

Facts That Shed Light on Intent of Single-Firm  
Refusals to Deal:  
Comparative Review of the United States and the  
Republic of Korea Jurisprudence

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I. INTRODUCTION

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A refusal to deal is an interesting topic in antitrust law.<sup>1</sup> In addition to its passive nature,<sup>2</sup> for a court to hold a refusal unlawful is to recognize a duty to deal, which often requires the court to set transaction terms and supervise parties' dealings. Judicial or governmental intervention in private business transactions is generally not favored and it is assuredly not welcome in antitrust law.<sup>3</sup> Among refusals to deal, single-firm refusals seem particularly harmless because they do not involve a horizontal agreement between multiple competitors to boycott a particular company. Still, a single firm's right to refuse to deal is limited in all major jurisdictions, including the United States, the European Union, and Japan, albeit to varying degrees,<sup>4</sup> thus showing their common judgment that single-firm refusals are not all innocuous. Antitrust laws have particular relevance to large, global companies that have presence in multiple jurisdictions. Consequently, understanding how a ubiquitous business practice such as single-firm refusal to deal is treated in different jurisdictions can serve as useful guidance to both academics and practitioners in the areas of antitrust law and international trade.

Part II of this article discusses the business practice known as a refusal to deal, and argues that understanding the intent of the refuser is the key to understanding its somewhat illusive nature and how it has fared under antitrust laws of two disparate jurisdictions: the United States and

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<sup>1</sup> Competition law is usually called antitrust law in the United States (from the first antitrust statute of the United States – The Sherman Antitrust Act of 1890, 15 U.S.C.A. §§ 1–7 (2009)) and as fair trade law in Korea (from Korea's first antitrust statute – The Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014, (S. Kor.)). These terms suggest Korean competition law was designed to address a broader array of practices than that of the United States, which limits its application to those directly affecting competition. The term antitrust law is used in this article to refer to competition law in the general sense.

<sup>2</sup> This element of inaction often made courts hesitant to inquire about intent in refusals. *See, e.g.*, *Green v. Victor Talking Mach. Co.*, 24 F.2d 378, 382 (2d Cir. 1928) (stating refusal to deal requires no justification in the absence of some duty to act); *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 513 (7th Cir. 1982) (“There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.”).

<sup>3</sup> *See, e.g.*, *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004) (arguing against turning courts into “central planners” of terms of dealing, pointing out their institutional incompetence and risk of facilitating collusion between competitors); Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852-53 (1989) (arguing compulsory duty to deal should be exceptional under antitrust law, especially when imposing such duty would involve the court in day-to-day regulatory management).

<sup>4</sup> Jeremy K. West, *Refusals to Deal 2007* 153-57, 193-207 (OECD Best Practice Roundtables in Competition Policy Working Paper No. 93, Sept. 8, 2009), available at <http://www.oecd.org/daf/43644518.pdf> (last visited Feb. 1, 2014).

the Republic of Korea. In the next two parts, this article reviews each jurisdiction's major refusal-to-deal cases to introduce what legal standards each jurisdiction applied to the practice. Simply listing out each jurisdiction's legal standards and comparing them element by element is unlikely to be helpful, as such method would incur the risk of making too much out of different representations of the same idea and missing subtle, but material, differences in their legal standards. Rather, by paying attention to the factual underpinnings of each case instead of the legal standards presumably applied by the courts,<sup>5</sup> one can develop a better sense of how the practice tends to be dealt with in these jurisdictions.

This article introduces and discusses several fact patterns that tend to indicate an anticompetitive intent of the refuser in a refusal to deal and those fact patterns that tend to indicate the absence of such intent in a refusal to deal.<sup>6</sup> Perhaps not surprisingly, these cases show that refusals involving similar facts tend to produce similar results whether in the United States or in Korea, notwithstanding substantial differences in their antitrust laws. It is crucial to distinguish between intent to exclude and destroy a rival by means of reducing market-wide competition from intent to protect and improve business with any resulting harm being an incidental, though not necessarily unforeseeable, byproduct of the refusal. Subsequently, one must then consider which is more likely to be reasonably considered by the refuser.

This article concludes with a summary regarding the dangers of relying solely on effect analysis in determining antitrust liability for single-firm refusals and how intent analysis focusing on facts can help mitigate such dangers.

## II. IMPORTANCE OF INTENT IN SINGLE-FIRM REFUSALS TO DEAL

At first look, refusals to deal sound passive and thus benign since strictly speaking, a refusal may involve nothing more than simply saying "no" to an offer. However, even though there may be no action directed at the refusee, such absence of action, when combined with an offer to take

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<sup>5</sup> By focusing on facts, this article attempts to avoid an excessive reliance on conclusive reiteration of vague statutory labels. See Einer R. Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 263-66 (2003) (noting dangers of relying on "conclusory labels" – e.g., business acumen, superior products, anticompetitive, exclusionary, or unfair conduct, competition on the merits or normal competition, and valid, normal, or legitimate business justifications – that impede more than aid the substantive analysis).

<sup>6</sup> A statistical analysis would have been ideal but the number of Korean antitrust cases, largely due to the short history of the country's antitrust jurisprudence, is too small for such analysis to be informative (around fifty in total at the author's latest count, excluding resolutions by the Korea Fair Trade Commission, most of which are either discussed or cited in this article).

actions upon certain conditions, can have a significant effect on the refusee. In fact, a number of anticompetitive practices that sound proactive are partly based on a refusal to deal on certain conditions. Some examples include: tying<sup>7</sup> which is based on a refusal to sell a certain product unless another product is purchased as well from the same seller, price discrimination<sup>8</sup> on a refusal to deal with firms on equivalent price terms, exclusive dealing<sup>9</sup> on a refusal to deal with those that would deal with others, and resale price maintenance<sup>10</sup> on a refusal to sell to retailers that would deviate from a set price schedule.

One may object that these conditional refusals are distinguishable from unconditional refusals, which supposedly involve an absolute rejection of a relationship. However, these unconditional refusals are nearly non-existent because most corporate decision-makers are motivated to maximize profit, if not so obligated by their fiduciary duty, and thus would agree to terms that are sufficiently favorable. Even in *United States v. Colgate & Co.*, the landmark case that established a private firm's general right to refusal in the United States, the refusal to deal was not an end in itself but rather a means selectively utilized to enforce resale price maintenance.<sup>11</sup>

Throughout this article, the term single-firm refusal will be used to refer to a single firm's rejection of an offer of a particular transaction. Single-firm refusals are distinguishable from concerted refusals, or group boycotts. Concerted actions are "inherently [] fraught with anticompetitive risk" because they "deprive[] the marketplace of the independent centers of decision-making that competition assumes and demands."<sup>12</sup> Naturally, concerted refusals are subject to stricter scrutiny than single-firm refusals in both the United States and Korea: the U.S. antitrust law deems

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<sup>7</sup> Tying can be defined as "an agreement by a party to sell one product, but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958).

<sup>8</sup> Price discrimination can be defined as "discriminat[ion] in price between different purchasers of commodities of like grade and quality." 15 U.S.C.A §13(a) (2009).

<sup>9</sup> Exclusive dealing can be defined as a "contractual requirement by which retailers or distributors promise a supplier that they will not handle the goods of competing producers." Howard P. Marvel, *Exclusive Dealing*, 25 J. OF L. & ECON. 1, 1 (1982).

<sup>10</sup> Resale price maintenance can be defined as a "contract in which a manufacturer and a downstream distributor (hereafter a retailer) agree to a minimum or maximum price the retailer will charge its customers." Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, 3 ISSUES IN COMPETITION LAW AND POLICY 1841, Wayne D. Collins, ed. (ABA Section of Antitrust Law 2008).

<sup>11</sup> See *United States v. Colgate & Co.*, 250 U.S. 300, 303-04 (1919).

<sup>12</sup> *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768-69 (1984).

concerted refusals per se unlawful generally, while subjecting single-firm refusals to the rule of reason.<sup>13</sup> The Korean antitrust law presumes concerted refusals unlawful, placing the burden of rebutting the presumption on the refuser, while presuming other types of refusals lawful, placing the burden of rebutting the presumption on the challenger.<sup>14</sup>

A single-firm refusal may still implicate a concerted action – a vertical agreement between the refuser and a competitor of the refusee or a horizontal agreement between competitors of the refusee to pressure their common supplier to terminate the refusee. Among single-firm refusals, refusals that implicate no concerted action are called “unilateral refusals.” The distinction between unilateral refusals and other refusals is material in applying Section 1 of the Sherman Act in the United States and Article 19 of the Monopoly Regulation and Fair Trade Act (“MRFTA”) in Korea, both of which can reach only concerted actions.<sup>15</sup> Although unilateral refusals are a more focused category, unilateral refusals are harder to identify from facts than single-firm refusals because they involve the legal question of “what is a unilateral action,” whereas single-firm refusals simply require there be only one firm that refuses to deal.<sup>16</sup> The ease of

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<sup>13</sup> See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 130, 138 (1998); *but see* *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986) (listing exceptions to the per se ban of group boycotts). Under the rule of reason, “the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1997) (internal quotation mark omitted).

<sup>14</sup> See Item 1 of Appendix 1-2 to Clause 1, Article 36 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act, Act No. 25173, Feb. 14, 2014 (S. Kor.). See also Supreme Court [S. Ct.], 2000Du833, Dec. 11, 2001 (S. Kor.) available at <http://www.asianlii.org/kr/cases/KRSC/2001/31.html> (last visited Feb. 1, 2014). Korean cases cited herein are generally not available in English. Korean cases are generally referred to with their case numbers, but throughout this article, the author refers to them by the name of the party whose refusal to deal is being challenged in the case (e.g. *Hite Beer II*). The name of the refuser is the author’s preferred choice because, as it will become clear later in the article, the challenger in most of these cases is the Korea Fair Trade Commission (“KFTC”).

<sup>15</sup> See The Sherman Act, 15 U.S.C.A. § 1 (2009); Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014, art. 19 (S. Kor.). Article 19 of the MRFTA broadly prohibits firms from jointly and unfairly restricting competition, but this Article has seen little utilization regarding refusals to deal probably because given that a refusal can be struck down under Article 23 upon showing of unfairness alone, there is no reason to invoke Article 19 that requires additional showing of joint action.

<sup>16</sup> For instance, identifying unilateral refusals would require legal analysis if there are multiple firms all refusing to deal with one particular firm. Whether these refusals should be deemed parallel unilateral refusals or one collective refusal hinges on the existence of a horizontal agreement among the refusers, which cannot be determined without delving into the legal definition of an agreement in the jurisdiction.

identifying unilateral refusals from facts is important in comparing two jurisdictions that have disparate legal standards.

At the core of any refusal is an act of rejecting an offer of particular terms. This fact distinguishes a refusal from the various transactional outcomes the refusal is employed to bring about. A firm with strong market power can often rely on this strength to pressure its negotiating partner into being excluded from negotiations unless the partner agrees to some anticompetitive arrangement. Here, while an anticompetitive agreement would emerge only if the partner consents to the arrangement, the act of refusal has already occurred, and thus may get challenged, whether the agreement has been formed<sup>17</sup> or not.<sup>18</sup> However, when the agreement gets formed, the agreement would be a more attractive target of challenge than a single firm's act of refusal, and naturally, the typical refusal-to-deal case would arise when the agreement fails to get formed or is terminated.<sup>19</sup>

Present in virtually all negotiations, the act of refusing to deal is common and does not by itself warrant any antitrust scrutiny. Of more importance is the intent behind the party's refusal to deal. From the onset, some intent analysis is necessary to see who played a larger role in a failed negotiation. After all, a failed negotiation may be just as much a result of the offeror's refusal to offer better terms as the offeree's refusal to accept the offered terms. In constructive refusals, for instance, the true refuser of the relationship is the offeror of terms that are so unfavorable that no reasonable offeree would accept them.<sup>20</sup>

In addition, single-firm refusals are somewhat unique in that without some showing, presumption, or inference of anticompetitive intent

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<sup>17</sup> See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) (involving a successful challenge to Kodak's tying arrangement and refusal to deal).

<sup>18</sup> See, e.g., *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

<sup>19</sup> For this reason, those provisions requiring some kind of agreement – e.g., Section 1 of the Sherman Act, 15 U.S.C.A. § 1 (2009); Section 3 of the Clayton Act, 15 U.S.C.A. § 14 (2009); Section 2(a) of the Robinson-Patman Act, 15 U.S.C.A. § 13(a) (2009) – are destined to have limited relevance to single-firm refusals to deal. See also *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 915-16 (5th Cir. 1952) (saying Section 3 of Clayton Act does not cover a “situation where the manufacturer refuses to make a sale or enter into a contract” and in “all of the cases decided by the Supreme Court involving Section 3 . . . there was an agreement and not a mere refusal to deal”); *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 439 F.3d 653, 669 (10th Cir. 2006) (“It is well established that a refusal to deal simply does not fall within the proscription of section 2(a) of the Robinson-Patman Act.”) (internal quotation marks and citation omitted).

<sup>20</sup> See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (stating that a ski slope operator offered its rival 12.5% of revenues from joint ticket sales, 2.5% lower than previous season, the rival refused and sued, and the Supreme Court found the offeror, not the offeree, as the one engaged in refusal to deal).

they cannot support antitrust liability, regardless of any harm they may cause. Suppose a firm refuses to deal because it is going out of business, either voluntarily or involuntarily. An antitrust law prohibiting this kind of refusal would be unduly intrusive<sup>21</sup> given that such a prohibition would, if the exit was voluntary, force the refuser to stay in business against its will. On the other hand, if the exit were involuntary, it would subvert the central tenet of free competition, which assumes the demise of the less efficient as much as it does the survival of the more efficient.<sup>22</sup> It follows that no one trying to determine the legality of a refusal under antitrust laws can avoid asking why the refusal took place.<sup>23</sup>

The intent to be sought is what a reasonable fact finder would place in the mind of the refuser given the factual circumstances at the time of the refusal, even if this may not be the actual intent of the refuser.<sup>24</sup> This is because it is the reasonable anticompetitive intent not the unreasonable one that, when acted upon, injures competition and thus “warrant[s] trundling out the great machinery of antitrust enforcement.”<sup>25</sup>

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<sup>21</sup> Antitrust enforcement to this effect would be constitutionally suspect in the United States given the limit on federal power to force private parties to take part in commerce. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2591 (2012) (holding that a federal mandate forcing individuals to buy health insurance exceeded Congress's commerce power).

