Paragraphs 208 and 209 of the Discussion Paper.
Chapter 9 deals with refusal to deal.\textsuperscript{20} 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.\textsuperscript{21} 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. BIAC 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”.\textsuperscript{22} 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 “normal” have to be fulfilled in order for the termination of an existing supply relationship to be abusive. The conditions are:

\begin{enumerate}
\item the behaviour must be properly characterised as a refusal to supply;
\item the supplier must be dominant;
\item the refusal must be likely to have market distorting foreclosure effects; and
\item the refusal must not be justified objectively or by efficiencies.
\end{enumerate}

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:

\begin{quote}
“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
\end{quote}

\textsuperscript{20} 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.

\textsuperscript{21} Paragraphs 207 and 214 of the Discussion Paper.

\textsuperscript{22} Paragraph 213 of the Discussion Paper.
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.”

23. 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.

24. 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.

25. 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. 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.

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24 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).
Conclusion on EC

26. 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 courts. Regrettably the Discussion Paper does not clarify and appropriately circumscribe the role of Article 82(c) in refusal to deal cases.

III. Comments on Additional Questions Posed in the Request for Submissions

Vertical vs. Horizontal” Refusals to Deal

27. The relationship between a supplier and its customer is necessarily a “vertical” relationship25. 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”.

28. 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.

29. 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

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25 Except in the situation discussed on page 43 EAGCP paper, see note 2 above.
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.

30. 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.

31. 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 party as a customer where the requirements of that provision are met. 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.

32. 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.”

33. 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.

Same conduct – different analysis?

34. 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

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26 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.
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.

History of Dealing

35. 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\(^{27}\) and Chrysler.\(^{28}\) In Europe, for 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.

Reasonable Justifications

36. 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

\(^{27}\) Canada (Director of Investigation and Research) v. Xerox Canada Inc., [1990] 33 C.P.R. (3d) 83 (Comp. Trib.).

\(^{28}\) Canada (Director of Investigation and Research ) v. Chrysler Canada Ltd., [1989] 27 C.P.R. (3d) 1 (Comp. Trib.).
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.

Essential Facilities

37. 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”. 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 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.

IV. Conclusion

38. BIAC’s position can be summarized as follow:

- 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.”

29 Trinko supra at note 5, p. 410
• 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.