The American Antitrust Institute

Before the U. S. Antitrust Modernization Commission

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

WORKING GROUP ON EXCLUSIONARY CONDUCT

July 15, 2005

INTRODUCTION

These are the comments of a Working Group on Exclusionary Conduct established by the American Antitrust Institute ("AAI") for the purpose of responding to the Request of the U.S. Antitrust Modernization Commission ("AMC") for Public Comment on specific issues of antitrust law and policy. These comments reflect a consensus of the Working Group, but it should not be assumed that all members agree with every statement or position herein. The Working Group is chaired by Robert Skitol (Drinker Biddle & Reath LLP) and the other members are Roberto Amore (AAI), Joseph Bauer (Notre Dame University), Maxwell Blecher (Blecher & Collins PC), William Comanor (University of California, Santa Barbara), Lloyd Constantine (Constantine, Cannon PC), Albert Foer (AAI), Warren Grimes (Southwestern University Law School), Norman Hawker (Western Michigan University), George Hay (Cornell University Law School), John Kirkwood (University of Seattle Law School), Douglas Rosenthal (Sonnenschein Nath & Rosenthal LLP), Jonathan Rubin (AAI), F.M Scherer (Harvard University), and Robert Steiner (AAI). Jonathan Rubin is the principal author of these comments.

On May 4, 2005, the Commission adopted an Exclusionary Conduct Study Plan to explore the modernization of the substantive standards for determining whether conduct is exclusionary or anticompetitive under the Sherman Act.

The Study Plan states an overarching exclusionary conduct issue and recommends four specific questions for public comment. The questions seek comment on various forms of potentially exclusionary conduct: refusals to deal with (or discrimination against) rivals, denial of an essential facility, and product bundling or bundled pricing. The predominant focus of the questions is the appropriate legal standards for determining the circumstances under which such conduct should be unlawful under §2 of the Sherman Act. The final question is a query about the determination, revision, and clarification of standards for exclusionary or anticompetitive conduct.

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On May 19, 2005, the Commission issued its Request for Public Comment on the four specific questions.[1] In the following comment, the AAI Working Group on Exclusionary Conduct ("Working Group") responds to the exclusionary conduct issue with an answer that also responds to Question 4 relating to the determination of legal standards. This is followed by the Working Group's response *seriatim* to the remaining Questions on refusals to deal with rivals (Question 1), essential facilities (Question 2), and product and price bundling (Question 3).

A. Exclusionary Conduct Under the Sherman Act

> **(Exclusionary Conduct Issue): Should the substantive standards for determining whether conduct is exclusionary or anticompetitive under Section 1 or Section 2 of the Sherman Act be revisited?**
>
> **(Question 4.): How should the standards for exclusionary or anticompetitive conduct be determined (e.g., through legislation, judicial development, amicus efforts by DOJ and FTC), particularly if you believe the current standards are not appropriate or clear?**

1. Collusion and Exclusion

A widely respected contemporary antitrust textbook observes:

> American antitrust law is evolving away from reliance on narrow doctrinal categories towards a more unitary analytical framework, driven by broad economic concepts such as market power, entry and efficiency.[2]

Following this framework, the authors separately analyze conduct threatening collusive anticompetitive effects and conduct threatening exclusionary effects. In the exclusionary category the authors include dominant firm behavior, vertical interbrand restraints and vertical mergers.[3] This unitary framework is also reflected in the AMC's exclusionary conduct issue. The Working Group agrees with the implicit notion that Sections 1 and 2 should share the same standards

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[1]70 Fed. Reg. 28902-28907 (May 19, 2005)(available at: http://www.amc.gov/comments/request_comment _fr_28902/exclusionary_comments.pdf, last visited July 15, 2005)

[2]Andrew I. Gavil, William E. Kovacic, Jonathan B.Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, St. Paul: West Group, 2002, at v ("*Antitrust Law in Perspective*").

[3]Unilateral exclusionary conduct is covered by Section 2 of the Sherman Act; exclusionary agreements are covered by both Sections 1 and 2.

when conduct is claimed to be unlawful because of exclusionary anticompetitive effects.[4]

The collusion-exclusion categorization may have been what the Supreme Court had in mind when it coined its famous definition of monopoly power in *U.S. v. E.I. du Pont dE Nemours & Co.*, "the power to control prices or exclude competition."[5] An economist might fault this definition on the ground that one or the other of its two branches is superfluous. But in a legal sense the distinction lies in the contrast between the two types of harm to the competitive process, as the *du Pont* Court put it, the "enhancement of price" and the "throttling of competition" toward which the Sherman Act is simultaneously directed.[6]

Collusive anticompetitive harm occurs when competitors agree "to emulate a monopolist by restricting output and raising price," *i.e.*, firms suppress their *own* output in order to raise market prices.[7] By contrast, exclusionary conduct inflicts antitrust harm by suppressing a *rival's* output[8] or "capacity to exert a competitive constraint."[9] Whereas collusive conduct has a direct anticompetitive effect (on price, for example), the anticompetitive effect of exclusionary conduct is indirect. Exclusionary strategies are typically aimed at maintaining monopoly profits during what Judge Posner calls the "extension period," that is, "the period for which a monopoly is extended by means of exclusionary practices."[10]

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[4]In La Page's Inc. v. 3M Co, 324 F.3d 141 (3rd Cir., 2003) exclusionary agreements that violated Section 2, illogically, were held not to violate Section 1; see also Andrew I. Gavil, "*Copperweld* 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act," 68 *Antitrust L. J.* 87 (2000).

[5]351 U.S. 377, 387 (1956).

[6]*Id.*

[7]*Antitrust Law in Perspective*, cited in note 2, supra, at. 44. See also Susan A. Creighton, "Cheap Exclusion," Remarks of the Director, Bureau of Competition, Federal Trade Commission Before Charles River Associates 9th Annual Conference, Current Topics in Antitrust Economics and Competition Policy, Washington, D.C. (Feb. 8, 2005) ("*Cheap Exclusion*") (available at: http://www.ftc.gov /speeches/creighton/050425cheapexclusion.pdf, last visited July 15, 2005) (at 1, defining collusion as potentially anticompetitive conduct that "involves efforts by competitors jointly to raise price by reducing their *own* output").

[8]*Cheap Exclusion*, cited in note 7, supra, at 2 (stating that exclusion "involves conduct by which firms exclude competitors from the market and effectively prevent those excluded firms from expanding output, so that overall market output is reduced"); see also Tom Krattenmaker & Steven C. Salop, "Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price," 96 *Yale L. J.* 209 (1986).

[9]A. Douglas Melamed, "Exclusive Dealing Agreements and Other Exclusionary Conduct–Are There Unifying Principles?" mimeo, draft printed March 10, 2005, at 3.

[10]Richard A. Posner, "Vertical Restraints and Antitrust Policy," 72 *U.Chi.L.Rev.* 229, 232 (2005).