<sup>22</sup> *See United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897) (“In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and, perhaps, ruin, shall be its accompaniment, in regard to some of those who were engaged in the old methods.”).

<sup>23</sup> *See Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 160 (2d ed. 1993) (“Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.”).

<sup>24</sup> A firm without market power cannot reasonably intend to foreclose a rival by refusing to deal with anyone who would deal with the rival, but that does not mean no one is so unreasonable as to act on such intent. A similar distinction was made between objective and subjective intent, with the objective intent referring to the presumption that a firm intends the probable consequences of its acts. *See Phillip E. Areeda & Herbert Hovenkamp, FUNDAMENTALS OF ANTITRUST LAW* 8.03b2 (4th ed. 2011). The problem with the objective intent test is that it can be abused to find anticompetitive intent in a refusal that has reasonably foreseeable anticompetitive consequences even if there may be other innocent explanations. *Compare Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980) (finding no anticompetitive intent in refusal reducing market competitions where the refuser does not operate) *with LaPeyre v. FTC*, 366 F.2d 117, 121 (5th Cir. 1966) (holding the use of monopoly power in one market to curtail competition in another is sufficient to make it an unfair method of competition under Section 5 of Federal Trade Commission Act). This article posits that even refusals with natural consequences that reduce competition should not be viewed to have anticompetitive intent unless it would not have occurred but for the anticompetitive consequence.

<sup>25</sup> *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.) (saying that the probability that a firm with no market power would adopt anti-consumer policies is too small to justify the cost of antitrust enforcement); *cf. Aspen*

In practice, however, the reasonable intent and actual intent are likely to be indistinguishable given the general unavailability of direct evidence of actual intent. Both must be inferred from the factual circumstances of the refusal assuming the reasonableness of the refuser.

What complicates intent analysis is not the possibility that people (and thus companies run by them) can act in an irrational manner. Rather, the complicacy primarily lies in the fact that people often pursue goals other than economic goals – e.g., terminating a distributor for firing a personal friend.<sup>26</sup> Furthermore, people may pursue economic goals but in a way that injures competition – e.g., not selling a rival bidder what is essential to perform the project that cannot be obtained elsewhere.<sup>27</sup> The aim of this article is to see how single-firm refusals employed for these various purposes (to be inferred from facts of each case) fare under antitrust laws of the United States and Korea.<sup>28</sup>

Although this article primarily focuses on the significance of antitrust intent, it is also important to appreciate the significance of a refusal's effects. A refusal's impact on the individual victim<sup>29</sup> and market-wide competition is not only a damages issue but it is also a liability issue and in the United States, it is a standing issue as well. A detailed discussion of these issues would go beyond the scope of this article. However, it is worth mentioning that given that all challenges allege some harm, the important question is whether the alleged harm is the kind of harm recognized by the antitrust provision in question. In addition to its independent significance, effect analysis is also helpful to intent analysis because despite the problem of hindsight bias,<sup>30</sup> what arises from a refusal

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Skiing, 472 U.S. at 611 n.44 (refusing to weigh in on “whether non-exclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose”).

<sup>26</sup> See *Bay City-Abrahams Bros., Inc. v. Estee Lauder, Inc.*, 375 F. Supp. 1206, 1210-11 (S.D.N.Y. 1974).

<sup>27</sup> See KFTC 2011-177, 2010BuSa0687, § 2.Ga. (KAI).

<sup>28</sup> Intent analysis for a refusal to deal involves both a question of fact—why a firm refused to deal—and a question of law—whether that intent would get the firm in trouble with a particular statute. In principle, judges in both jurisdictions resolve the legal question while the fact question is resolved mostly by juries in the United States and mostly by judges in Korea. See Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 E. ASIA L. REV. 177, 185 (2009). These questions, however, are often difficult to separate and as a result, even U.S. judges often play a significant role in the fact-finding part of intent analysis, as will be seen below.

<sup>29</sup> The victim, or the party that is intended to suffer harm from the refusal, is not necessarily the refusee since refusals can be used to isolate the refusee's trading partner. See e.g. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); KFTC 93-106, 9305Dok343, (*Dongyang Beer*).

<sup>30</sup> See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science:*



is powerful evidence of the refuser's intent.<sup>31</sup> Indirectly, exclusionary effects of a refusal can show that the refuser possessed market power, obviating the need to engage in a detailed market analysis.<sup>32</sup> As discussed below, the possession of market power sheds invaluable light on the refuser's intent.

Granting the importance of effect analysis, it is often hard to tell what effects are attributable to a refusal. The refusal may not last long enough to produce any sign of competitive harm, say, because it was quickly withdrawn in response to media attention<sup>33</sup> or agency investigation.<sup>34</sup> Even when some sign of competitive harm emerges, establishing a causal relationship between the refusal and the harm takes more than proving their chronological order. Moreover, even if the status quo was apparently preserved, that does not necessarily mean there was no harm done because things could have been better had it not been for the refusal. These concerns call for some serious theories capable of explaining how a refusal may actually reduce competition, and hopefully development of such theories could benefit from the factual analysis conducted herein on the intent side of single-firm refusals to deal.

### III. SINGLE-FIRM REFUSALS UNDER UNITED STATES ANTITRUST LAWS

It is harder to successfully challenge a single-firm refusal in the United States than in most other jurisdictions.<sup>35</sup> In *United States v. Colgate & Co.*, the Supreme Court held that “[i]n the absence of any purpose to create or maintain a monopoly . . . [a] trader or manufacturer engaged in an entirely private business [may] freely [] exercise his own independent discretion as to parties with whom he will deal.”<sup>36</sup> This

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*Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1095-1100 (2000).

<sup>31</sup> See LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 39, at 105 (1977) (“Circumstances in which intent can be inferred other than from conduct which is itself exclusionary will no doubt be rare . . . . [T]he relationship between intent and conduct is intimate: thought enlivens the deed; it can also be inferred from the deed.”).

<sup>32</sup> See *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (citing *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986)).

<sup>33</sup> See *Dongyang Beer*, 9305Dok343, § 2.Na. (supply resumed after media inquiry).

<sup>34</sup> See *Verizon Commc’n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 403-04 (2004) (granting of discriminatory access sanctioned by regulatory agencies before the filing of a private antitrust suit).

<sup>35</sup> See West, *supra* note 4, at 10 (U.S. adopting a “higher threshold” for challenges to unilateral refusals than other countries).

<sup>36</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

holding suggests that there are two ways a firm can protect itself from antitrust challenges using the *Colgate* doctrine: either (i) to show that the refusal was unilateral in the sense that it was based on the refuser's independent judgment or (ii) to show that the firm did not have the requisite monopolistic intent (i.e., the intent to create or maintain a monopoly). When a refusal fails to meet the first condition, it is reviewable under Section 1 of the Sherman Act as to whether it would unreasonably restrain competition. For instance, a firm may "announce in advance" that it would not deal with distributors not following its resale price maintenance ("RPM") policy and act as announced,<sup>37</sup> but it may get in trouble if it tried to contractually bind them to the RPM policy<sup>38</sup> or enforced the policy through enlisting help of other distributors.<sup>39</sup> Some guidance on how to distinguish unilateral refusals from other single-firm refusals was offered in *Monsanto Co. v. Spray-Rite Service Corp.* In *Monsanto*, the Supreme Court held that the applicability of Section 1 is established upon "evidence that tends to exclude the possibility that the [parties] were acting independently," such as evidence that the parties had a "conscious commitment to a common scheme designed to achieve an unlawful objective."<sup>40</sup>

As mentioned earlier, refusals implicated in these schemes tend to be overshadowed by the more restraining nature of the collective element of those schemes. Naturally, this article focuses on the other category of single-firm refusals unprotected by the *Colgate* doctrine: refusals that are subject to Section 2 of the Sherman Act for their intent to create or maintain monopoly power. Single-firm refusals are also subject to Section 5 of the Federal Trade Commission ("FTC") Act, which like Section 2 of the Sherman Act requires no showing of concerted action. The following sections review major refusal-to-deal cases adjudicated under these two provisions.

#### A. *Single-Firm Refusals under Section 2 of the Sherman Act*

Section 2 of the Sherman Act prohibits three offenses: (1) monopolization, (2) attempted monopolization, and (3) conspiracy to monopolize.<sup>41</sup> Single-firm refusals challenged under Section 2 are

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<sup>37</sup> *Id.*

<sup>38</sup> Minimum RPM agreements used to be a per se violation of Section 1 of the Sherman Act, *see* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911); now they are subject to the rule of reason, *see* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007).

<sup>39</sup> *See* *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960).

<sup>40</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 753, 764 (1984) (citations omitted).

<sup>41</sup> 15 U.S.C. § 2 (2013).

generally characterized and analyzed as one or both of the first two types, with the third type being mostly addressed by Section 1 of the Sherman Act for its non-unilateral character.

The offense of monopolization requires “(1) the possession of monopoly power in the relevant market and (2) the 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.”<sup>42</sup> The offense of attempted monopolization requires “that (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.”<sup>43</sup>

In the refusal-to-deal context, intent analysis is relevant to all three elements of attempted monopolization and to the second element of monopolization. Intent analysis is relevant to all three elements of attempted monopolization because whether a refusal is anticompetitive or predatory depends on its intent, and the intent sheds light on probable effects of the refusal.<sup>44</sup> It may appear that the monopolization offense needs no serious intent analysis in that it requires “only a general intent to do the act . . . [whereas] a specific intent to destroy competition or build monopoly is essential” to prove attempted monopolization.<sup>45</sup> However, now that the Supreme Court has recently found no general anticompetitive intent in a monopolist’s refusal that actually helped maintain its monopoly,<sup>46</sup> the distinction between general and specific intent is not that useful to analyzing single-firm refusals. Here, instead of pigeonholing refusals as monopolization or attempted monopolization and seeing whether each element of the offense has been met, this article reviews them for facts that materially influenced courts’ search for the requisite anticompetitive intent under Section 2 of the Sherman Act.

*Lorain Journal Co. v. United States*<sup>47</sup> shows that the *Colgate* doctrine cannot save a refusal employed with monopolistic intent from a Section 2 challenge. In *Lorain Journal*, a publisher of a newspaper subscribed by 99% of the families in the region refused to accept advertising from companies that also advertised through a newly

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<sup>42</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

<sup>43</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

<sup>44</sup> *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“[T]he purpose or end sought to be attained, are all relevant facts . . . because knowledge of intent may help the court to interpret facts and to predict consequences.”).

<sup>45</sup> *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953).

<sup>46</sup> *See Verizon Commc’n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408-11 (2004).

<sup>47</sup> *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

established radio station.<sup>48</sup> The refusal was condemned under Section 2 of the Sherman Act for its intent and effect to create a monopoly in the region's advertising market.<sup>49</sup>

While the refusees in *Lorain Journal* were solely in vertical relationships with the refuser, the refusees in *Otter Tail Power Co. v. United States* were in horizontal as well as vertical relationships with the refuser.<sup>50</sup> In *Otter Tail*, a power company had been selling electric power at retail in 91% of the towns in its service area.<sup>51</sup> When several towns decided to set up their own retail power systems, the company refused to supply electric power at wholesale and even refused to wheel power from other wholesalers to the towns, making it impossible for the towns to operate their own systems.<sup>52</sup> Finding that the power company used its monopoly power to foreclose competition in its towns, the Supreme Court upheld the Justice Department's Section 2 challenge to the refusals.<sup>53</sup>

*Otter Tail* is one of the major cases that are interpreted as supportive of the so-called essential facilities doctrine.<sup>54</sup> The essential facilities doctrine provides that "the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market" has a legal obligation under antitrust law to "make the facility available to its competitors on a nondiscriminatory basis."<sup>55</sup> provided that doing so is "feasible," meaning there is no "legitimate business justification" for refusing to do so,<sup>56</sup> and such access is not otherwise available, say, through an existing regulatory framework.<sup>57</sup>

The essential facilities doctrine has been traced to *United States v. Terminal R.R. Ass'n*, a 1912 Supreme Court decision dealing with a collective refusal to deal.<sup>58</sup> However, the legitimacy of the doctrine is in doubt today as the Supreme Court has expressly declined to accept the

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<sup>48</sup> *Id.* at 148-49.

<sup>49</sup> *Id.* at 152-55.

<sup>50</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

<sup>51</sup> *Id.* at 368-71.

<sup>52</sup> *Id.* at 368-71.

<sup>53</sup> *Id.* at 372-75.

<sup>54</sup> *See Areeda, supra* note 3, at 847.

<sup>55</sup> *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 983 (9th Cir. 1988).

<sup>56</sup> *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992).

<sup>57</sup> *See Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004).

<sup>58</sup> *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Areeda, supra* note 3, at 842.

doctrine on multiple occasions.<sup>59</sup> If it is unavailable as an independent route to proving a Section 2 violation, the doctrine is still valuable as a proxy for the traditional elements of a Section 2 violation: if a facility exclusively owned by a firm is non-duplicable and necessary for other firms to conduct their business, the firm must have monopoly power.<sup>60</sup> At the same time, the lack of legitimate business justification is indicative of monopolistic intent, though it may not prove such intent all by itself.<sup>61</sup>

Indeed, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, where the refusee successfully established the refuser's power to exclude and lack of legitimate justification, the Court did not have to rely on the essential facilities doctrine to uphold a jury verdict condemning the refusal under Section 2.<sup>62</sup> *Aspen Skiing* involved a refusal between purely horizontal competitors in the joint venture context: a ski facility operator in three of the four regional mountains decided to discontinue a joint ticket it had been issuing with its competitor for several years. The jury found that the refuser abused its monopoly power to foreclose competition in the skiing market, violating Section 2.<sup>63</sup>

The Court of Appeals for the Tenth Circuit affirmed the finding on two independent grounds – the joint ticket was an essential facility and the refusal was intended to further monopoly power.<sup>64</sup> Setting aside the essential facilities doctrine as “unnecessary to consider,” the Supreme Court affirmed the case on the ground that monopolistic intent could reasonably be inferred from the refuser's willingness to “sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”<sup>65</sup>

The U.S. jurisprudence reveals that single-firm refusals that are struck down tend to involve discriminatory dealing, termination of a relationship, or both. In *Terminal R.R.*, the defendant association's anticompetitive intent was partially inferred from discriminatory hauling charges it imposed on those seeking access.<sup>66</sup> In *Lorain Journal* and *Otter Tail*, the refusers discriminated against the refusees by offering the refused

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<sup>59</sup> See *Trinko*, 540 U.S. at 410-11; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985).

<sup>60</sup> See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (defining monopoly power as “the power to control prices or exclude competition”).

<sup>61</sup> See, e.g., *Trinko*, 540 U.S. at 409 (finding no monopolistic intent in refusal to grant essential access at cost because there was no profit sacrifice).

<sup>62</sup> *Aspen Skiing*, 472 U.S. 585, 586 (1985).

<sup>63</sup> *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1512-13, 1520-22 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

<sup>64</sup> *Id.*

<sup>65</sup> *Aspen Skiing*, 472 U.S. at 610-11 & n.44.

<sup>66</sup> *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 410 (1912).

service - advertising in *Lorain Journal* and wheeling of electric power in *Otter Tail* - to other customers.<sup>67</sup> Instead of discriminatory dealing, *Aspen Skiing* involved termination of a profitable relationship.

The refusal in *Eastman Kodak Co. v. Image Technical Services, Inc.* involved both discriminatory dealing and termination of a profitable relationship. There, a photocopier maker was sued by independent repair service providers (“ISOs”) for restricting the sale of photocopier parts to purchasers of its equipment that would not buy service from ISOs.<sup>68</sup> Through this policy, the maker effectively terminated its part supply to ISOs while keeping supply relationships with other customers that would also buy its service.<sup>69</sup> The Supreme Court found that from these facts, intent to exclude a rival and maintain monopoly power in the parts and service markets could reasonably be inferred, and denied the refuser’s summary judgment motion on the refuser’s Section 2 claim.<sup>70</sup>

The necessity of either discriminatory dealing or relationship termination to condemning a single-firm refusal under Section 2 of the Sherman Act was made more explicit in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.<sup>71</sup> In *Trinko* an incumbent local exchange carrier faced a Section 2 complaint for failing to provide adequate network access to its competitors.<sup>72</sup> Holding that the carrier had no antitrust duty to provide network access, the Supreme Court emphasized that the network access was not something the carrier had been providing to anyone before statutory compulsion, thus distinguishing the case from both *Aspen Skiing* and *Otter Tail*.<sup>73</sup> The Court opined that the carrier’s “reluctance to interconnect at the cost-based rate of compensation” did not evidence its monopolistic intent and dismissed the complaint.<sup>74</sup>

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<sup>67</sup> See Elhauge, *supra* note 5, at 308-09 (finding some form of discrimination against rivals was present in “every case where the [Supreme] Court held a monopolist liable for a unilateral refusal to deal directly with its rivals”).

<sup>68</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 458 (1992).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 480-86.

<sup>71</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V Trinko, LLP*, 540 U.S. 398 (2004).

<sup>72</sup> *Id.* at 402-06.

<sup>73</sup> *Id.* at 407-11. Although it can be argued the carrier had discriminated in favor of itself by refusing to deal with others, there had been no discriminatory *dealing*.

<sup>74</sup> *Id.* at 409, 416. In dicta, the Court said the essential facilities doctrine was inapplicable because the Telecommunications Act (the “Act”) already ordered access. *Id.* at 411. However, to take the Act’s saving clause seriously, which provided “nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws,” *id.* at 406, it can be argued the Court should not have regarded the essential facilities claim barred by the Act’s requirement of access; rather, such

That discriminatory dealing or relationship termination is necessary to find monopolistic intent does not mean they would be sufficient, as indicated by *Colgate*, which involved a private firm's discriminatory termination of distributors based on their compliance with its RPM policy.<sup>75</sup> Still, the Section 2 jurisprudence suggests that these facts, along with the refuser's market power and the refusal's anticompetitive effects, are helpful evidence of anticompetitive intent or lack thereof in a refusal to deal.

B. *Single-Firm Refusals under Section 5 of the Federal Trade Commission Act*

Single-firm refusals may also be challenged under Section 5 of the FTC Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."<sup>76</sup> Enacted in 1914, the FTC Act created the FTC, giving it broad authority to regulate unfair methods of competition, which were deliberately left undefined without examples because "human inventiveness" was thought capable of giving rise to "too many unfair practices to define."<sup>77</sup> However, this broad mandate, later attributed to Section 5's "prophylactic" role<sup>78</sup> of stopping potential antitrust violations "in their incipiency,"<sup>79</sup> has received a narrow reading as applied to refusals to deal.

In *FTC v. Gratz*, the Supreme Court held that "practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly" were not to be deemed unfair methods of competition.<sup>80</sup> Because there was no allegation of monopoly power or intent to acquire it, the manufacturer's refusal to sell steel ties, which were used to bind bales of cotton, and jute bagging, which was used to wrap the bales, "except in conjunction" was found not to be an unfair method of competition.<sup>81</sup>

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requirement, to the extent it reflected the legislature's recognition of the essentiality of access, should have enhanced the doctrine's applicability to the case, provided that the doctrine were to be accepted.

<sup>75</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 302-04 (1919).

<sup>76</sup> 15 U.S.C.A. § 45(a)(1) (2009).

<sup>77</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972) (citations omitted).

<sup>78</sup> *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 466 (1941).

<sup>79</sup> *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966).

<sup>80</sup> *FTC v. Gratz*, 253 U.S. 421, 427 (1920), *overruled by Brown Shoe*, 384 U.S. at 320-21.

<sup>81</sup> *Id.* at 427, 428-29.

Since *Gratz*, courts' Section 5 jurisprudence on single-firm refusals largely tracked their Sherman Act jurisprudence on the same topic. In *FTC v. Beech-Nut Packing Co.*, the Supreme Court upheld the FTC's condemnation of a food producer's refusal to sell to distributors not adhering to its RPM policy.<sup>82</sup> The Supreme Court reasoned that the producer's enforcement scheme, pursuant to which price cutters were reported by special agents and other dealers, went beyond the unilateral refusal allowed in *Colgate*.<sup>83</sup> Although the *Beech-Nut* court said the Sherman Act's involvement in the case was only as a "declaration of public policy" against practices with a tendency to harm competition,<sup>84</sup> its reasoning was indistinguishable from the Sherman Act jurisprudence in cases with similar facts.<sup>85</sup>

The trend of interpreting the Section 5 authority within the narrow Sherman Act framework continued in *FTC v. Raymond Bros.-Clark Co.*, where the Court upheld a wholesaler's refusal to deal with a manufacturer for dealing with its rival. The Court reasoned that a retail dealer has the "right to stop dealing with a manufacturer [ ]for reasons sufficient to himself, [ ]" unless the refusal was unlawful at common law or had monopolistic tendencies.<sup>86</sup> Subsequent cases<sup>87</sup> and statutory amendments<sup>88</sup> gave the FTC the additional power to condemn unfair or deceptive acts or practices ("UDAP") and extended its existing unfair method of

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<sup>82</sup> *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 443-45 (1922).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 453-54.

<sup>85</sup> *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723 (1944); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 40-43 (1960).

<sup>86</sup> *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565, 569, 572-74 (1924).

<sup>87</sup> *See, e.g., FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 309-13 (1934) (sustaining the FTC's condemnation of practice that had long been deemed contrary to public policy—employing an element of gambling to sell candies to children—saying the FTC's Section 5 authority is not limited to "fixed and unyielding categories" or practices "which happen to have been litigated before this Court"); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (holding unfair competitive practice need not be deceptive or in violation of the letter or spirit of the antitrust laws).

<sup>88</sup> *See* The Wheeler-Lea Act of 1938, Ch. 49, § 3, 52 Stat. 111 (1938) (current version at 15 U.S.C.A. § 45(a) (2009)) (empowering the FTC to go after unfair or deceptive acts or practices in addition to unfair methods of competition). The intent of the amendment was to allow the FTC to protect not only competitors but also consumers directly. *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 966-67 (D.C. Cir. 1985). *See also* The Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312 (1994) (current version at 15 U.S.C.A. § 45(n) (2009)) (enabling the FTC to find a practice unfair if it would inflict substantial consumer injury not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or to competition, which judgment, however, may not be primarily based on public policy considerations).



competition authority to the point where it did not have to show any infringing of the letter or spirit of the antitrust laws. These developments, however, have not changed the FTC's narrow approach to single-firm refusals to deal, challenging the practice based on its intent and effect to restrain competition.

In *Official Airline Guides, Inc. v. FTC*, the Second Circuit held that a monopolist publisher of flight schedules did not violate Section 5 when it arbitrarily but unilaterally refused to list commuter airlines' connecting flights while listing the same flights for certificated airlines.<sup>89</sup> The court said no monopolistic motive or intent to gain a competitive advantage could be found because the refuser did not participate in the airline market that suffered the competitive harm.<sup>90</sup> To hold otherwise, said the court, would be to grant the FTC the power to delve into "social, political, or personal reasons" for a single-firm practice just because it undermines competition in some market.<sup>91</sup>

However, in *LaPeyre v. FTC*, the Fifth Circuit ruled that a monopolist manufacturer of shrimp processing machines violated Section 5 when it refused to deal with Northwest and Gulf Coast shrimp canners on equivalent terms; thus, reducing competition in the shrimp canning industry.<sup>92</sup> *LaPeyre*, nevertheless, is distinguishable from *Official Airline* because the refuser in *LaPeyre* was operating one of the Gulf Coast canners that received a better rate than its Northwest rivals.<sup>93</sup>

Despite the agency's recent attempts to reinvigorate its Section 5 enforcement,<sup>94</sup> it is unlikely that Section 5's independent refusal-to-deal jurisprudence will expand anytime soon. While private actions account for more than 90% of all federal antitrust cases,<sup>95</sup> the FTC Act provides no private right of action.<sup>96</sup> In addition, the FTC's primary means of Section 5

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<sup>89</sup> *Official Airline Guides Inc. v. FTC*, 630 F.2d 920, 921-28 (2d Cir. 1980).

<sup>90</sup> *Id.* at 925-26.

<sup>91</sup> *Id.* at 927.

<sup>92</sup> *LaPeyre v. FTC*, 366 F.2d 117, 120-21 (5th Cir. 1966).

<sup>93</sup> *Id.* at 118, 118-120.

<sup>94</sup> See, e.g., Press Release, FTC Bars Transitions Optical, Inc. from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses (March 3, 2010), available at <http://www.ftc.gov/news-events/press-releases/2010/03/ftc-bars-transitions-optical-inc-using-anticompetitive-tactics> (last visited Feb. 1, 2014); Press Release, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), available at <http://www.ftc.gov/opa/2010/08/intel.shtm> (last visited Feb. 1, 2014).

<sup>95</sup> Joshua P. Davis & Robert Lande, *An Evaluation of Private Antitrust Enforcement: 29 Case Studies*, Interim Report to the Antitrust Modernization Commission (2006), available at <http://www.antitrustinstitute.org/files/550b.pdf> (last visited Feb. 1, 2014).

<sup>96</sup> See *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 231 (3d

enforcement are cease and desist orders and consent decrees,<sup>97</sup> weaker deterrents than treble damages that may be sought for a Sherman Act violation.<sup>98</sup> These differences, along with the fact that the Sherman Act was enacted earlier than the FTC Act, led to the development of more robust single-firm conduct jurisprudence under the Sherman Act, and the FTC's own reliance on this jurisprudence in Section 5 cases contributed little to the growth of independent Section 5 jurisprudence on single-firm conduct.<sup>99</sup> Moreover, given the Supreme Court's growing tolerance of single-firm refusals<sup>100</sup> and the prevalence of state unfair competition statutes that mirror Section 5,<sup>101</sup> bringing Section 5 cases against single-

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Cir. 1990).

<sup>97</sup> See ABA Section of Antitrust Law, *Antitrust Law Developments* 656-59 (6th ed. 2007).

<sup>98</sup> 15 U.S.C.A. § 15(a) (2009).

<sup>99</sup> See, e.g., *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999) (“[T]he Commission relied upon [the] Sherman Act law in adjudicating this case.”); *Rambus, Inc. v. FTC*, 522 F.3d 456, 462 (D.C. Cir. 2008) (“In this case under § 5 of the FTC Act, the Commission expressly limited its theory of liability to Rambus’s unlawful monopolization of four markets in violation of § 2 of the Sherman Act.”). It has been pointed out since 1968 no federal court has based a finding of liability solely on Section 5 of the FTC Act. Karin A. DeMasi & Jonathan J. Clarke, *Section 5 of the FTC Act and the End of Antitrust Modesty* 3, *Antitrust & Trade Edition of BLOOMBERG LAW REPORTS* (June 25, 2010), [http://www.cravath.com/files/Uploads/Documents/Publications/3233999\\_1.pdf](http://www.cravath.com/files/Uploads/Documents/Publications/3233999_1.pdf). For the development of an independent Section 5 jurisprudence, some commentators have advocated avoiding the established Sherman Act framework in unfair method of competition cases. See William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 *ANTITRUST L. J.* 929, 929, 933 (2010). This, however, may not be easy because, despite the “great weight” accorded the FTC’s view, *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948), it is still the courts that have the “final word” on what is unfair, *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 368 (1965), and they may not be receptive to the agency’s novel arguments when the established Section 2 jurisprudence on the same topic points the other way. See DeMasi & Clarke, *supra* note 99, at 6.

<sup>100</sup> See, e.g., *Verizon Comm’n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>101</sup> See, e.g., Florida Deceptive and Unfair Trade Practices Act, F.S.A. § 501.204 (2010). All fifty states and the District of Columbia have their own Unfair and Deceptive Acts Practices (“UDAP”) statutes mostly based on Section 5 of the FTC Act, under which all jurisdictions but the State of Iowa offer a private right of action, twenty states award multiple or punitive damages, and all except nine jurisdictions offer class action remedies to consumers. See Carolyn L. Carter, National Consumer Law Center Inc., *Consumer Prot. in the States* (Feb. 2009), available at [http://www.nclc.org/images/pdf/udap/report\\_50\\_states.pdf](http://www.nclc.org/images/pdf/udap/report_50_states.pdf) (last visited Feb. 1, 2014). That being said, their relevance to single-firm refusals should not be exaggerated. See *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 598-99 (Mass.1975) (“[R]efusal to deal, without a showing of monopolistic purpose or concerted effort to hinder free trade, is not an unfair trade practice” under Massachusetts’s law.).

firm refusals is unlikely to be the most efficient use of the agency's limited resources.

One potential avenue for Section 5 enforcement in the refusal-to-deal context is a unilateral refusal that restrains competition but falls short of creating or maintaining a monopoly. Since these refusals cannot be reached either by Section 1 of the Sherman Act – for they are unilateral – or by Section 2 – for they lack monopolistic potential – these refusals can be an attractive target of Section 5 enforcement. In exploring this avenue, the FTC may find it helpful to articulate a clear limiting principle that can assure courts that its broadly phrased Section 5 power will not be abused to interfere with the efficient functioning of the private marketplace.