2. Exclusionary Dynamics and Predatory Pricing

The time element of exclusionary harm signals a deeper distinction between collusion and exclusion. The defendant's Schumpeterian perspective may not have exactly carried the day in *U.S. v. Microsoft,*[11] but it did bring into the courtroom an understanding of the importance of innovation and unhampered technological change as a legitimate competitive value worthy of antitrust protection. The Schumpeterian view feeds off of the notion that competition over price is static, while competition over other values, such as innovation, quality, reliability, variety, and interoperability, is dynamic.[12] Static analysis compares one timeless state of the world to another; dynamic analysis seeks to know what takes place (and when) as the world passes from one state to another. Dynamic competition refers to a *process of competitive change*. An exclusionary dynamic, therefore, is *an interference with the process of competitive change*.

Predatory pricing law is the most clearly articulated exclusionary dynamic in antitrust. Predatory pricing describes a strategy in which an incumbent sets prices low during a "predation period" to drive its rivals out of business followed by a "recoupment period" during which the incumbent is able to set prices high and earn supranormal profits. The incumbent's antitrust liability for a predatory pricing claim does not depend on whether its intended scheme of setting a low price to drive the rival out of business actually worked; the strategy could have worked exactly as intended and still not give rise to antitrust liability. What liability depends on is whether the low price was *improperly* low.

The distinction, then, between lawful discount pricing and unlawful predatory pricing is a matter of *propriety*.[13] Fortunately, there is a simple competition policy norm that supplies a guide to propriety in this instance which is that the law does not prohibit a firm from offering low prices that are profitable. As a result, whether prices are improperly low can be workably tested using a standard that condemns only unprofitable pricing. This is precisely the approach taken in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[14] where the Supreme Court seized on the "profit-sacrifice test" as a tool for fact finders to determine the point at which a low price

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[11]253 F.3d 34 (D.C. Cir., 2001).

[12]See Philip J. Weiser, "The Relationship of Antitrust and Regulation in a Deregulatory Era," 50 *Antitrust Bull.*___ (forthcoming 2005) ("Schumpeter highlights how technological change (i.e., dynamic competition) provides a far more powerful driver of economic growth than price competition (i.e., static competition)").

[13]See Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 Antitrust L.J. 841, 846 (1989). Section 2 prohibits activities that improperly stifle competition. As Professor Areeda observes:

> It is perfectly clear that the concept of monopolization requires some element of impropriety; it has to be monopoly power coupled not with building the better mousetrap, but monopoly power coupled with some impropriety in its achievement or maintenance.

[14]509 U.S. 209 (1993) (claim of predatory pricing demands proof of below-cost pricing).

becomes a predatory price.

As with the broader class of "non-price" exclusionary conduct, the predatory pricing scenario involves conduct ("low prices") with the chameleon-like quality that it is lawful in some contexts and unlawful in others. Before such conduct can be condemned its effect on the market and the wider competitive conditions must be consulted. The legal analysis of exclusionary conduct can be said to be highly *context sensitive*.

Another quality that is typical of an exclusionary anticompetitive effect is that the mechanism of competitive harm is indirect and occurs in a multi-period dynamic framework. The harm from a successful predatory pricing strategy can be captured as a change (or expected change) from a low-price/high-output state to a high-price/low-output state, which can be demonstrated with comparative statics.[15] However, unlike a collusive effect, the mechanism does not operate directly in the price-quantity space. Comparative statics cannot even begin to tell the whole story because the indirect predatory pricing exclusionary dynamic operates through a time-consuming scheme of driving rivals out of business to reduce alternative sources of supply.

On the other hand, unlike the broader class that includes non price exclusionary conduct, the dynamics of predatory pricing are fairly transparent, in part because the instrument of the exclusionary conduct is the firm's own asking price (or, quantity produced) and the exclusionary mechanism, although indirect, is only one step removed from the market. Thus, in non-price cases the exclusionary dynamic may be much more complicated.

The really meaningful difference between predatory pricing and non-price exclusion, however, is the susceptibility of the core conduct element ("low prices") to a formulaic standard ("profit-sacrifice") to determine whether the low prices are improper in an antitrust sense. Because of context sensitivity, every case of claimed exclusionary conduct requires a way to decide whether the challenged conduct is adorned with the requisite degree of impropriety. Consequently, the profit-sacrifice perspective—and the theoretical coherence of the predatory pricing paradigm—has profoundly influenced the thinking of courts and commentators about exclusionary conduct generally. There has been some unjustified giving in to the temptation to install the profit-sacrifice test across the board as a screen for all claims of unlawful exclusionary conduct.[16]

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[15]Such a demonstration would be sufficient to establish antitrust harm in a predatory pricing case; it is not necessary.

[16]See, *e.g.*, ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, 2005 Edition (2005), pp. C-1-C-109 *passim*, (Section 2 jury instructions that under various theories require the defendant to have incurred some form of short-run profit sacrifice as a pre-condition to liability).

Of course, this is unworkable for reasons that are explained more fully below.[17] But it is worth noting here that the profit-sacrifice test is appropriate for predatory pricing only because there is a competition norm that links profit-making price-setting to honest competition and loss-generating price-setting to something not quite kosher. There is no guarantee that a corresponding legal policy norm will exist that supports a formulaic rule to easily determine the lawfulness of non-price conduct that sports both exclusionary dynamics as well as arguable efficiencies, such as exclusive dealing, tying, bundling, or refusals to deal.

The principal danger of applying the profit-sacrifice test too broadly is its illogical tendency to establish short run profitability as a defense to a non-price exclusionary strategy. A second problem is its failure to condemn so-called "naked exclusion."[18] To signal that the Working Group rejects the notion that exclusionary conduct must pass a profit-sacrifice test to be actionable, we eschew the phrase "non-price predation" because the word "predation" has come to subsume the profit-sacrifice test.[19] We refer instead to "non-price exclusionary conduct."

3. Naked and Dressed-Up Exclusion

It has proven useful to distinguishing "naked" exclusion (also called "cheap exclusion"[20]) from other kinds of exclusion that are more "dressed-up." Naked exclusion is unambiguously anticompetitive. Such conduct has no efficiency or business justification and does not result in

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[17]See Jonathan L. Rubin, "The Truth About *Trinko*," 50 *Antitrust Bull.* ____ (forthcoming 2005) (arguing that *Trinko* did not endorse a particular standard); see also Steven C. Salop, "Section 2 Paradigms and the Flawed Profit Sacrifice Standard," mimeo, draft dated Feb. 10, 2005; and Einer Elhauge, "Defining Better Monopolization Standards," 56 *Stan. L. Rev.* 255, *passim* (2003) ("*Monopolization Standards*").

[18]See *Cheap Exclusion*, cited in note 7, supra, at 7 ("examples of cheap predation suggest that there might be limits to the application of the 'profit sacrifice' test as a necessary (rather than sufficient) standard for all forms of predation"); but see A. Douglas Melamed, "Exclusive Dealing Agreements and Other Exclusionary Conduct–Are There Unifying Principles?" mimeo, draft printed March 10, 2005, at 19, note 26 ("Conduct that creates no efficiency benefit can be condemned as naked exclusion without reaching the sacrifice test").

[19]See, *e.g.*, Covad Communications Company v. Bell Atlantic Corp., 398 F.3d 666 (DCCir., 2005) (Ginsburg, C.J.) (motion to dismiss for failing to plead profit-sacrifice should be denied because "in the vernacular of antitrust law, a 'predatory' practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor," citing *Brooke Group*).