#### IV. SINGLE-FIRM REFUSALS UNDER REPUBLIC OF KOREA ANTITRUST LAWS

While U.S. antitrust law has evolved mainly through case law,<sup>102</sup> the Korean antitrust law has evolved mainly through statutory amendments, in line with Korea's civil law tradition.<sup>103</sup> The Monopoly Regulation and Fair Trade Act ("MRFTA"), Korea's primary antitrust statute, provides for a private right of action allowing anyone injured by a violation of the MRFTA to bring suit for actual damages against those who negligently or deliberately committed the violation.<sup>104</sup> In addition, anyone with or without suffering injury may report a suspected antitrust violation to the Korea Fair Trade Commission ("KFTC"), Korea's primary antitrust enforcement agency. The KFTC, may in response, or on its own initiative, launch an investigation and, find a violation, issue a cease-and-desist order, impose a fine, or take other corrective measures it deems necessary.<sup>105</sup>

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<sup>102</sup> See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶104 (3rd and 4th ed. 2010-2013).

<sup>103</sup> See Eric Ilhyung Lee, *Expert Evidence in the Republic of Korea and under the U.S. Federal Rules of Evidence: A Comparative Study*, 19 *LOY. L.A. INT'L & COMP. L.J.* 585, 588 (1997) (tracing Korea's legal system to Japan's civil law system, which was in turn based on Germany's civil law system). The MRFTA has been amended forty-five times since its enactment in 1980. See Korean version of MRFTA, available at <http://www.ftc.go.kr/laws/laws/lawsLink.jsp?lawNm=%B5%B6%C1%A1%B1%D4%C1%A6%20%B9%D7%20%B0%F8%C1%A4%B0%C5%B7%A1%BF%A1%20%B0%FC%C7%D1%20%B9%FD%B7%FC> (last visited Feb. 1, 2014).

<sup>104</sup> Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014, art. 56 (S. Kor.). In addition to a MRFTA action, the victim may bring a contract or tort claim under the Civil Act against an unfair business practice. See Sai Ree Yun, Seuk Joon Lee & Sangwook Daniel Han, *Korea*, in *GETTING THE DEAL THROUGH, DOMINANCE* 154 (2010).

<sup>105</sup> See Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014, art.5, 6, 27, 28, 49 (S. Kor.).

If the violation is deemed so serious as to substantially restrain competition, the KFTC is obligated to report it to the Prosecutor General for criminal prosecution, and it is only through this report that the violation may be criminally prosecuted.<sup>106</sup> The KFTC's finding of a MRFTA violation may be appealed to the KFTC itself for rehearing or, skipping the rehearing process, appealed directly to the Seoul High Court, and then to the Supreme Court.<sup>107</sup> The KFTC's failure to find a violation or failure to report a violation to the Prosecutor General may be appealed to the Constitutional Court on the ground that the failure constituted an abuse of public power or violated the appellant's right to equality and right to testify at trial provided in the Constitution.<sup>108</sup> The Constitutional Court and the Supreme Court are Korea's two highest courts with jurisdiction over different types of cases.<sup>109</sup> Generally speaking, the former serves as the final authority on the constitutionality of laws and other specified matters and the latter serves as the same on the constitutionality and the legality of decrees, regulations, and administrative judgments and on all matters not subject to the Constitutional Court's purview.<sup>110</sup> On rare occasions, however, these Courts have been asked to weigh in on the same issue, as will be seen later.

Most single-firm refusals are challenged under either Article 3-2 of the MRFTA, which prohibits abuse of market-dominance, or Article 23 of the MRFTA, which prohibits unfair business practices.<sup>111</sup> The scope of

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<sup>106</sup> *Id.* art. 71, cl. 1-2. No refusal to deal has been criminally prosecuted for violating the MRFTA so far. *See* Korea Fair Trade Comm'n, Int'l Competition Network Unilateral Conduct Working Group Questionnaire on Refusal to Deal 3 (April 11, 2009), *available at* <http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/korea.pdf> (last visited Feb. 1, 2014).

<sup>107</sup> Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014, art. 53-55 (S. Kor.). Due to the Supreme Court's heavy caseload—2,500 cases per justice annually, *see* Korean Bar Association: Judicial Reform, International Bar Association, *available at* <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0a3ed9fb-767d-48d6-9e2e-bb29864fd6a8>—most of its affirming decisions are a short regurgitation of lower court's reasoning with a sentence of approval. Therefore, the author often looks to lower court decisions – mostly the Seoul High Court's – for substantive reasoning. Obviously, the Supreme Court offers its own reasons in reversals or vacators, making them more informative than affirming decisions.

<sup>108</sup> *See* DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 11, 27 (S. Kor.), *available at* <http://www.law.go.kr/engLsSc.do?menuId=0&subMenu=5&query=%ED%97%8C%EB%B2%95#liBgcolor0> (last visited Feb. 12, 2013).

<sup>109</sup> *See id.* at art. 107 & 111.

<sup>110</sup> *Id.*

<sup>111</sup> Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014, art. 3-2 and 23 (S. Kor.).

Article 3-2 is narrower than that of Article 23, as Article 3-2 requires a dominant market position on the part of the refuser as well as market-wide harm arising from a violation, neither of which is required in a violation of Article 23.<sup>112</sup> Since Article 3-2 allows imposing heavier fines,<sup>113</sup> however, the KFTC would rely on Article 23 only if it believes it would be unable to satisfy the more restrictive Article 3-2 standard.<sup>114</sup>

#### A. *Single-Firm Refusals under Article 3-2 of the MRFTA*

Article 3-2 of the MRFTA prohibits five types of conduct.<sup>115</sup> Among these, the prohibition of unfair interference with the business of other firms is relevant to most single-firm refusals challenged under Article 3-2.<sup>116</sup> Types of unfair interference are further illustrated in the

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<sup>112</sup> See Supreme Court [S. Ct.], 2002Du8626, Nov. 22, 2007, § 2.Ga. (S. Kor.), available at <http://www.asianlii.org/kr/cases/KRSC/2007/48.html> (last visited Feb. 1, 2014).

<sup>113</sup> Compare Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014, art. 6 (S. Kor.) (fines for Article 3-2 violations) with Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014, art. 24-2 (S. Kor.) (fines for Article 23 violations).

<sup>114</sup> See Yo Sop Choi, *New Theory for the Vertical Regulation in Korea*, GLOBAL ANTITRUST REVIEW, 26, 34 (2009), available at <http://www.icc.qmul.ac.uk/GAR/GAR2009/GAR%20Online%20Yo%20Sop%20Choi%2002.pdf> (last visited Feb. 1, 2014). A refusal may be challenged under both provisions. See, e.g., Constitutional Court [Const. Ct.], 2005Hun-Ma1209, Dec. 27, 2007 (S. Kor.), available at <http://www.asianlii.org/kr/cases/KRCC/2007/17.html> (last visited Feb. 1, 2014).

<sup>115</sup> Clause 1, Article 3-2 of the MRFTA prohibits:

1. Acts of unfairly\* determining, maintaining, or changing the price of goods or services [];
2. Acts of unfairly controlling the sale of goods or provision of services;
3. Acts of unfairly interfering with the business activities of other enterprisers;
4. Acts of unfairly impeding the participation of new competitors;
5. Acts to unfairly exclude competing enterprisers or acts that may significantly harm the interest of consumers.

\* The same Korean word can be translated as, among others, “unfairly,” “unjustly,” “wrongfully,” “undeservedly,” or “unreasonably.” Naver Dictionary available at <http://endic.naver.com/krenEntry.nhn?sLn=en&entryId=3a08134896f64e898e4911a075987d0e&query=%EB%B6%80%EB%8B%B9> (in Korean) (last visited on February 21, 2014). Throughout this article, the author sticks to the first translation, which he believes best conveys the nuance.

<sup>116</sup> *Id.* Item 3, Clause 1, Article 3-2. Item 3 would be inapplicable if the refusees

Enforcement Decree of the MRFTA (“Decree”),<sup>117</sup> but it is the KFTC’s guidance on abuse of dominance that expressly lists an unfair refusal to deal as an example of unfair interference.<sup>118</sup> To come under the proscription of this guidance, a refusal to deal has to be with a specific business, meaning the refusal has to involve discriminatory dealing.<sup>119</sup>

To date, the most influential single-firm refusal-to-deal case brought under Article 3-2 is *POSCO*,<sup>120</sup> where a hot coil producer with 79% of the domestic market declined to start a supply relationship with a firm with which it competed in the downstream cold rolled steel sheet market.<sup>121</sup> The Korean Supreme Court first provided that the requisite unfairness under Article 3-2, unlike that under Article 23, requires probable harm to market-wide competition and intent to create or maintain monopoly power.<sup>122</sup> The Court said when a refusal actually causes prices to rise, supply to drop, innovation to slow, competitors to exit, or product diversity to diminish, the requisite intent and harm should be presumed, subject to contrary proof.<sup>123</sup> When these effects are not apparent, the Court said, the intent and harm should be inferred from other circumstances of

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are consumers rather than businesses. Those refusals would be covered under Item 5 to the extent that they hurt consumers considerably and unfairly. *See, e.g.*, Supreme Court [S. Ct.], 2009Du1983, May 27, 2010, § 1 (S. Kor.) (involving KFTC’s Item 5 challenge to cable company’s termination of group-based channel package).

<sup>117</sup> Enforcement Decree of the Monopoly Regulation and Fair Trade Act, Presidential Decree No. 23475, Jan. 1, 2012, art. 5, cl. 3 (S. Kor.), *available at* [http://eng.ftc.go.kr/files/static/Legal\\_Authority/Enforcement%20Decree%20of%20The%20Monopoly%20Regulation%20and%20Fair%20Trade%20Act\\_mar%2014%202012.pdf](http://eng.ftc.go.kr/files/static/Legal_Authority/Enforcement%20Decree%20of%20The%20Monopoly%20Regulation%20and%20Fair%20Trade%20Act_mar%2014%202012.pdf) (last visited Feb. 1, 2014). Note that one formulation of essential facilities doctrine has recently been codified in Item 3, Clause 4 of Article 5 of the Decree, prohibiting a business from refusing to provide an essential facility to another without valid justification.

<sup>118</sup> Fair Trade Commission (S. Kor.), *Guideline for Review of the Abuse of Market Dominant Position*, art. IV, cl. 3 Item D (1), (May 16, 2002), *available at* [http://eng.ftc.go.kr/files/static/Legal\\_Authority/Guidelines%20for%20review%20of%20the%20abuse%20of%20market%20dominant%20position\(2002\).pdf](http://eng.ftc.go.kr/files/static/Legal_Authority/Guidelines%20for%20review%20of%20the%20abuse%20of%20market%20dominant%20position(2002).pdf) (last visited Feb. 1, 2013).

<sup>119</sup> *See* Seoul High Court [Seoul High Ct.], 2001Nu5370, Aug. 27, 2002, § 2.Ra.(3) (S. Kor.), *aff’d*, Supreme Court [S. Ct.], 2002Du8626, Nov. 22, 2007 (S. Kor.), *available at* <http://www.asianlii.org/kr/cases/KRSC/2007/48.html> (last visited Feb. 1, 2014).

<sup>120</sup> Supreme Court [S. Ct.], 2002Du8626, Nov. 22, 2007 (S. Kor.) *available at* <http://www.asianlii.org/kr/cases/KRSC/2007/48.html> (last visited Feb. 1, 2014).

<sup>121</sup> Seoul High Court [Seoul High Ct.], 2001Nu5370, Aug. 27, 2002, §§ 1, 2.Ra. (S. Kor.).

<sup>122</sup> Supreme Court [S. Ct.], 2002Du8626, Nov. 22, 2007, § 2 (S. Kor.) *available at* <http://www.asianlii.org/kr/cases/KRSC/2007/48.html> (last visited Feb. 1, 2014).

<sup>123</sup> *Id.*

the refusal, such as claimed reasons for the refusal, characteristics of the relevant market, and actual harm suffered by the victim.<sup>124</sup> The Court then noted that the injury claimed in the case was limited to the individual refusee and was unsupported by any evidence of increased price or lowered production in the market.<sup>125</sup> Even that injury was far from debilitating, given that the refusee's business had been consistently profitable despite having to import all its hot coils from Japan.<sup>126</sup> On these grounds, the Court concluded that the refusal did not have the requisite unfairness under Article 3-2 of the MRFTA.<sup>127</sup>

*POSCO*'s interpretation of Article 3-2 can be understood more clearly if the case is compared with three of the KFTC's Article 3-2 resolutions that preceded it. In *Dongyang Beer*, the KFTC struck down a dominant beer brewer's refusal to supply wholesalers that would also stock a competitor's products.<sup>128</sup> The KFTC found that: (i) the refusal would interfere with the business of both the refusees and the competitor because the refuser held a 90% market share in the region; (ii) the refusal coincided with the launch of a new product by the competitor; and (iii) the refuser conditioned the resumption of supply on the refusees' termination of their dealings with the competitor.<sup>129</sup> To apply the *POSCO* framework to the case, the requisite exclusionary intent would be inferred from the refuser's discrimination against customers of its competitor, and the requisite harm would be inferred from the foreclosure of 90% of the market that would result from the refusal. Since *Dongyang Beer* had facts supporting both the subjective and objective elements of an Article 3-2 violation, the case would have come out the same way, even if it had been brought after *POSCO*.

More recently in *RITCO*, the KFTC found that a supplier of fire detectors engaged in an unfair refusal under Article 3-2 when it refused to supply its exclusive fire detectors to the winner of a construction bid, for which it had also competed.<sup>130</sup> The KFTC found that since the refuser's detectors were essential to the construction project, the refusal resulted in the project being taken away from the winner of the bid and awarded to

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at § 2.Da.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> KFTC 93-106, 9305Dok343.

<sup>129</sup> *Id.* at § 3.Ga.-Na.

<sup>130</sup> KFTC 2006-221, 2005GyungChok2649, § 2.Ga.

the refuser.<sup>131</sup> From this, the agency concluded that the refuser abused its detector monopoly to foreclose competition for the construction project.<sup>132</sup>

*RITCO* seems to be a tough case to justify in light of *POSCO*. Both cases involved a vertically integrated firm with a virtual monopoly in the upstream market refusing to supply a competitor in the downstream market. However, unlike *POSCO*, *RITCO* lacked any indication of discriminatory dealing, that is, whether the refuser had ever supplied its detectors to any other installers. It is also unclear how a single construction project taken away from the refusee would reduce market-wide competition in a way the *POSCO* court would have found worrisome. The KFTC assumed the installation market as the relevant market<sup>133</sup> but with no showing of companies operating exclusively in that market, their market shares, or the degree of vertical integration in the industry – i.e., detector distributors also performing installation. To the extent that the detector and installation markets were indistinguishable, the refuser may well have been the only company, not just a dominant one, that had made sufficient investment in the necessary capability of performing the project.

*T-Broad Chonju*,<sup>134</sup> if brought today, would not have fared any better. In *T-Broad Chonju*, a government-authorized cable company with a market share of 85% stopped airing a shopping channel for forty-two hours to protest the acquisition of the shopping program provider by a competing buyer.<sup>135</sup> The KFTC condemned the refusal under Article 3-2, finding that it put the refusee at a competitive disadvantage in the online sales market by freezing its operation.<sup>136</sup> *T-Broad Chonju* may be a contract violation case but is unlikely to be a viable Article 3-2 case because the refuser's intent was not to create or maintain a monopoly but instead was to protest a potential monopoly being created.<sup>137</sup> To accept the KFTC's competitive disadvantage argument as a basis for Article 3-2 liability is to deny a distinction between harm to competitors and harm to competition since any harm to a competitor necessarily undermines that competitor's competitive position vis-à-vis its uninjured rivals.<sup>138</sup>

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<sup>131</sup> *Id.* at § 2.Na.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> KFTC 2007-137, 2006SuhGyung2380.

<sup>135</sup> *Id.* at §§ 1-2.

<sup>136</sup> *Id.* at § 2.Da.

<sup>137</sup> *Id.* at §§ 1.Da., 2.Da. Here, the refusee was the fourth largest home shopping program provider in the country and the competing buyer that ultimately acquired the refusee provider was one of the largest offline retailers in the country. *Id.* at § 1.Da.

<sup>138</sup> Harm to competitors and harm to competition are analytically separate but not mutually exclusive. *See* *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 353 (1990) (holding that when competitors are injured by “illicit” means rather than by “free



*POSCO*'s requirement of market-wide impact applies not only to unfair interference cases under Item 3, Clause 1, Article 3-2 but also to unfair consumer harm cases under the second part of Item 5, Clause 1, Article 3-2.<sup>139</sup> In *T-Broad Kangseo*, a dominant cable company cut its lowest-price group-based channel package, causing viewers to pay more for the same channels on an individual basis.<sup>140</sup> The Korean Supreme Court provided that whether an act causes considerable consumer harm should be determined on a case-by-case basis taking into account the act's frequency, duration, and timing, the number of consumers injured, and how the act compares to what consumers experience in similar markets.<sup>141</sup> According to the Korean Supreme Court, for the act to be unfair under Article 3-2 it should be shown that the refuser's pursuit of excessive monopoly profits not just undermines the interest of a particular consumer but spoils the benefits consumers can expect from a competitive market.<sup>142</sup> Upon reviewing the facts, the Court found that the KFTC failed to show that the alleged consumer harm – fee hikes and reduced access to cable television – was either considerable, for no comparison was made to what was available in similar markets, or unfair, for there was no evidence that the refuser's intent was to realize excessive monopoly profits.<sup>143</sup>

The considerable harm test is the effect prong of the Item 5 Clause 1, Article 3-2 standard, which looks at how many consumers were hurt, how badly, and how unusual the act was compared to acts of other firms in similar markets. The unfair harm test is the intent prong, which builds upon the first prong to see if there was an underlying monopolistic design. Since the unfairness under both Items 3 and 5 requires monopolistic intent, a refusal to deal that survives an Item 3 challenge for lack of unfairness can also withstand an Item 5 challenge regardless of any harm to consumers.

In *SK Telecom*, a telecommunications company's refusal to share its digital rights management ("DRM") technology with its competitor in a related market was upheld for lack of unfairness under both Items 3 and 5

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play of market forces," antitrust laws protect competitors "precisely for the purpose of protecting competition."). This, however, is not the same as saying antitrust law should "promote competition through the protection of viable, small, locally owned business[es]," *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). The difference is that only the latter view takes market decentralization as an independent goal apart from the efficiency-enhancing aspect of competition.

<sup>139</sup> Item 3, Clause 1, Article 3-2 of the MRFTA prohibits acts of unfairly interfering with the business activities of other enterprisers, and the second part of Item 5 of the same clause prohibits acts that may significantly harm the interest of consumers.

<sup>140</sup> Supreme Court [S. Ct.], 2009Du1983, May 27, 2010, § 1 (S. Kor.).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

of Clause 1, Article 3-2.<sup>144</sup> The company, which serviced 60% of cell phones on Korea's wireless network that could play MP3 music files, developed its exclusive DRM technology and adopted it on its phones and the MP3 music files it sold on its website.<sup>145</sup> This had the effect of preventing MP3 files purchased elsewhere from being played on its MP3 phones without going through a time-consuming conversion process.<sup>146</sup>

The Seoul High Court held that the company's refusal to share its DRM with a rival music seller was not unfair because the purpose of the DRM was to protect its MP3 files from illegal downloads and the company's DRM was not essential, as shown by its two largest competitors in the cell phone service market using their own DRM on their phones and MP3 files.<sup>147</sup> Since its DRM was not essential, its refusal to share the technology could have hurt neither market-wide competition nor a broad swath of consumers, and no monopolistic intent that could satisfy *POSCO's* unfairness standard could be found.

#### B. *Single-Firm Refusals under Article 23 of the MRFTA*

Item 1, Clause 1, Article 23 of the MRFTA expressly prohibits unfair refusals to deal,<sup>148</sup> and the Decree presumes single-firm refusals as

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<sup>144</sup> Seoul High Court [Seoul High Ct.], 2007Nu8623, Dec. 27, 2007 (S. Kor.). *aff'd*, Supreme Court [S. Ct.], 2008Du1832, Oct. 13, 2011 (S. Kor.).

<sup>145</sup> *Id.* at § 1.Na.-Da.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at § 1.Na.

<sup>148</sup> Clause 1, Article 23 of the MRFTA prohibits doing, or making another firm do:

1. Act of unfairly rejecting any transaction or discriminating against a certain transacting partner;
2. Act of unfairly excluding competitors;
3. Act of unfairly inducing or coercing customers of competitors to deal with the enterpriser in question;
4. Act of engaging in a trade with a transacting partner by unfairly taking advantage of its own position in the transaction;
5. Act of trading under conditions that unfairly restrict the business activities of a transacting partner or disrupt the business activities of another enterpriser;
6. Deleted;
7. Act of assisting a person with special interest or other companies by providing advanced payment, loans, manpower, real estate, stocks and bonds, goods and services, intangible assets and such, or by transacting under substantially favorable terms;
8. Any act that threatens to impair fair trade other than those listed in Subparagraphs 1 to 7.

In its character, Article 23 is comparable to the UDAP portion of Section 5 of the FTC Act. Historically, Article 23 was based on a similar provision of Japan's Antimonopoly Act, which was in turn based on Section 5 of the FTC Act. *See Sang-Seung Yi & Youngjin Jung, A New Kid on the Block: Korean Competition Law, Policy,*

fair unless otherwise proven.<sup>149</sup> The KFTC's guidance on unfair business practices provides that for a single-firm refusal to violate Article 23, the refusee must be a business, not just a consumer, and the refusal must target a specific company in a way not accountable by a reasonable policy of general applicability.<sup>150</sup> The guidance assesses unfairness based on the following considerations: whether the refusal would drive out the refusee or block its market entry, the availability of alternative partners to the refuser, and any countervailing consumer benefits.<sup>151</sup> The guidance also takes into account whether the refusal was a means to enforce an unlawful end – e.g., resale price maintenance prohibited under Article 29 – and any business justification for the refusal – e.g., product shortage, risk of bankruptcy, and credit or credibility issues with the refusee.<sup>152</sup>

In *Hanil*, a pharmaceutical company refused to supply several types of clinical reagent within its exclusivity to a regional rival after losing to the rival a supply contract including those reagent types.<sup>153</sup> The refusal made it impossible for its rival to perform the contract and the contract was eventually awarded to the refuser.<sup>154</sup> The Seoul High Court noted that participants in tenders based on total contract price customarily supplied their exclusive items to the eventual winner of the tender without advance notice, and there had been such dealings between the refuser and refusee prior to the refusal.<sup>155</sup> From the refuser's deviation from the industry's and its own past practices, the Seoul High Court inferred that the refuser's intent was to exclude its rival from the clinical reagent market, and held the refusal unfair under Article 23.<sup>156</sup>

*Woolim* provided a more detailed Article 23 framework for analyzing single-firm refusals.<sup>157</sup> In *Woolim*, the Seoul High Court held

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*and Economics*, COMPETITION POLICY INTERNATIONAL, Vol. 3, No. 2, 174 (Autumn 2007).

<sup>149</sup> See Decree, *supra* note 14, at Item 1 of Appendix 1-2 to Clause 1, Article 36.

<sup>150</sup> Item B(1), Clause 1, Article V of Guidelines for Review of Unfair Trade Practices (Unfair Practice Guideline), available at [http://eng.ftc.go.kr/files/static/Legal\\_Authority/Guidelines%20for%20Review%20of%20Unfair%20Trade%20Practices\(2005\).pdf](http://eng.ftc.go.kr/files/static/Legal_Authority/Guidelines%20for%20Review%20of%20Unfair%20Trade%20Practices(2005).pdf) (last visited Feb. 4, 2013).

<sup>151</sup> *Id.* at Item B(2), Clause 1, Article V.

<sup>152</sup> *Id.* A refusal may be reached through other Items than Item 1, such as Items 4 and 5 of Clause 1, Article 23 of the MRFTA. See Item B(3), Clause 1, Article V of Unfair Practice Guideline.

<sup>153</sup> Seoul High Court [Seoul High Ct.], 94Gu34120, Dec. 14, 1995, § 1.Ga.-Ma. (S. Kor.) *aff'd*, Supreme Court [S. Ct.], 96Nu2019, June 25, 1996 (S. Kor.).

<sup>154</sup> *Id.* at § 1.Ma.

<sup>155</sup> *Id.* at § 2.Da.

<sup>156</sup> *Id.*

<sup>157</sup> Seoul High Court [Seoul High Ct.], 94Gu39927, May 23, 1996 (S. Kor.).

that an oil refiner's refusal to supply a distributor was not unfair under Article 23 because the refuser's intent was to limit its financial exposure to the distributor that had already run up a substantial amount of unsecured debt to it.<sup>158</sup> Affirming *Woolim*, the Supreme Court provided that the unfairness under Article 23 must be assessed based on the parties' relative bargaining power, market concentration, and the purpose and effect of the refusal at issue.<sup>159</sup>

The opposite occurred in *Hite Beer II*, where a beer brewer stopped supplying an existing wholesaler on the one hand, and refused to start supplying a new wholesale market entrant on the other.<sup>160</sup> The Seoul High Court found that the first refusal – the refusal to continue to supply an existing wholesaler – was requested by the wholesaler's rivals that resented the wholesaler's price-cutting and thus the intent of the beer brewer's refusal was to hinder the wholesaler's business in cooperation with the wholesaler's rivals.<sup>161</sup> Regarding the second refusal, the Court found it inconsistent with the refuser's standing practice and in consideration of the refuser's 80% market share, found that the refusal's effect was to preclude the refusee's entry to the wholesale beer market.<sup>162</sup> By preventing entry, the Court reasoned, the refuser intended to protect incumbent wholesalers' margin on its products and maintain its dominance in the market.<sup>163</sup>

As noted earlier, non-exclusionary intent can be inferred from the absence of the exclusionary effect expected from the refusal. In *Coca Cola*, a soft drink producer, having failed to acquire its long-time bottler, refused to renew its supply agreement with the bottler; in the meantime, the bottler in apparent anticipation of the nonrenewal had established a subsidiary, through which it was producing its own soft drinks.<sup>164</sup> The Korean

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*aff'd*, Supreme Court [S. Ct.], 96Nu9003, (*Woolim Supreme*), Sept. 8, 1998 (S. Kor.).

<sup>158</sup> *Id.* at § 2.Ga., Ra.

<sup>159</sup> *Woolim Supreme*, 96Nu9003.

<sup>160</sup> Seoul High Court [Seoul High Ct.], 2005Nu2744, Mar. 27, 2006, § 1.Na. (S. Kor.) *aff'd*, Supreme Court [S. Ct.], 2006Du9924, Aug. 31, 2006 (S. Kor.).

<sup>161</sup> *Id.* at § 3.Na.-Da.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at § 3.Da. Ordinarily, a beer brewer would have the incentive to make the wholesale market more competitive, not less, to strengthen its bargaining position vis-à-vis wholesalers. Yet here, the first refusal was urged upon the refuser by a group of incumbent wholesalers threatening to boycott its beer unless it stopped supplying the refusee. Regarding the second refusal, the court assumed there was some quid pro quo arrangement between the refuser and the incumbent wholesalers, under which the latter would help the former maintain its dominance in exchange for the refusal. *Id.* at § 3.Na.-Da. That is, both refusals were driven by incumbent wholesalers who stood to gain from reduced competition in the wholesale beer market.

<sup>164</sup> Supreme Court [S. Ct.], 98Du17869, Jan. 5, 2001, § 1 (S. Kor.).

Supreme Court put forth a three-part test, which provided that a single-firm refusal would be deemed unfair under Item 1, Clause 1, Article 23 if: (i) it would likely deprive the victim of sufficient transaction opportunities to jeopardize the victim's business; (ii) it represents an abuse of superior bargaining power with sole intent to jeopardize the victim's business; or (iii) it was unfairly employed as a means to achieve an unlawful objective.<sup>165</sup> Applying this test, the Court found that the refusal in question could not jeopardize the bottler's business since the bottler had already been conducting an independent soft drink operation. Even assuming the refuser's superior bargaining power to the bottler's, there was no evidence that the refusal was solely intended to jeopardize the bottler's business or as a means to force unfair acquisition terms upon the bottler.<sup>166</sup>

*Coca Cola's* three-part test has been frequently applied in Article 23 refusal cases by both Korea's Supreme Court<sup>167</sup> and its Constitutional Court.<sup>168</sup> The first part of the *Coca Cola* test, if read literally, would have any refusal jeopardizing the victim's business deemed unfair regardless of its intent. But post-*Coca Cola* cases showed independent intent analysis is still necessary by applying the *Woolim Supreme* holding that required consideration of a refusal's purpose as well as its effect in determining its unfairness, side-by-side with the *Coca Cola* test in Article 23 refusal-to-deal cases.<sup>169</sup> In *UK ChemiPharm*, for instance, the Seoul High Court condemned a refusal on the ground that the refusal was unfair not only under the first part of the *Coca Cola* test but also under the *Woolim Supreme* holding,<sup>170</sup> lending support to the independent role played by an intent analysis.