[20]See *Cheap Exclusion*, cited in note 7, supra. The conduct is "cheap" in the sense that it costs the firm little to engage in, particularly compared to the expected gain, and also cheap in the sense of adding little positive value, *i.e.*, being devoid of a plausible efficiency justification.

any plausible economic benefit.[21] Most often naked exclusion is also tortious,[22] but it needn't be. It is enough that the conduct lacks redeeming value.[23] The fact that a defendant's conduct is tortious does not preclude a finding that it is also anticompetitive under the Sherman Act. As Judge Ginsburg recently observed, "whether a particular allegation states a claim under the Sherman Act depends entirely upon the competitive significance of the conduct alleged ***."[24] Whether or not conduct is anticompetitive, in other words, depends on its interaction with the competitive process. Thus, despite being naked, this type of exclusion remains context sensitive.

The *Caribbean Broadcasting*[25] case offers a useful example. A dominant commercial radio station falsely represented to advertisers that its geographic signal coverage completely overlapped a smaller station's coverage. Erroneously thinking that it could offer no additional geographic coverage, advertisers ceased doing business with the smaller station. The competitor sued the dominant firm on the theory that its misrepresentations constituted exclusionary conduct in violation of §2. The D.C. Circuit agreed.

Only the competitive context in *Caribbean Broadcasting* justified elevating a commercial dispute based on fraud, commercial interference or other state-law business tort to the level of a Sherman Act violation. The two important points worth stressing are a) that the crucial ingredient of antitrust impropriety was an economically plausible dynamic mechanism by which the market was effected by the challenged conduct, and b) that conduct alone, without consideration of its market-wide effects, cannot be evaluated to determine whether it is anticompetitive.

Dressed-up exclusion, by contrast, bears a claimed efficiency benefit. Exclusionary conduct with efficiency attributes lie at the heart of the dispute between those who would reach for consensus on a universal standard and those who would opt for case-by-case determination based on an approach that balances the competitive harm of the conduct against its claimed efficiencies. For exclusionary conduct cases in which an authentic efficiency defense can be

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[21]See Eric B. Rasmusen, J. Mark Ramseyer, and John Shepard Wiley, Jr.,"Naked Exclusion," 81 *Amer. Econ. Rev.* 1137 (1991) (Naked exclusion is "conduct unabashedly meant to exclude rivals, for which no one offers any efficiency justification"); see also Ilya Segal and Michael D. Whinston,"Naked Exclusion: Comment," 90 *Amer.Econ.Rev.* 296 (2000); and Eric B. Rasmusen, J. Mark Ramseyer, and John Shepard Wiley, Jr., "Naked Exclusion: Reply," 90 *Amer. Econ. Rev*. 310 (2000).

[22]See *e.g.* Conwood Co. L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir., 2002) (dominant firm's "dirty tricks" at rival's point of sale could violate §2) and Caribbean Broadcasting System, Ltd. v. Cable & Wireless Plc, 148 F.3d 1080 (D.C.Cir.,1998) (intentional misrepresentations by dominant firm about service qualities compared to rival could violate §2).

[23]See, *e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (packing standards-setting association could violate §1).

[24]Covad Communications Company v. Bell Atlantic Corp., 398 F.3d 666, 672 (DCCir., 2005).

[25]Caribbean Broadcasting System, Ltd. v. Cable & Wireless Plc, 148 F.3d 1080 (D.C.Cir.,1998).

raised the Working Group endorses reliance on common law principles that have long governed exclusionary conduct applied on a case-by-case basis.

4. Standards for Dressed-Up Exclusionary Conduct

A general formulation for non-price exclusion remains elusive despite the norm-driven test for predatory pricing adopted by the Supreme Court in *Brooke Group.*[26] As the Commission's Single-Firm Working Group observed, commentators differ widely over the appropriate standard for determining whether conduct is exclusionary, with "no consensus in sight."[27] In the same vein, the Director of the FTC's Bureau of Competition observed that some instances of collusive conduct, such as price fixing or territorial allocation, are immediately recognized as violations of the Sherman Act, while "no similar consensus has developed that there exists some set of 'core' [exclusionary] conduct that can be viewed as inherently problematic."[28] A great deal of academic bickering goes on over the nature and degree of the competitive harm caused by dressed-up exclusionary conduct, on how the conduct causing such harm should be assayed, and whether the benefits of enforcement are worth the costs.

Some of the debate over dressed-up exclusionary conduct standards plays out in the larger context of monopolization standards under Section 2. The elements for unlawful monopolization under Section 2 are articulated in *United States v. Grinnell Corp*. The two elements of the black-letter *Grinnell* test for monopolization, (1) possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident,[29] have been criticized as vague and even vacuous. As one commentator put it, the troubles with current monopolization standards start "at the top" with *Grinnell* elements that suffer from "extensive and unnecessary" uncertainty.[30]

A number of possible explanations can be offered for these observations about monopolization standards in general and about exclusionary conduct standards in particular. The most counterfactual is that, in contrast to collusion, "no forms of exclusionary conduct can be readily identified as anticompetitive without elaborate analysis."[31] However, the occurance of naked exclusion or predatory pricing belies this explanation. FTC Director of Competition

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[26]Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[27]Memorandum of the Single-Firm Working Group to the Commission, Re: Single-Firm Conduct Issues Recommended for Commission Study, December 21, 2004, at 8.

[28]*Cheap Exclusion*, cited in note 7, supra, at 2.

[29]384 U.S. 536, 570-71 (1966).

[30]*Monopolization Standards*, cited in note 17, supra, at 257.

[31]*Cheap Exclusion*, cited in note 7, supra, at 2.

Creighton's suggests that the single-minded focus on a general standard for determining when exclusionary conduct should be condemned has eclipsed the more pressing priority of identifying certain core types of exclusionary conduct that cause the greatest competitive harm.[32] Yet another explanation is that *standards of improper conduct are more difficult to fashion when the impropriety depends crucially on the exegesis of a dynamic mechanism of competitive harm.*

In any event, there is plenty of heated debate over the legal standards that should apply to non-price exclusionary conduct. For example, the Commission's own Single-Firm Working Group suggested that the fact that the Supreme Court declined in its recent decision in *Verizon v. Trinko*[33] to accept or reject "the 'sacrifice test,' the 'unnecessarily restrictive' test, the balancing test, or any other formulation" for adjudging exclusionary conduct posed "an obstacle to U.S. businesses in deciding what they can or cannot do."[34]

The Working Group rejects the notion that there is excessive uncertainty in this area, or that current doctrine poses any serious problems for U.S. businesses. Moreover, there is no current crisis or dysfunction in the application of the Sherman Act as it relates to exclusionary conduct. The Working Group disagrees with the premise implicit in the exclusionary conduct issue (and several of the subsidiary Questions) that a single rule can provide a bright-line test applicable to all exclusionary practices (or to a series of doctrinaire sub-classifications of conduct). A "one-size-fits-all" legal standard for determining the lawfulness of challenged exclusionary conduct is neither desirable nor achievable.