The Constitutional Court's Article 23 jurisprudence on single-firm refusals has its origin in *Ace Bed*, where it recognized its power to review the KFTC's decisions not to report Article 23 violations to the Prosecutor General for criminal prosecution.<sup>171</sup> In *Ace Bed*, the Court held that a bed

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<sup>165</sup> *Id.* at § 2.

<sup>166</sup> *Id.*

<sup>167</sup> See, e.g., Supreme Court [S. Ct.], 2004Da39238, (*Inchon Refinery Supreme*), Feb. 14, 2008, § 1.Ga. (S. Kor.); Supreme Court [S. Ct.], 2002Du11059, July 9, 2004, § 2 (S. Kor.).

<sup>168</sup> See, e.g., Constitutional Court [Const. Ct.], 2008HunMa497, (*Kyungnam Textile*) (consol.), Feb. 25, 2010, § 3.Na.(1) (S. Kor.); Constitutional Court [Const. Ct.], 2006HunMa1033, (*Samsung Networks II*), Oct. 30, 2008, § 3.Na.(1) (S. Kor.).

<sup>169</sup> See, e.g., *Inchon Refinery Supreme*, 2004Da39238, § 1.Ga.

<sup>170</sup> Seoul High Court [Seoul High Ct.], 2006Nu30777, (*UK ChemiPharm*), Dec. 20, 2007, § 2.Na.(2) (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 2008Du1474, May 15, 2008 (S. Kor.).

<sup>171</sup> Constitutional Court [Const. Ct.], 94HunMa136, July 21, 1995, § 3.Na. (S. Kor.).

manufacturer's termination of its dealer of ten years with no advance notice was unfair but not to the extent to require criminal prosecution. The refusal inflicted no significant harm to the general furniture market and any wrong suffered by the refusee could be fully redressed by a damages suit under Article 56 of the MRFTA or contract or tort claims under the Civil Act.<sup>172</sup> Subsequently in *SI*, the Court's scope of review was extended to the KFTC's finding of no MRFTA violation,<sup>173</sup> beyond its failure to report a violation for criminal prosecution.

With the Constitutional Court's jurisdiction creeping into the Article 23 jurisprudence on single-firm refusals, it was only a matter of time before the nation's two highest courts were asked to pass on the fairness of the same refusal. In *Inchon Refinery Constitutional*, the Constitutional Court reversed the KFTC's dismissal of a complaint against a vertically integrated oil company's refusal to distribute the product of a rival oil supplier.<sup>174</sup> The Court found that the refusal satisfied the first part of the *Coca Cola* test because, in the heavily concentrated Korean oil market where the top three refiners had a combined market share of 75%, the refusal at issue by the third largest refiner could threaten the refusee's business, which relied on the refuser's distribution network for 55% of its domestic production.<sup>175</sup> On the intent issue, the Court took the position that when a refusal would jeopardize the victim's business, it is not enough that the refusal would be somewhat helpful to the refuser's business; rather, the justification must be commensurately compelling – for example, the refuser would go out of business without the refusal.<sup>176</sup> Under this commensurate justification test, the Court found that the financial difficulty claimed by the refuser was insufficient to justify its refusal because its profits were improving and its financial difficulty was neither caused nor likely to be exacerbated by its dealings with the refusee.<sup>177</sup>

Interestingly, on the same day the Constitutional Court struck down the refusal, the Daejeon High Court issued its own decision upholding the same refusal under the same provision in a civil case brought by the refusee to confirm the continued validity of its relationship with the refuser.<sup>178</sup> Four years later, the Korean Supreme Court agreed

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<sup>172</sup> *Id.* at § 3.Na.(2).

<sup>173</sup> Constitutional Court [Const. Ct.], 2001HunMa381, June 27, 2002, § 3.Ga. (S. Kor.).

<sup>174</sup> Constitutional Court [Const. Ct.], 2002HunMa496, May 24, 2004 (S. Kor.).

<sup>175</sup> *Id.* at § 3.Da.(2).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Daejeon High Court 2004. 6.24. 2003Na4974, *aff'd*, Supreme Court [S. Ct.], 2004Da39238, (*Inchon Refinery Supreme*), Feb. 14, 2008 (S. Kor.). Although KFTC

with the Daejeon High Court, holding that given the increase in the refusee's profits since the nonrenewal, the refusal did not jeopardize the refusee's business, and since the refusal was not unfair, the supply relationship between the parties no longer existed.<sup>179</sup> Notably, while applying its *Coca Cola* test and *Woolim Supreme* holding to the facts, the Court did not mention the Constitutional Court's commensurate justification test.<sup>180</sup> This is notable because the application of the commensurate justification test would not have changed the ultimate outcome of the case, since the Court found no exclusionary effect from the refusal. This case represents an instance where Korea's two highest courts differed not only on how to apply certain tests to a particular single-firm refusal but also on what tests to apply to the practice in general.<sup>181</sup>

One shortcoming of the *Coca Cola* test is the vagueness of the term "jeopardize."<sup>182</sup> Some decisions viewed the term as satisfied only if the refusee could no longer run its business,<sup>183</sup> whereas others found the term satisfied as long as there were some important transactions denied or delayed.<sup>184</sup> This kind of vagueness is yet another reason why deductive

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resolutions fall within the exclusive jurisdiction of the Seoul High Court, see Article 55 of the MRFTA, non-administrative cases involving only private parties may be brought for damages or other remedies in, and appealed to, other courts having proper jurisdiction, see Article 56 of the MRFTA.

<sup>179</sup> *Inchon Refinery Supreme*. 2004Da39238, § 1.Ga. The inconsistent rulings caused an awkward situation where the KFTC had to condemn a refusal that was upheld by the Supreme Court. The author was unable to find any KFTC action following *Inchon Refinery Constitutional* but that should not be surprising given that even if the KFTC condemns the refusal, the refuser would be able to have the ruling vacated on appeal by invoking *Inchon Refinery Supreme*.

<sup>180</sup> *Id.*

<sup>181</sup> The author could find only one court that applied this commensurate justification test of *Inchon Refinery Constitutional*. Seoul High Court [Seoul High Ct.], 2005Nu2744, (*Hite Beer II*), April 27, 2006, §3.Da.(1) (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 2006Du9924, Aug. 31, 2006 (S. Kor.). The dearth of acceptance is understandable given the extreme nature of the test, which essentially obligates a dominant firm not to refuse to deal unless it would go bankrupt otherwise.

<sup>182</sup> The same Korean word can be translated as, among others, make it "difficult," "tough," "awkward," or "embarrassing." Naver Dictionary available at <http://endic.naver.com/krenEntry.nhn?sLn=en&entryId=fc67fc447e834e2d8cea1983dc5b215f&query=%EA%B3%A4%EB%9E%80> (in Korean) (last visited on February 21, 2014). The author translates it as "jeopardize" throughout this article, which the author believes best conveys the nuance.

<sup>183</sup> See, e.g., *Inchon Refinery Supreme*, 2004Da39238, § 1.Ga.; Supreme Court [S. Ct.], 98Du17869, (*Coca Cola*), Jan. 5, 2001, § 2 (S. Kor.).

<sup>184</sup> See, e.g., Constitutional Court [Const. Ct.], 2002HunMa496, (*Inchon Refinery Constitutional*), June 24, 2004, § 3.Da. (S. Kor.), Seoul High Court [Seoul High Ct.], 2006Nu30777, (*UK ChemiPharm*), Dec. 20, 2007, § 2.Da. (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 2008Du1474, May 15, 2008 (S. Kor.).

legal analysis in antitrust law, which applies deceptively simple statutes and judge-made rules to innumerable factual situations, often misses important lessons that can be gleaned from inductive factual analysis. Inductive factual analysis takes facts in their totality and in their respective contexts and makes an inference as to how those that devised the statutes and tests would have thought of them. This factual inquiry will be addressed below.

#### V. FACTS THAT SHED LIGHT ON INTENT OF SINGLE-FIRM REFUSALS TO DEAL

One common element that is necessary to find an anticompetitive intent is some degree of market power on the part of the refuser. Section 2 of the Sherman Act requires that the offender be shown to possess monopoly power or at least a dangerous probability of achieving it, and Article 3-2 of the MRFTA requires that the refuser have sufficient market power to unilaterally impact market-wide competition. Similarly, a violation of Section 5 of the FTC Act necessitates such market power that would get the refuser in trouble with either Section 1 or Section 2 of the Sherman Act. Even Article 23 of the MRFTA, applicable to any firm with a market share of 10% or more,<sup>185</sup> requires the refusal to jeopardize the victim's business, and in the absence of some market power, the refusal would only cause the refusee to go somewhere else to find a partner. At the end, the requirement of some market power brings the four antitrust provisions together, notwithstanding their divergence on the precise intent they require.<sup>186</sup>

Presuming some degree of market power on the part of the refuser, in the following sections, this article identifies a few facts that have been shown in both U.S. and Korean cases as indicative of the refuser's anticompetitive intent – i.e., indicating factors – and those shown to vindicate the refuser's innocent intent – i.e., vindicating factors. One thing to keep in mind is that the inverse of a proposition is not necessarily true – i.e., “A tends to indicate anticompetitive intent” is not “A's absence tends to vindicate the refusal's innocent intent.” If that were true, it would be unnecessary to separate vindicating factors from indicating factors, as they would just be mirror images of each other. That is, if one fact is listed as a

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<sup>185</sup> See Unfair Practice Guideline, *supra* note 150, at Item B(4), Clause 1, Article V.

<sup>186</sup> In a sense, then, the absence of market power is a paradigmatic vindicating factor. Still, market power is not included in this article's list of vindicating factors because market power is as much a legal matter as it is a factual matter. There is a wide variance between the United States and Korea, and between different antitrust provisions of each of these jurisdictions, as to how much market power is necessary to trigger the inference of anticompetitive intent. Yet, it does seem clear that everything else being equal, the higher the market power, the more severe the exclusion resulting from the refusal and the harder it would be to argue the refusal had an innocent purpose.



vindicating factor, it is because that fact is much more likely to vindicate the refuser's innocent intent than its absence would prove the refuser's anticompetitive intent.<sup>187</sup> At times, some of these factors may seem too obvious to merit discussion. But not all facts that are deemed to support a certain intent in one jurisdiction are deemed to support the same intent in other jurisdictions as illustrated in the example discussed below.<sup>188</sup> The point of this article is not solely to make out indicating and vindicating factors common to the two jurisdictions, but to examine those factors' relative strength to one another and likely exceptions to their application. At the end of the day, absolute consistency is not to be expected, either within the same jurisdiction or from the same court.<sup>189</sup> Yet, by identifying facts that have driven the development of the refusal-to-deal jurisprudence of the United States and Korea engenders a better sense of what to look for in anticipating the way their courts would characterize a refuser's intent in future cases.

A. *Indicating Factor 1: Refusal to Deal with Those Dealing with a Rival*

When a firm refuses to deal with those dealing with its rival, the firm's intent could be anticompetitive – say, to punish the refusee for taking on its rival as a partner and/or to deprive the rival of the resources or customers it needs to succeed in the market. At the same time, the same refusal may have pro-competitive intent – say, to prevent distributors from getting distracted by their need to market other products and/or to prevent them from free riding on the marketing investment made by the firm's more dedicated distributors. But when the refuser has enough market shares as to be able to unilaterally exclude the refusee or the rival from a substantial portion of the market, courts tend to find the anticompetitive account more convincing.

In *Lorain Journal*, businesses wanting to advertise in the region could not reasonably expect to do so effectively without running ads on the refuser's newspaper that was subscribed by 99% of the families in the city.<sup>190</sup> Hence, the Court found that the newspaper's refusal to run ads for

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<sup>187</sup> For instance, the absence of prior dealing, a vindicating factor, typically shows there was no anticompetitive intent in the refusal, but the existence of prior dealing does not typically establish anticompetitive intent. In fact, a relationship termination is so common and has so obvious pro-competitive justifications that a vast majority of them would not be deemed to possess anticompetitive intent either in the United States or in Korea.

<sup>188</sup> See Section V.H. of this article where the different treatments afforded by the United States and Korea to refusals to deal involved in partner switching are discussed.

<sup>189</sup> See Oliver W. Holmes, Jr., *THE COMMON LAW* 1 (Dover Publications 1991) (1881) (“The life of the law has not been logic; it has been experience.”).

<sup>190</sup> *Lorain Journal Co. v. United States*, 342 U.S. 143, 146 (1951).

anyone that would also advertise through a rival radio station was an attempt to hinder the rival's entry to the local advertising market.<sup>191</sup> *Yeha Media*, is a KFTC resolution that condemned the same type of refusal.<sup>192</sup> In *Yeha Media*, a publisher with a 92% share of a certain reference book market stopped supplying a retailer until the retailer quit selling a competitor's online study aids.<sup>193</sup> The KFTC found that the refuser's intent was to leverage its monopoly in the reference book market to force the retailer to drop the competitor's products.<sup>194</sup>

The inference of anticompetitive intent from this type of refusal does not require a virtual monopoly.<sup>195</sup> With a market share of 75-80%, a dental equipment maker was found to have intended to "tie up" dealers in violation of Section 2 of the Sherman Act when it refused to sell to dealers that would distribute competing brands.<sup>196</sup> Under Section 1 of the Sherman Act, it was held that an online bookseller with market share up to 70% could reasonably have intended to foreclose competition when the bookseller refused to allow a publisher to use its direct sales channel, which was "proven to lift sales," for the reason that the publisher insisted on using a third party printer over the refuser's printing subsidiary.<sup>197</sup> A market share of 70% was also deemed sufficient to find the requisite unfair intent under Article 23 of the MRFTA when a medical company terminated a distributor that carried products of its German rival, thereby depriving the rival of its sole channel of distribution in Korea's radiofrequency lesion generator market.<sup>198</sup>

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<sup>191</sup> *Id.* at 149-50, 155.