5. Standards Should Emerge Out of the Common Law

There are three principal reasons the Commission should forego its search for universal tests and instead focus on the common law principles from existing case law that long have governed exclusionary conduct.

First, an infinite variety of conduct may dynamically cause competitive harm in a multitude of ways.[35] For this reason it should not be surprising that universal standards in this

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[32] *Id.*

[33] Verizon Comm'ns, Inc. v. Trinko, 540 U.S. 398 (2004).

[34] Memorandum of the Single-Firm Working Group to the Commission, Re: Single-Firm Conduct Issues Recommended for Commission Study, December 21, 2004, at 8.

[35] See Caribbean Broadcasting System, Ltd. v. Cable & Wireless Plc, 148 F.3d 1080 (D.C.Cir.,1998) ("'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties").

area elude facile determination.[36] That is why Congress left to the courts the responsibility of defining the parameters of the Sherman Act.[37] As one court observed, Sections 2's prohibition against anticompetitive conduct by dominant firms encompasses

> a wide variety of behavior including espionage, sabotage, predatory pricing, fraud, price discrimination, price-fixing, bid-rigging, illegal tying arrangements, product disparagement and a host of other activities that improperly stifle competition. Section 2 prohibits a monopolist from engaging in anticompetitive practices that are designed to deter potential rivals from entering the market or from preventing existing rivals from increasing their output, no matter how flagrant or subtle the violation. *** Perhaps the clearest way to explain what a monopolist may legally do is to say that the monopolist may engage in all of the same procompetitive activities that allowed it to become a legal monopolist in the first place. *** If these activities result in even more market share, and drive competitors out of the market, the monopolist is nevertheless fully entitled to such expansion, and its conduct is not a violation of the Sherman Act. Conversely, a monopolist may not engage in any activities other than those that are procompetitive ***.[38]

The second reason to place predominant reliance on the case-by-case method of the common law to develop legal standards in this area is because the lawfulness of exclusionary conduct is so context sensitive. Formulae and standards involve a level of abstraction that may systematically bias antitrust outcomes. Formulaic tests have difficulty capturing the indirect dynamic mechanism that typifies exclusionary effects.

Finally, perhaps the best reason to abandon the reach for universal standards is that it is inessential to the consistency or development of doctrine. There is little to be gained from deciding in the abstract whether, for example, conduct that involves the sacrifice of short-run profits or conduct that raises rivals' costs should be the *sine qua non* of a successful prosecution

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[36]See R. Hewitt Pate, "The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct, Address by the Assistant Attorney General, Antitrust Division, before the Thirtieth Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, N.Y. (Oct. 23, 2003) (available at: http://www.usdoj.gov/atr/public/speeches/202724.htm, last visited July 13, 2005)("The all-purpose, one-sentence, universal test for section 2 liability is a 'holy grail' that may never be precisely located.")

[37]Caribbean Broadcasting System, Ltd. v. Cable & Wireless Plc, 148 F.3d 1080 (D.C.Cir.,1998), citing 21 *Cong. Rec.* 2460 (1890) (discussing the standards for §1: "it is difficult to define in legal language the precise line between lawful and unlawful combination").

[38]Caldera, Inc. v. Microsoft Corp., 72 F.Supp.2d 1295, 1306 (D.Utah, 1999).

of a dominant firm for a refusal to deal under Section 2.[39] Instead, the inquiry should rest on the enduring and non-controversial legal and economic principles on which the judicial system has long relied when adjudicating whether particular conduct in its context threatens anticompetitive effects.[40]

Significantly, it does not follow from the failure of the courts over the years to articulate a single legal-economic theory that explains the universe of exclusionary anticompetitive conduct that the law in this area is so lacking in clarity or logic that businesses and their legal advisors are left without meaningful guidance. One of the reasons the common law serves antitrust well is that common law principles enable educated predictions of what a court might do in a given case.[41] Antitrust courts and counselors have learned to recognize anticompetitive effects when they see them. Nor does the fact that an all-encompassing legal-economic standard has failed to evolve detract from the correctness of the outcome of individual cases.[42]

B. Refusal to Deal as a Violation of Section 2

> **(Question 1.): What are the circumstances in which a firm's refusal to deal with (or discrimination against) rivals in adjacent markets violates Section 2 of the Sherman Act? Does the Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), state an appropriate legal standard in this respect?**

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[39]The debate has raged for years but has sharpened recently from the government's arguments and the Court's decision in the *Trinko* case as the "sacrifice test" has come to represent its own doctrinal pole. *Trinko* did not settle this issue one way or another, see note 70 and accompanying text, infra.

[40]The Working Group also recommends continued reliance on the common law and case-by-case resolutions rather than legislative reform as the most effective means of refining and modernizing doctrine in this area. See R. Hewitt Pate, "The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct, Address by the Assistant Attorney General, Antitrust Division, before the Thirtieth Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, N.Y. (Oct. 23, 2003) (available at: http://www.usdoj.gov/atr/public/speeches/202724.htm, last visited July 13, 2005)("It is the adaptability and incremental approach of case law that has enabled courts and enforcers over time to introduce rigorous economic analysis into antitrust law and to continue incorporating better economic thinking as it becomes available"); see also A. Douglas Melamed, "Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?" draft manuscript ("lawfulness [of instances of conduct should be] determined by applying to them basic principles applicable to exclusionary conduct in general, albeit with careful attention to the particular facts").

[41]See O. W. Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 61 (1897) ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts").

[42]See *Monopolization Standards*, cited in note 17, supra, at 267 ("As in many areas, the actual results reached by courts can often be explained by theories they themselves did not articulate, perhaps because the courts rested on intuitive judgments they could not fully explain, or because underlying theoretical concerns cause parties not to present certain arguments").

1. Preliminary Statement

Exclusionary conduct known as a "refusal to deal" fits into a "narrow doctrinal category"[43] focusing on which can be strenuous. Technically, refusal to deal describes a tactic that may be exclusionary and not an exclusionary dynamic. By contrast, the essential facilities doctrine (discussed in the next Question) immediately suggests the dynamic mechanism of competitive harm being claimed. Moreover, the definition of a refusal to deal is difficult to cabin; it becomes increasingly general with study until it ends up including any aspect of the terms of trade between any counterparties that could exert any exclusionary anticompetitive effect.

Although the first part of the Question invites an inclusive interpretation of "refusal" that includes discrimination, the Question also limits itself to dealings between incumbent firms and rivals. Cases such as *U.S. v. Dentsply Int'l, Inc.*[44] and *Covad Communications Co. v. Bell Atlantic Corp.,*[45] therefore, both of which involve exclusionary refusals to deal between an incumbent and a counterparty other than a rival, lie outside the scope. Finally, the phrase "in adjacent markets" introduces an ambiguous limitation.

With respect to the second part of Question 1., the Working Group respectfully rejects the premise that *Verizon v. Trinko* established a particular standard for refusals to deal, or any other type of exclusionary conduct. The Commission's Exclusionary Conduct Study Group recognized as much when it observed that the Supreme Court declined to accept or reject "the 'sacrifice test,' the 'unnecessarily restrictive' test, the balancing test, or any other formulation" for adjudging exclusionary conduct.[46]

We describe below the applicable principles reflected by the common law in this area followed by a brief comment with our view of the legal effect of *Verizon v. Trinko* as it relates to the legal standards for refusals to deal.

2. Current Refusal to Deal Doctrine

A general rule was established in the 1919 case of *United States v. Colgate & Co.,* in which the Supreme Court held that, absent a purpose to create or maintain a monopoly, firms are

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[43]See note 2, supra, and accompanying text.

[44]399 F.3d 181 (3rd Cir., 2005).

[45]398 F.3d 666 (D.C. Cir., 2005).

[46]Memorandum of the Single-Firm Working Group to the Commission, Re: Single-Firm Conduct Issues Recommended for Commission Study, December 21, 2004, at 8.

free to deal with whomever and on whatever terms they wish.[47] The *Colgate* rule by its own terms is not unqualified; it is unlawful to "create or maintain a monopoly" under §2 of the Sherman Act. Interaction between these two principles—that even dominant firms have the freedom to deal with whomever they wish, but a refusal to deal might sometimes nonetheless violate Section 2—drives one of the enduring issues in Sherman Act jurisprudence.

Indeed, a rule that "a firm that develops a superior product must sometimes share it with its rivals"[48] does not seem to reflect a coherent theory. But any general rule governing a dominant firm's dealings with other parties will be subject to this same criticism: dominant firms have the right to deal with whomever and on whatever terms they wish, except when done in a manner that constitutes monopolization under §2.[49]

The Supreme Court has circumscribed a monopolist's *Colgate* freedom quite often; at the same time, the Court has rarely overturned its antitrust decisions.[50] Consequently, there is an enduring body of jurisprudence for adjudging the occurrence of anticompetitive conduct, including refusals to deal. The *Colgate* qualification to the unfettered freedom of a dominant firm to deal has been fleshed out by the Supreme Court in a line of cases that includes *Standard Oil* (*New Jersey*),[51] *Lorain Journal,*[52] *Otter Tail*,[53] *Aspen*,[54] *Kodak*,[55] and *Trinko*.[56] Unilateral refusals to deal occur when a single dominant firm chooses to deal on overly-restrictive or exclusionary

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[47] 250 U.S. 300, 307 (1919); see Glen O. Robinson, "On Refusing to Deal With Rivals," 87 *Cornell L. Rev*. 1177, 1190 (2001) (*Colgate's* "freedom formulation" is the "baseline norm" that continues to be cited with "programmed repetition. The norm itself remains unexplained; it is just one of those original principles that is grounded only on itself").

[48] *Id.*, at 261.

[49] This is the rule for single-firm conduct under §2. The corresponding rule for concerted action raises the same problem: firms are free to enter into agreements to deal with whomever and on whatever terms they wish, except when doing so constitutes an agreement in unreasonable restraint of trade under §1.

[50] See Richard J. Pierce, Jr., "Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan," 69 *Geo.Wash.L.Rev.* 1103, 1111-2 (2000-01) ("The Supreme Court has decided over 100 antitrust cases in the past century, and it has overruled only two of those decisions," citing State Oil v. Kahn, 522 U.S. 3 (1997) and Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).

[51] Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1 (1911).

[52] Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[53] Otter Tail Power Co. v U.S., 410 U.S. 366 (1973).

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

[55] Eastman Kodak Co., v. Image Technical Services, Inc., 504 U.S. 451 (1992).

[56] Verizon Comm'ns, Inc. v. Trinko, 540 U.S. 398 (2004).

terms. This can include terms of dealing that are so uneconomical as to constitute a refusal, as well as restrictive terms with counterparties that have the effect of impeding rivals' access to inputs or customers.

Some authorities find it useful to subdivide refusals to deal into types. For example, a contemporary antitrust casebook identifies three variations:

> The first category includes cases in which a dominant firm threatens to cease cooperation, with a customer or supplier that is considering forming a relationship with the dominant firm's competitors. The second category consists of challenges to a dominant firm's attempt to withdraw from an existing contractual relationship or to impose new terms on an existing relationship. The third category concerns the refusal of a dominant firm to provide access to a facility—sometimes called an "essential facility"—that a rival requires in order to compete with the dominant firm.[57]

In the first category, exemplified by *Lorain Journal v. U.S.*,[58] the dominant media outlet in Lorain, Ohio was a newspaper that had threatened to withhold advertising space from its advertising customers who also placed advertisements with a new entrant, a local radio station.[59]

The second category involves abandoning or altering an existing relationship, as in *Aspen Skiing*[60] and *Kodak*.[61] In *Aspen Skiing*, the dominant ski resort in town, Ski Co., after years of an arrangement beneficial to consumers in which it jointly sold an "All Aspen" ski-lift ticket together with its fringe competitor, Highlands, decided to terminate its arrangement, refusing to sell to Highlands even at its regular retail price.

Finally, in the exemplary essential facility case, *Otter Tail*,[62] the transmission grid owner refused to wheel electricity through its monopolized service area to an independent municipal power company, abusing its position as sole transmission provider.

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[57]*Antitrust Law in Perspective*, cited in note 2, supra, at 630.

[58]342 U.S. 143 (1951).

[59]See Dennis W. Carlton, "A General Analysis of Exclusionary Conduct and Refusal to Deal—Why *Aspen* and *Kodak* Are Misguided," 68 *Antitrust L. J.* 659, 676 (2001) (arguing that *Lorain Journal* represents a "sensible application[ ] of antitrust in refusal to deal cases").

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

[61]Eastman Kodak Co., v. Image Technical Services, Inc., 504 U.S. 451 (1992).

[62]Otter Tail Power Co. v U.S., 410 U.S. 366 (1973).

In each of the cases a dominant firm exploits or abuses its complementary, collaborative, or mutual business relationships with, for example, input suppliers, potential customers, or its control over an "essential facility" in a manner that does not qualify as a legitimate method of battling the competition.[63] This suggests that the antitrust impropriety in a dominant firm's refusal to deal involves the abuse of what would otherwise be a mutually beneficial relationship.[64] It is anticompetitive to wield market power in a complementary (inputs, customers, essential facilities) or collaborative (counterparty, patent pool, standards-setting body) relationship for the purpose of achieving or maintaining monopoly power.

The relationship abused in *Aspen Skiing* is illuminated nicely by Professor Areeda:

> Suppose Ski offered the $114 discount ticket to skiers only on the condition that they not ski at Highlands. If we truly thought Ski were a monopolist, we would be troubled indeed. Of course, the practical effect of the six-day discounted ticket might well be the same.[65]

The key relationship in *Aspen Skiing*, therefore, was between the ski operators and their shared pool of potential customers. Ski Co. was in a position to impose costs on Highlands' potential customers and it did so. Under other circumstances, Ski Co.'s conduct may not have been exclusionary. But the *Aspen Skiing* case demonstrates the context-sensitivity of the antitrust impropriety in the dominant operator's refusal to deal.