<sup>192</sup> KFTC 2006-058, 2005KyungChok2293.

<sup>193</sup> *Id.* at §§ 1.Ga.-Na., 2.Ga.

<sup>194</sup> *Id.* at § 2.Na. *See also* KFTC 93-106, 9305Dok343, §§ 1-3 (*Dongyang Beer*) (finding refusal by beer brewer with 90% of regional market to supply wholesalers also buying from a rival was intended to interfere with the rival's marketing of new product); KFTC 2007-137, 2006SuhGyung2380, § 2 (*T-Broad Chonju*) (finding it unfair for a government-approved cable company with 83% market share to shut down online shopping channel to protest the program producer's being acquired by a competing suitor).

<sup>195</sup> After all, market share is only one of many factors that can shed light on the refuser's market power, other major factors including market concentration and entry barriers.

<sup>196</sup> *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 188-89 (3d Cir. 2005). *See also* *U.S. Horticultural Supply, Inc. v. Scotts Co.*, No. Civ.A.03-773, 2004 WL 1529185, at 1, 6-8 (E.D. Pa. Feb. 18, 2004) (finding that a fertilizer producer with more than a 75% market share could reasonably have had "specific intent to monopolize" when it terminated its distributor for dealing in competing products).

<sup>197</sup> *Booklocker.com, Inc. v. Amazon.com, Inc.*, 650 F.Supp.2d 89, 94 (D. Me. 2009).

<sup>198</sup> KFTC 2008-186, 2006DokGaam0747, (*Tyco Healthcare*), §§ 1, 2.Da.

On the other hand, in the absence of a substantial market share, a refusal to deal with a rival's partners has been found to lack anticompetitive intent. In *FTC v. Raymond Bros.-Clark Co.*, a grocery wholesaler's refusal to buy from a supplier that sold to its rival was found not to constitute an unfair method of competition under Section 5 of the FTC Act, on the ground that the refuser lacked "dominant control" of the market and the competition between the refuser and the rival was "on equal terms."<sup>199</sup> Similarly in *Beautiful House*, a non-dominant embroidery floss producer's termination of a retailer that was planning to distribute products of a rival producer was found to have been motivated to protect its distribution network in the Korean embroidery floss market, rather than to foreclose the rival or to achieve any other unlawful purpose.<sup>200</sup>

The common assumption that runs through these cases is that a firm without market power cannot reasonably intend to foreclose a rival by refusing to deal with the rival's partners, and in the absence of exclusionary intent, such refusal has avoided antitrust liability both in the United States<sup>201</sup> and in Korea.

B. *Indicating Factor 2: Refusal to Deal as Urged by the Refusee's Rival*

Sometimes a firm is urged by another to refuse to deal with the latter's rival. The fact that a refusal was urged on a firm which subsequently complies with the refusal does not automatically eliminate the possibility that the refusal was within the independent judgment of the refuser.<sup>202</sup> Yet, the nature of competition is such that firms want their

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<sup>199</sup> *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565, 568, 572-73 (1924). See also *FTC v. Curtis Pub. Co.*, 260 U.S. 568, 579-82 (1923) (upholding under Section 5 of the FTC Act on a non-dominant newspaper company's refusal to use distributors that would also deliver competing newspapers).

<sup>200</sup> Supreme Court [S. Ct.], 2002Nu4466, May 26, 2005, § 2.Da. (S. Kor.).

<sup>201</sup> In the United States, a refusal to deal with a rival's partner has been often challenged under Section 1 of the Sherman Act and Section 3 of the Clayton Act as well, but their requirement of an agreement made those challenges largely unsuccessful. For Section 1 cases, see *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911, 914-16 (5th Cir. 1952) (upholding refusal under Section 1 for failing to allege an agreement); *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99, 101-02, 104 (3d Cir. 1946) (same); *but see Walter Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 6-7 (9th Cir. 1963) (denying beer brewer's motion to dismiss Section 1 claim, holding it sufficiently alleged termination of distributor for selling competing beer was due to a "horizontal understanding among [other] distributors as well as a vertical one between the [brewer] and each distributor" to "exclude rival products" from the market) (internal quotation marks omitted). For Section 3 cases, see *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 392-93 (7th Cir. 1984) (declining to enjoin termination for lack of exclusive agreement); *McElhenney Co. v. W. Auto Supply Co.*, 269 F.2d 332, 337-38 (4th Cir. 1959) (dismissing a Section 3 challenge to refusal for failing to allege exclusivity provision).

<sup>202</sup> See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984)

rivals out of business and one way to achieve that is to get those firms dealing with the rival to stop dealing with it. At the same time, the refuser generally lacks incentives to assist its partner in the upstream or downstream market in reducing competition in that market because that would enhance the partner's bargaining power vis-à-vis the refuser.<sup>203</sup> Then, when a firm did refuse to deal as urged by the refusee's rival, it is likely that the refusal was due to the pressure of the urging rather than its independent judgment, warranting the inference of anticompetitive intent. In fact, an example of this pressure has already been seen in the previous section: refusal to deal with those that would deal with a rival.<sup>204</sup>

When a refusal is urged by multiple rivals rather than a single rival of the target refusee, the pressure would be higher and the room for the refuser's independent judgment would be that much smaller. In *Rossi v. Standard Roofing, Inc.*, three distributors of roofing and siding materials successfully pressured their supplier to terminate supply to their new price-cutting rival.<sup>205</sup> Since the distributors accounted for 44.5% of the refuser's regional sales, they were found to hold "substantial economic leverage" over the refuser, and the refusal was found inconsistent with the supplier's independent policy of selling to all comers.<sup>206</sup> On these findings, the Third Circuit held that a reasonable jury could view the refusal as owing to the pressure from conspiring distributors rather than to the refuser's independent judgment, and denied the defense's motion for summary judgment on the refusee's Section 1 claim.<sup>207</sup> A horizontal

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(noting dealer termination in response to another dealer's complaint, though not irrelevant, does not establish conspiracy between refuser and complaining dealer).

<sup>203</sup> See Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 23 (1981). However, when a firm holds interest in another firm in a related market, the firm may have incentives to see to it that competition there be reduced in favor of the firm in which it holds interest. See *Tunis Bros. Co. v. Ford Motor Co.*, 823 F.2d 49, 50-51 (3d Cir. 1987) (finding sufficient evidence for jury to find termination of dealership was in conspiracy with another dealership in which refuser held interest).

<sup>204</sup> Though closely related, this refusal is analytically distinct from the refusal discussed in this section, as they are neither sufficient nor necessary for each other.

<sup>205</sup> *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 456-61 (3d Cir. 1998).

<sup>206</sup> *Id.* at 472-75.

<sup>207</sup> *Id.* at 478-79. For similar cases of conspiring firms putting pressure on their supplier to stop dealing with their rival, see *Toledo Mack Sales, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225-26 (3d Cir. 2008) (keeping alive a Section 1 claim upon finding that refusal was due to joint pressure from refusee's rivals); *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1380 (3d Cir. 1992) (same). Note that refusals committed in agreement with the refusee's rival do not necessarily mean they were urged by the refusee's rival, as it is unclear where the idea of refusal came from. See *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420 (5th Cir. 2010) (dismissing a horizontal restraint claim for failure to allege refusee's rivals as the source of price restraint). Even if the idea came from the refusee's rival, it is entirely possible the refusal

conspiracy among those urging a refusal, though it may show the forceful nature of the urging, is not necessary to find anticompetitive intent. In *Bowen v. New York News, Inc.*, a newspaper company, which had the largest newspaper circulation in the United States, stopped using most of its independent distributors upon the request by its franchise distributors that distributed only the company's papers.<sup>208</sup> Condemning the refusal under Section 1 of the Sherman Act, the Second Circuit found that the refuser's switch of distribution methods was not made independently but in vertical conspiracy with the franchise distributors whose intent was to "cut off the independent [distributor]s' source of supply, thus excluding [them] as competitors."<sup>209</sup>

In *Hite Beer II*, a beer brewer's termination of a distributor was found unfair under Article 23 of the MRFTA when the termination was urged by an association of the brewer's distributors that did not like the refusee's discounting practice and there was no independent business justification found credible.<sup>210</sup> *Sulfuric Acid* involved multiple refusers who were not conspiring with each other but were being urged by the same group of distributors to stop dealing with a new distributor.<sup>211</sup> The refusers, together accounting for 41% of domestic sulfuric acid production, complied with the request by terminating the new distributor in the middle of their contracts with it, and these refusals were found unfair under Article 23.<sup>212</sup> In this line of cases, the key issue has been whether the urging by the refusee's rivals had the effect of substituting their plan of exclusion for the refuser's independent judgment to the contrary.

The key issue remains the same when it is a single rival of the refusee, rather than multiple rivals, that urges the refusal. In *Harold*

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was willingly agreed to based on the refuser's independent judgment.

<sup>208</sup> 522 F.2d 1242, 1246-47 (2d Cir. 1975).

<sup>209</sup> *Id.* at 1256-57. A refusal to deal "in response to" complaints by the refusee's rivals does not establish a vertical conspiracy since the rivals can be an "important source of information" on which the refuser is free to rely to make independent decisions, including termination of the refusee. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 785-86 (1984). For refusals urged by the refusee's rivals that avoided antitrust liability, see *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 452 (7th Cir. 2007) (finding evidence insufficient to establish either a horizontal boycott or vertical price-fixing); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 109, 113 (3d Cir. 1980) (attributing a termination to refusee's failure to provide adequate service and "pervasive trademark violations," rather than complaints by its rivals).

<sup>210</sup> Seoul High Court [Seoul High Ct.], 2005Nu2744, March 27, 2006, § 3.Da. (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 2006Du9924, Aug. 31, 2006 (S. Kor.).

<sup>211</sup> Seoul High Court [Seoul High Ct.], 99Nu3999, Oct. 13, 1999, § 1.Ga. (S. Kor.).

<sup>212</sup> *Id.* at §§ 1, 2.Da. *See also* KFTC 2006-177, 2005GwangSa4184, (*Jinro Ballantines*), 4185, § 2 (condemning liquor importers' refusals to sell to distributor as urged by refusee's regional competitors).

*Friedman Inc. v. Thorofare Markets, Inc.*, the Third Circuit declined to throw out a Section 1 claim against a shopping mall's refusal to extend a lease for a supermarket at the mall.<sup>213</sup> The court noted that the mall's refusal was "not an independent decision on its part" but rather was due to a rival supermarket's exercise of its exclusivity clause in its lease agreement with the refuser, and held that a trial was necessary to determine if the exclusivity clause was an unreasonable restraint of trade.<sup>214</sup>

If a rival of the refusee has substantial market power, it needs no contractual right to induce a refusal. In *Toys "R" Us, Inc. v. FTC*, a national toy retailer successfully urged ten major toy makers, accounting for 40% of the market, to cease selling their popular toys to warehouse-type discounters.<sup>215</sup> The Seventh Circuit reasoned that since these refusals were contrary to the toy makers' independent desire to diversify their distribution channels, the retailer must have had sufficient market power to force refusals upon the toy makers.<sup>216</sup> Therefore, the court said, the FTC could have reasonably found that the refusals had the purpose of insulating the national retailer from price competition posed by its discounting rivals.<sup>217</sup>

In *Korea Telecom*, the KFTC showed similar suspicion to a refusal urged by a dominant rival of the refusee. There, a phonebook company with an 83% market share, which had been separately listing phone numbers serviced by two companies, one serving 98.2% and the other 1.8% of the phone users, refused the request by the small company to consolidate the lists.<sup>218</sup> The KFTC found that Korea Telecom, being the second largest shareholder of the refuser used its leverage to impose its objection to the request on the refuser, and held that the refusal had the

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<sup>213</sup> *Harold Friedman Inc. v. Thorofare Mkts. Inc.*, 587 F.2d 127, 130-31, 144 (3d Cir. 1978).

<sup>214</sup> *Id.* at 142-44.

<sup>215</sup> *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

<sup>216</sup> *Id.* at 937-38.

<sup>217</sup> *Id.* See also *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189-90, 196-97 (3d Cir. 2005) (finding an exclusionary intent under Section 2 in dominant artificial teeth supplier's exclusive dealing policy which caused its dealers to refuse to deal with supplier's rivals). A refusal following a complaint by the refusee's rival may still lack anticompetitive intent if the rival lacked leverage over the refuser or if there was independent business justification. See *Blankenship v. Herzfeld*, 661 F.2d 840, 844-45 (10th Cir. 1981) (finding distributor termination following a rival's complaint as independently decided on the ground the rival held no leverage on the refuser); *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988) (finding distributor termination following a rival's complaint as independently decided based on refusee's "erratic purchases and refusal to stock [a full line of] inventory").

<sup>218</sup> KFTC 2001-043, 2001DokJum0265, §§ 1, 2.Ga.

unfair purpose of denying the refusee nondiscriminatory access to the popular phonebook.<sup>219</sup>

Obviously, the refuser must possess some market power for its refusal to have a reasonable prospect of foreclosure, without which no exclusionary intent may reasonably be inferred. In *Business Electrics Corp. v. Sharp Electrics Corp.*, an electronic calculator maker terminated a dealer after being repeatedly urged to do so by a rival dealer, and the refusal was held to be subject to the rule of reason.<sup>220</sup> In *Electrics Communications Corp. v. Toshiba American Consumer Productions Inc.*, the Second Circuit applied the rule of reason to a dealer termination, holding that even if a rival of the terminated dealer coerced the termination, the challenge could not succeed because there were other large competitors in the refuser's market.<sup>221</sup> The Supreme Court of Korea similarly recognized the necessity of market power in *G-Market*.<sup>222</sup> In this Article 3-2 case, the Court declined to find the requisite unfairness in seven retailers' refusal to sell through an online website as urged by the website's rival, pointing out the refusers' combined market share amounted to a meager 0.24%.<sup>223</sup>

These cases show that when (i) a firm has such bargaining power vis-à-vis its partner that the partner has no choice but to do the firm's bidding and (ii) the firm's partner has such market power vis-à-vis a rival of the firm that the partner's refusal to deal with the rival would effectively exclude the rival from competition, such refusal by the partner as urged by the firm tends to be ascribed anticompetitive intent in the United States and Korea.