Each of the cases discussed above sheds light on the following four elements:

1. the defendant has engaged in a purposeful and illicit economic strategy of employing a mutual, collateral, or complementary relationship to achieve or maintain monopoly power;

2. the challenged conduct is reasonably likely to exclude or reduce the capacity of an identifiable class of rivals to exert a competitive constraint on the dominant firm or otherwise to participate in the

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[63]See A. Douglas Melamed, Principal Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Exclusionary Vertical Agreements," Address before the American Bar Association, Antitrust Section, April 2, 1998, at 8 (arguing, in the related context of exclusionary vertical agreements, that unlawfulness should require that the suspect agreement "exclude rivals from the market or materially diminish their competitive efficacy by raising their costs or denying them needed inputs").

[64]See Jonathan B. Baker, "Promoting Innovation Competition Through the *Aspen/Kodak* Rule,"7 *Geo.Mason L. Rev.* 495, 503 (1998-99) (The *Aspen/Kodak* rule is that "a firm with monopoly power violates Sherman Act §2 if it excludes rivals from the monopolized market by restricting a complementary or collaborative relationship without an adequate business justification").

[65]Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 *Antitrust L.J.* 841, 850 (1989).

market;

3. the challenged conduct is likely to deny an identifiable class of consumers or end-users specific expected benefits of competition; and,

4. there is no demonstrable non-exclusionary or otherwise legitimate business justification for the challenged conduct.

The second element, that the conduct at issue must be reasonably likely to lead to exclusionary competitive harm, is particularly important in cases brought by disgruntled rivals. The challenged conduct may be somewhat removed from any ultimate harmful effect on competition. For instance, business torts that rise to the level of an antitrust violation, as in *Caribbean Broadcasting*[66] or *Conwood*[67], usually involve open tactics that are witnessed and recorded. However, liability in such cases will turn on whether the tactic is reasonably likely to result in the kind of injury the antitrust laws were enacted to redress, that is, whether the harmful tactic also *interfered with the competitive process*.

The third element encompasses antitrust harm and requires that the claimed interference with the competitive process can be explained in terms of injury to a particular class intended to benefit from the presence of competition.

Finally, none of the defendants in the cases mentioned was able to offer a plausible efficiency justification for its conduct.

It is instructive to compare the approach to refusals to deal taken by the *Model Jury Instructions in Civil Antitrust Cases*:[68]

> Ordinarily, a company may deal or refuse to deal with whomever it pleases, as long as it acts independently. Even a company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and ordinarily may refuse to deal with them.
>
> A refusal to deal with a competitor constitutes anticompetitive conduct only where the refusal is contrary to the short-run best interest of defendant, and where it makes sense for defendant only because it harms competitors and helps defendant achieve or

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[66]Caribbean Broadcasting System, Ltd. v. Cable & Wireless Plc, 148 F.3d 1080 (D.C.Cir.,1998).

[67]Conwood Co. L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6^{th} Cir., 2002).

[68]ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, 2005 Edition (2005).

> maintain monopoly power in the long run. In other words, if the refusal to deal results in [*or is expected to result in*] short-run benefits to defendant—such as more profits, a higher market share, or avoiding the loss of customers—then it is not anticompetitive and you must find for defendant on this element. On the other hand, if the refusal to deal hurts defendant in the short run [*and was expected to hurt defendant in the short run*], and is undertaken only because defendant expects it to harm competitors and enhance its monopoly power in the long run, then you must find for plaintiff on this element.[69]

It is difficult to reconcile these proposed instructions with the basic principles that emerge from the common law. Under this instruction, the fact finder is invited to reject the plaintiff's claim whenever sacrifice of short-term profits cannot be demonstrated. For the reasons given in the foregoing response and below, this is not a workable requirement. The Commission should recommend to the ABA Section of Antitrust Law that the quoted instruction does not emerge out of existing case law and should be revised.

3. <u>Refusal to Deal Doctrine in Light of *Trinko*</u>

The Working Group does not interpret the Supreme Court in its 2004 decision in *Verizon v. Trinko*[70] as having appreciably altered Sherman Act jurisprudence as it relates to refusals to deal, nor as having endorsed or adopted any particular behavioral or legal standard.

The decision in *Verizon Comm'ns, Inc. v. Law Office of Curtis V. Trinko*[71] stands for the undeniable proposition that the antitrust laws do not—without more—require that a court carve out elements of a monopolist's private, productive infrastructure and compel the monopolist to sell them as inputs at regulated prices to the monopolist's rivals.[72] Of course, this was exactly what the Telecommunications Act of 1996 required of the incumbent local exchange carriers ("ILECs"). In the 1996 Act, Congress induced a tectonic shift in the legal paradigm covering the telecommunications industry to foster competition in lieu of regulation as the retail rate-setting mechanism.

The Act required the Federal Communications Commission ("FCC") to establish new "wholesale" markets, to start regulating rates for telecommunications services as inputs, and to

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[69]*Id.*, at C-36.

[70]Verizon Comm'ns, Inc. v. Trinko, 540 U.S. 398 (2004).

[71]540 U.S. 398 (2004).

[72]John Thorne, "A Categorical Rule Limiting Section 2 of the Sherman Act: *Verizon v Trinko*," 72 *U.Chi.L.Rev.* 289 (2005).

withdraw from regulating the retail price for services. The plan was that rivals (competitive local exchange carriers, "CLECs") would compete with the ILECs by building infrastructure or could buy rate-regulated services in the new wholesale market.

If there is black-letter law laid down in *Trinko*, it is that Section 2 of the Sherman Act does not nakedly empower an antitrust court to impose "the extraordinary requirements already imposed by the [FCC]" pursuant to the 1996 Act. The answer to the question of whether such an industrial re-organization is mandated by the unadorned antitrust laws must be "no."[73] However, *Trinko* should not be read as substantively changing the jurisprudence of Section 2. Without overruling any case or doctrine, the Court presumed continuity in the rights and duties imposed by the antitrust laws before and after the 1996 Telecommunications Act to reach the unremarkable result that the antitrust laws do not by themselves authorize a court to force incumbent telecommunications carriers to sell wholesale services at regulated rates to their rivals.[74]

The *Trinko* decision inspires over-interpretation. A maximal view of *Trinko* holds that the Court eliminated refusals to deal (or nearly did),[75] declared that regulation categorically displaces antitrust,[76] required profit sacrifice as a condition to unlawful exclusionary conduct,[77] and repudiated the essential facilities doctrine.

The Working Group does not believe that any such broad reading of *Trinko* is either

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[73]*Id.*, at 291.

[74]The rest of the Trinko opinion, inessential if not irrelevant to its simple holding, commented generally on four additional doctrinal points: the significance of the defendant's sacrifice of short-run profits; the significance of a prior course of dealing; the reliability of the FCC's (or other regulatory agency's) stewardship of the antitrust function in light of the costs of antitrust enforcement; and, finally, the proper role of intent, including what the allegations in a complaint need to say about a defendant's "dreams of monopoly." All of these points contributed incrementally to the result, all of them can be understood as an application of one or more of the elemental principles itemized above (with the exception of the Court's discussion of the FCC's antitrust function which arises because of the regulatory context), and none of them was crucial to the narrow holding of the case. For a discussion of the significance of the *Trinko* decision on the doctrines of regulatory antitrust preclusion, see AAI Working Group on Regulated Industries, Comments Before the AMC (filed July 15, 2005).

[75]See George A. Hay, "*Trinko*: Going All the Way," 50 *Antitrust Bull.* ____ (2005) (forthcoming) (arguing that the *Trinko* decision has started the process of eliminating unlawful refusals to deal under Section 2); see also David S. Evans & A. Jorge Padilla, "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach," 72 *Univ. Chi. L. Rev.* 73, 88, note 55 (2005) ("The Supreme Court also seems to have moved to a modified per se legality standard for the refusal to share property").

[76]See Philip J. Weiser, "The Relationship of Antitrust and Regulation in a Deregulatory Era," 50 *Antitrust Bull.*___ (forthcoming 2005) (*Trinko* dicta is susceptible "to calls for a limited application of antitrust law").

[77]See the response to the previous Question.

warranted or reasonable.[78] The Court clearly refrained from a) overruling either *Otter Tail*[79] or *Aspen Skiing*[80] (albeit placing the latter case near the "outer boundary of Section 2"), b) requiring a prior course of dealing as a condition to an unlawful refusal to deal, c) repudiating the essential facilities doctrine, or d) making any change in the doctrine of monopoly leveraging, which continues to be governed as any other attempted monopolization claim by the rule in *Spectrum Sports, Inc. v. McQuillan*.[81]

Perhaps most germane to the present discussion, however, is that the *Trinko* Court clearly declared that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2."[82] In light of this express language, it is discouraging that the Department of Justice Task Force on Intellectual Property has issued a report supporting codification of "the Rights of Intellectual Property Owners to Determine Independently Whether to License Their Technology."[83] In particular, the Report refers to

> a recent legal ruling that expressed great skepticism about applying the antitrust laws in ways that would force companies to share the source of their competitive advantage with others.[84]

This statement appears to refer to the *Trinko* decision without naming it. If so, it leaves the unfortunate impression that the import of the decision was to pare back the authority of antitrust, when in fact *Trinko* leaves the status quo entirely intact, not only by preserving prior rulings, practices and doctrines, but by expressly reaffirming that under certain circumstances antitrust has the legal authority to make unlawful a refusal to share property, including intellectual property.[85]

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[78]See Jonathan L. Rubin, "The Truth About *Trinko,*" 50 *Antitrust Bull.* ___ (forthcoming 2005) (arguing that the case made no change in Section 2 doctrine, endorsed a case-by-case approach to the antitrust-regulation interface, refrained from adopting any behavioral or legal test, and made no change in the essential facilities doctrine).

[79]Otter Tail Power Co. v U.S., 410 U.S. 366 (1973).

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

[81]506 U.S. 447 (1993).

[82]Verizon Comm'ns, Inc. v. Trinko, 540 U.S. 398, 408 (2004).

[83]U.S. Department of Justice, Report of the Department of Justice's Task Force on Intellectual Property (October 2004), at 41-2.

[84]*Id*.

[85]See Richard A. Posner, "Vertical Restraints and Antitrust Policy," 72 *U.Chi.L.Rev.* 229, 232 (2005) (stating that "the cost of an exclusionary practice, *especially in intellectual property markets*, need not always exceed the additional monopoly profits that the practice makes possible" and expressing the view that "at present intellectual property rights are too broadly rather than too narrowly defined").

Prior course of dealing was not adopted by the Court as a required element of an unlawful refusal to deal claim. Although prior dealings can be probative as to whether dealing is efficient and practicable and as a guide to reasonable terms,[86] it is not a necessary or elemental condition.

The self-limiting particularities of the decisions themselves and the very nature of the competitive markets that antitrust seeks to promote limit the frequency with which violations are found relative to the number of lawsuits filed, resulting, in short, in a low "conviction ratio." But, far from being a cogent criticism to drive reform, the low conviction ratio argues against any need for change in the general direction of existing law.

C. THE ESSENTIAL FACILITIES DOCTRINE

(Question 2.): Should the essential facilities doctrine constitute an independent basis of liability for single-firm conduct under Section 2 of the Sherman Act?

The essential facilities doctrine is usually traced to the 1912 case, *U.S. v. Terminal R.R. Ass'n*[87] which involved concerted action by a consortium of railroads that jointly controlled the railroad river crossings at St. Louis. The Court found the Terminal Association to have violated §1 of the Sherman Act and ordered access for non-Association members "upon such just and reasonable terms as shall place such [railroads] upon a plane of equality in respect of benefits and burdens [incurred by Association members]."[88] The Court's emphasis on the "essentiality" of the Association's trackage, access, and terminal facilities that could not be feasibly duplicated because of the geographical features of the St. Louis area gave rise to the notion, eventually imported into §2, of a doctrine of essential facilities.

Although it has never been expressly endorsed by the Supreme Court, in *AT&T v. Iowa Utilities Board*[89] Justice Scalia suggested it to the Federal Communications Commissions as an appropriate criterion on which to determine the degree of sharing required for a particular

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[86]See Glen O. Robinson, "On Refusing to Deal With Rivals," 87 *Cornell L. Rev*. 1177, 1202 n. 109 (2001-2002)("One plausible basis for distinguishing termination cases from initial refusals is that termination cases provide some basis for evaluating the reasonableness of proposed terms of dealing").

[87]224 U.S. 383 (1912).

[88]*Id.*, at 410-11.

[89]525 U.S. 366 (1999).

unbundled network element.[90] On the other hand, Justice Breyer seemed to have some disdain for it.[91] Significantly, in *Verizon Comm'ns, Inc. v. Trinko,*[92] the Court refused either to endorse or to repudiate it.

Even though the Supreme Court has not put its official imprimatur on the doctrine, "the Court's opinions acknowledge the doctrine as a product of its own prior decisions as well as those of the lower courts."[93] Indeed, every federal circuit has interpreted the general anti-monopolization standard to impose an antitrust duty to deal with rivals when sharing is feasible, a monopolist has control over a facility that cannot practicably be duplicated and access to which is 'essential' for rivals to compete, and there is no legitimate business justification for defendant's refusal to do so.[94] It should not be surprising, therefore, that the status of the essential facilities doctrine in antitrust law is "somewhat uncertain."[95]

The conventional view is not that the essential facilities doctrine represents an "independent" claim under the antitrust laws but rather that "denial of access to [*the facility*] constitutes 'anticompetitive conduct' and thus satisfies the second element of a monopolization claim."[96] As one court expressed it, 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 the law."[97] The majority view appears to be that "an essential facilities theory cannot serve as a stand-alone offense, [but] that conduct that is exclusionary under section 2 must still be found."[98]

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[90]*Id.*, at 388, (Scalia, J., concurring in part and dissenting in part) ("We need not decide whether, as a matter of law, the 1996 Act requires the FCC to apply [the essential facilities] standard; it may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind").

[91]*Id.*, at 428, (Breyer, J., concurring in part and dissenting in part) (noting that the essential facilities was "an antitrust doctrine that this Court has never adopted").

[92]540 U.S. 398 (2004).

[93]Glen O. Robinson, "On Refusing to Deal With Rivals," 87 *Cornell L. Rev*. 1177, 1200 (2002).

[94]See Einer Elhauge, "Defining Better Monopolization Standards," 56 *Stan. L. Rev.* 255, 257 (2003) (citing cases).

[95]Glen O. Robinson, "On Refusing to Deal With Rivals," 87 *Cornell L. Rev*. 1177, 1200 (2002).

[96]ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, 2005 Edition (2005).

[97]Viacom Int'l, Inc. v. Time, Inc., 785 F.Supp. 371, 376 n. 12 (S.D.N.Y., 1992).

[98]R. Hewitt Pate, "The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct, Address by the Assistant Attorney General, Antitrust Division, before the Thirtieth Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, N.Y. (Oct. 23, 2003) (available at: http://www.usdoj.gov/atr/public/speeches/202724.htm, last visited July 13, 2005), at 17.

In *MCI Communications v. AT&T*,[99] an opinion often cited as establishing the standards for an essential facilities case, a panel of the Seventh Circuit set forth four elements necessary to establish liability using the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

The frequent criticism of the doctrine is somewhat puzzling.[100] While some commentators have urged that it requires "limiting principles" or that it is "unmanageable," according to others, "it is a model of coherence and restraint compared to the unguided 'general doctrine' of refusal to deal."[101] Indeed, compelling scholarship recognizes the utility of the essential facilities formulation. For example, Professor Robinson suggests that, ultimately, the best way to define and limit the obligation to deal with rivals "is to use a *narrowly defined* essential facilities doctrine as the sole foundation for imposing such a duty."[102]

In a similar vein, Professor Elhauge states:

> the concern that the essential facilities might misguidedly extend *beyond* the Supreme Court's antitrust duty to deal rests on the mistaken premise that this doctrine might require sharing even when the Supreme Court would hold that a refusal to deal was justified. In fact, the lower courts applying the essential facilities doctrine have interpreted its element require that sharing be "feasible" to mean the same set of open-ended factors that the Court examines to decide whether a refusal to deal is justified.[103]

The essential facilities doctrine, understood in this way, is narrower than the more general principles governing refusals to deal discussed, for example, in response to Question 1. This

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[99]708 F.2d 1081, 1132 (7th Cir., 1983).

[100]See, *e.g.,* Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 *Antitrust L.J.* 841 (1989), Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, §§7.7, Abbot B. Lipsky, Jr. & Gregory Sidak, "Essential Facilities," 51 *Stan. L Rev.* 1187 (1999); see also Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1412 (7th Cir., 1995)(Posner, J.)(criticizing essential facilities, noting that "the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute").

[101]Glen O. Robinson, "On Refusing to Deal With Rivals," 87 *Cornell L. Rev.* 1177, 1201 (2001-2002) ("The importance of limited essential facilities pales in comparison to the need for limited the nebulous refusal to deal 'doctrine' endorsed in *Aspen Skiing*").

[102]*Id.*, at 1203 [emphasis in original].

[103]Einer Elhauge, "Defining Better Monopolization Standards," 56 *Stan. L. Rev.* 255, 262 (2003) [citations omitted].

leads to the reasons that the essential facilities doctrine should continue to contribute to organizing the law on refusals to deal generally.

First, the doctrine governs only a narrow subset of refusals to deal and is particularly useful as a principle for applying antitrust where access problems plague relationships of fringe competitors with platform monopolists. Second, there is no more specific or useful alternative for the antitrust analysis of dealing involving large infrastructure possessed of an element of a public good, such as stadiums, communications networks, transmission grids, etc. The only alternatives are the more general "refusal to deal" or "anticompetitive conduct" standards. Finally, the essential facilities concept is likely to grow in importance as networks play a larger role in the economy. Access to networks becomes an ever-more crucial question, and a doctrine is needed to express the general principle of when access will be required.[104]

Accordingly, there is nothing to be gained and potentially much to be lost by abandoning the essential facilities doctrine as a specific application of a broader set of conditions.

D. BUNDLED REBATES

(Question 3.): What should be the standards for determining when a firm's product bundling or bundled pricing violates Section 2 of the Sherman Act?

The Working Group refers to its comment in response to Question 1., above, with respect to "standards" for sub-classes of exclusionary conduct. In response to this Question, we note that the Third Circuit's recent *en banc* decision in *La Page's Inc. v. 3M Co.*[105] was arrived at through an appropriate application of the common law to the case before the court. Similar cases involving product bundling or bundled pricing should also be decided according to the general principles of exclusionary conduct discussed herein and the particular competitive facts of the case at issue.

Following common law tradition, the *LaPage's* opinion recounted the journey from

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[104]Diana L. Moss, editor, *Network Access, Regulation and Antitrust* (London: Routledge, 2005).

[105]324 F.3d 141 (3rd Cir., 2003).

Alcoa[106] through *American Tobacco*,[107] past *Lorain Journal*,[108] and down a home stretch of *Aspen Skiing*,[109] *Kodak*,[110] and *Brooke Group*.[111] An influential observer recently called this exposition in *LaPage's*"jarring" because it left the impression that the court put serious intellectual stock in each of the cited decisions.[112] But this seems to miss the point of retelling the collective judicial experience. As one former enforcement official observed:

> *LePage's* was unreasoned, but it seemed that what drove it was an intuition that was not entirely crazy—that is, that the economics are different for bundled pricing versus single product pricing. The court failed to understand that more general but nonetheless rigorous antitrust principles regarding exclusionary conduct could be applied to the somewhat different sets of facts before it.[113]

The fact that the court did not clearly articulate these "more general but nonetheless rigorous antitrust principles regarding exclusionary conduct" does not mean they do not exist, or that the outcome of the case was any less correct.

The *LePage's* court saw its assignment as limited to evaluating 3M's legal argument that "after *Brooke Group,* no conduct by a monopolist who sells its product above cost—no matter how exclusionary the conduct—can constitute monopolization in violation of §2 of the Sherman Act."[114] The *LePage's* decision correctly rejects the predatory pricing paradigm (*i.e.*, the "sacrifice test" devised in *Brooke Group*) as the paradigm for all exclusionary conduct.

With respect to the particular claim of exclusionary price bundling and other terms of dealing, the mechanism of competitive harm in *LaPage's* can be presumed to satisfy the broad common law principles outlined in the Working Group's foregoing consolidated response to the

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[106]United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[107]American Tobacco Co. v. United States, 328 U.S. 781 (1946).

[108]Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

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

[110]Eastman Kodak Co., v. Image Technical Services, Inc., 504 U.S. 451 (1992).

[111]Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[112]William E. Kovacic, Speech before the ABA Section of Antitrust Law Conference on Exclusionary Conduct in High Technology Markets, Berkeley, CA, (June 9, 2005).

[113]A. Douglas Melamed, "Roundtable Discussion: Recent Developments in Section 2," 18 *Antitrust Source* 15, 19 (2003).

[114]324 F.3d 141, 147 (3rd Cir., 2003).

exclusionary conduct issue and Question 4. The *LaPage's* litigation is exemplary of how antitrust courts are capable of arriving at reasonable and predictable conclusions using common law principles based on sound economic intuition.