### C. Indicating Factor 3: Refusal to Deal That Blocks Entry to the Refuser's Market

A monopolist's discrimination against a partner for its decision to compete with the monopolist has been called "the essential feature of the

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<sup>219</sup> *Id.* at §§ 1, 2.Ga.-Na. See also Seoul High Court [Seoul High Ct.], 2003Nu1709, (*DuPont Korea*), Nov 25, 2004, § 2.Da.-Ra. (S. Kor.) (finding unfair intent under Article 23 in refusal to supply critical input, as urged by the refusee's rival that was major customer of the refuser), *aff'd*, Supreme Court 2005Du746, May 27, 2005 (S. Kor.); Seoul High Court [Seoul High Ct.], 2006Nu30777, (*UK ChemiPharm*), Dec. 20, 2007, § 2.Da (S. Kor.) (same), *aff'd*, Supreme Court [S. Ct.], 2008Du1474, May 15, 2008 (S. Kor.).

<sup>220</sup> *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726-27 (1988).

<sup>221</sup> *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245-46 (2d Cir. 1997).

<sup>222</sup> Supreme Court [S. Ct.], 2008Du16322, May 10, 2011 (S. Kor.).

<sup>223</sup> *Id.* at § 3.

refusal-to-deal cases.”<sup>224</sup> One might argue that refusals that thwart entry should not be treated any differently from refusals that eliminate an existing rival, since in both cases the market is left with one less competitor than without the refusal.<sup>225</sup> Still, refusals that block entry warrant particular caution due to its unique potential to disrupt the competitive process at the fundamental level. In general, competition assumes multiple firms participating in a market and consumers choosing a product that serves their interest best. Typically, firms that make popular products survive and grow and those that do not struggle and leave the market. When a refusal effectively deprives a firm of its *day in market*, however, consumers do not get to *vote* on what the firm had to offer, and the classic story that modern market-based societies have come to recognize by the name of competition never gets told. Considering the critical importance of entry to the viability of the competitive process, it is not surprising that heightened scrutiny has been applied to entry-blocking refusals both in the United States and in Korea.<sup>226</sup>

In *Otter Tail Power Co. v. United States*, the power company’s refusal to wheel or sell electric power at wholesale to municipalities effectively ran aground the municipalities’ plans to enter retail electric power markets, and the refusal was ascribed the intent to maintain monopolies in those markets.<sup>227</sup> In *E. Dental Corp. v. Isaac Masel Co.*, a manufacturer of orthodontic products stopped supplying a distributor after the distributor had begun making elastics in competition with the manufacturer.<sup>228</sup> The court found a reasonable jury could conclude that the intent of the manufacturer was to leverage its monopoly on the refused product to drive the distributor out of the elastics market. This finding was sufficient for the court to deny the manufacturer’s summary judgment motion on the distributor’s Section 2 claim.<sup>229</sup>

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<sup>224</sup> *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 377 (7th Cir. 1986).

<sup>225</sup> Harm suffered by individual refusees may be even worse in the latter situation due to sunk costs and loss aversion.

<sup>226</sup> The presumption of anticompetitive intent in entry-blocking refusals would disappear if the refuser neither currently operates nor intends to join the market in the foreseeable future, as there is no apparent anticompetitive benefit to the refuser in reducing competition there.

<sup>227</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368-72, 377-79 (1973).

<sup>228</sup> *E. Dental Corp. v. Isaac Masel Co.*, 502 F.Supp. 1354, 1357-58 (E.D. Pa. 1980).

<sup>229</sup> *Id.* at 1359-62. Approaching these refusals from the perspective of the monopoly leveraging theory is less helpful because the theory as applied to refusals to deal – whether a monopolist may refuse to deal in a market where it holds monopoly power to obtain a competitive advantage in another, but not a second monopoly, without violating Section 2 of the Sherman Act – is of uncertain validity. The theory has its roots in *United States v. Griffith*, where the Supreme Court said “the use of monopoly



Korean courts and the KFTC reveal the same tendency of inferring anticompetitive intent from a refusal that blocks entry to the refuser's market. In *Hanil*, the Seoul High Court noted that the pharmaceutical company's refusal to supply its exclusive items would effectively prevent its rival from performing any contract that involves the company's exclusive items, and from this effect inferred the requisite unfair intent under Article 23 of the MRFTA.<sup>230</sup> In *Yeha Media*, the KFTC struck down under the same provision a dominant publisher's termination of a distributor that tried to compete with it by selling reference materials of its own production.<sup>231</sup> Noting that the termination would effectively eliminate the distributor from the reference book market, the KFTC found exclusionary intent on the part of the publisher.<sup>232</sup>

Even if the refuser is not currently operating in the market that it is trying to shield from entry, so long as it has plans to enter the market in the foreseeable future, its entry-blocking refusal tends to be ascribed an anticompetitive motivation. This kind of refusal is common in a natural monopoly market where efficiency demands a single firm to take the entire market. In *Fishman v. Estate of Wirtz*, the first buyer group that reached an agreement to buy a professional basketball team subject to approval by the National Basketball Association ("NBA") lost the deal to another group.<sup>233</sup> A member of the second group that controlled the stadium at which the team had been playing for years refused to lease the facility to the first group.<sup>234</sup> Since there was no adequate alternative to the

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power . . . to gain a competitive advantage . . . is unlawful" under Section 2 of the Sherman Act. 334 U.S. 100, 107 (1948), *overruled on other grounds by* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The problem with this dictum (Griffith was a conspiracy case) is that it exceeds the literal reach of Section 2, which prohibits only monopolization, attempted monopolization, and conspiracy to monopolize. 15 U.S.C.A. § 2 (2009). The Supreme Court recognized this gap in *Copperweld*, where it said the Sherman Act "leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to Section 1 liability." *Copperweld Corp.*, 467 U.S. at 775. A circuit split followed: on the one hand, there are Second and Sixth Circuits that take the Griffith dicta seriously, *see Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 284 (2d Cir. 1979), & *Kerasotes Mich. Theatres, Inc. v. Nat'l Amusements, Inc.*, 854 F.2d 135, 137 (6th Cir. 1988); on the other hand, there are Ninth, Third, and Seventh Circuits, *see Ala. Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991), *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992), & *Schor v. Abbott Labs.*, 457 F.3d 608, 611-12 (7th Cir. 2006).

<sup>230</sup> Seoul High Court [Seoul High Ct.], 94Gu34120, Dec. 14, 1995, § 2.Da. (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 96Nu2019, May 6, 1996 (S. Kor.).

<sup>231</sup> KFTC 2006-058, 2005KyungChok2293, § 2.

<sup>232</sup> *Id.*

<sup>233</sup> *Fishman v. Estate of Wirtz*, 807 F.2d 520, 525-29 (7th Cir. 1986).

<sup>234</sup> *Id.*

stadium, the refuser effectively blocked the refusee's entry to, and thus allowed its group to take, the local market for the presentation of live professional basketball.<sup>235</sup> These circumstances led to the finding of exclusionary intent and antitrust liability on the part of the refuser's group under both Sections 1 and 2 of the Sherman Act.<sup>236</sup>

In Korea, this kind of refusal has been frequently found in bidding situations where a single winner takes the entire project.<sup>237</sup> In *KAI*, a contractor was chosen through an open tender by a government research organization as a preferred partner to develop a multi-purpose satellite. However, due to the second preferred partner's refusal to supply essential components that go into the mainframe of the satellite that were within its exclusive expertise, the contractor lost the 36.1 billion Korean won project to the second preferred partner.<sup>238</sup> Since the refuser's intent in blocking the rival's entry was to extend its component monopoly to the satellite market, the KFTC said, the refusal was unfair under Article 23 of the MRFTA.<sup>239</sup> An entry-blocking refusal was struck down in a non-bidding situation in *Tyco Healthcare Korea*, where a dominant medical device company stopped selling its liver cancer treating equipment to a distributor, after learning that the distributor developed similar equipment for treating uterine cancer.<sup>240</sup> The KFTC noted that the company itself had been planning to enter the uterine cancer market for some time, and found that the company's intent in the refusal was to punish the distributor for entering that market where it would compete with the company in the near future.<sup>241</sup>

So far the analysis has focused on several factors that signal the presence of anticompetitive intent in a single-firm refusal. Now, the

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<sup>235</sup> *Id.* at 536, 539-41.

<sup>236</sup> *Id. But cf. Mid-Texas Commc'ns Sys. v. AT&T*, 615 F.2d 1372, 1389-90 (5th Cir. 1980) (ordering a new trial because the jury was not instructed to consider the effect of regulation on a monopolist's refusal that blocked a rival's entry to a market monopolist when it wanted to serve itself).

<sup>237</sup> The U.S. jurisprudence typically deems a single tender insufficient to constitute an independent market. *See Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 367-68 (10th Cir. 1993) (calling a distributor's market definition - "the sale of a single product . . . to a single customer" - "fatal" to its Section 2 challenge to its termination). It is, however, not impossible to envision a bid project so large relative to the market size that its deprivation would impede the refusee's entry to the market.

<sup>238</sup> KFTC 2011-177, 2010BuSa0687, §§ 1.Ra., 2.Ga.

<sup>239</sup> *Id.* at § 2.Da.-Ra. *See also* KFTC 2006-221, 2005GyungChok2649, (*RITCO*), §2 (finding an unfair intent in refusing to supply essential input to bid winner, causing the bid to be awarded to it).

<sup>240</sup> KFTC 2008-186, 2006DokGaam0747, §§ 1-2.Ga.

<sup>241</sup> *Id.* at § 2.Da.

analysis turns to examine circumstances that point to the absence of such intent.

#### D. *Vindicating Factor 1: Refusal to Start Dealing*

The absence of prior dealing with the refusee is a strong vindicating factor. Its power of vindication would be near absolute when the refuser has not had a similar relationship with anyone in any related market. Even overlooking the obvious constitutional problem in forcing private persons to enter a market,<sup>242</sup> non-market participants have no apparent anticompetitive incentive to restrain market competition. The vindicating power seems still strong when the refuser is engaged in a related market but has not voluntarily participated in the market where the refusal took place. For instance, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, a local exchange carrier's refusal to allow network access to its rivals at cost was held to evidence no monopolistic intent because it had never provided such access to anyone prior to statutory compulsion.<sup>243</sup>

The vindicating effect is still ascertainable when one refuses to deal with a particular firm while dealing with others in the same market. In *RxUSA Wholesale, Inc. v. Alcon Laboratories, Inc.*, a drug wholesaler brought a Section 2 challenge against drug companies for refusing to sell their products to it while selling them to other wholesalers. The complaint was dismissed for failing to allege any prior course of dealing between the parties.<sup>244</sup> In *POSCO*, an Article 3-2 case, the Supreme Court of Korea

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<sup>242</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2591 (2012).

<sup>243</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V Trinko, LLP*, 540 U.S. 398, 407-11, 416 (2004). *Accord* In re Elevator Antitrust Litig., 502 F.3d 47, 48-54 (2d Cir. 2007) (dismissing a Section 2 claim against elevator makers' refusal to sell parts and tools necessary to service their elevators, on the basis of no prior relationship between the parties, instead crediting each refuser's "obvious commercial interests" in "assuring its own control over the maintenance of the elevators it markets, because maintenance is important in upholding the product's reputation for reliability and safety (no small considerations when it comes to elevators)"); *Covad Commc'ns Co. v. Bellsouth Corp.*, 374 F.3d 1044, 1049 (11th Cir. 2004) ("*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*.").

<sup>244</sup> *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 661 F.Supp.2d 218, 225, 228-29 (E.D.N.Y. 2009), *aff'd*, *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 391 Fed.App'x. 59 (2d Cir. 2010). An existing relationship would not make a difference if the new relationship demanded and refused were qualitatively different from the existing one. See, e.g., *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 922, 927-28 (2d Cir. 1980) (finding no anticompetitive intent in flight schedule publisher's refusal to list connecting flights in addition to direct flights for refusees, while listing both direct and connecting flights for refusees' competitors); *LaPeyre v. FTC*, 366 F.2d 117, 119, 121-22 (5th Cir. 1966) (finding no unfair purpose in equipment maker's refusal to sell its machines to its domestic lessees while selling them to foreign customers).

found no unfair intent in a hot coil producer's refusal to supply its downstream rival while it was supplying others, on the ground that the parties had no prior relationship and a mere declination to start dealing with a market entrant could not raise price or reduce output from their preexisting levels.<sup>245</sup> The same vindicating effect was observed in *HP Korea*, a case decided under Article 23 of the MRFTA.<sup>246</sup> There, a computer equipment distributor failed to deliver contracted equipment to a customer because the manufacturer refused to supply the equipment at the price requested by the distributor, citing its policy of limiting product discounts, ranging from 30 to 45%, to its established partners.<sup>247</sup> The policy was viewed reasonable because established partners had to make large quantity purchases and invest constantly in servicing the manufacturer's products, and accordingly, no unfair intent was found.<sup>248</sup>

On the flip side, a prior relationship often plays a crucial role in proving anticompetitive intent in a refusal to deal. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Supreme Court found that the skiing facility operator's termination of a successful joint venture with its rival indicated the operator's willingness to "sacrifice short-run benefits" in return for long-run exclusionary benefits expected from reduced competition in the market.<sup>249</sup> In *Hanil*, where a drug wholesaler's refusal to supply its exclusive items to a rival was found to be motivated by exclusionary intent, the Seoul High Court emphasized as an indication of such intent the wholesaler's deviation from its prior mutual supply relationship with the rival regarding pharmaceuticals falling within either party's exclusivity.<sup>250</sup> In *T-Broad Chonju*, unfair intent was found under Article 3-2 of the MRFTA partly because the cable company's refusal caused the program producer to lose its established viewers,<sup>251</sup> which it would not have had without its agreement with the cable company in the first place.

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<sup>245</sup> Supreme Court [S. Ct.], 2002Du8626, Nov. 22, 2007, § 2.Na.-Da. (S. Kor.).

<sup>246</sup> Seoul High Court [Seoul High Ct.], 2002Nu16612, Jan. 13, 2004 (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 2004Du2264, Jan. 13, 2006 (S. Kor.).

<sup>247</sup> *Id.* at § 1.Ga.-Da.

<sup>248</sup> *Id.* at § 4.Ga.

<sup>249</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985). *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), which held that exclusionary intent could reasonably be found in an equipment manufacturer's decision to stop selling its parts to those who would not also purchase its service, has also been read to support the necessity of prior dealing to finding anticompetitive intent in a refusal under Section 2 of the Sherman Act. *See In re Elevator*, 502 F.3d at 53-54 (quoting *Schor v. Abbot Labs.*, 457 F.3d 608, 614 (7th Cir. 2006)).

<sup>250</sup> Seoul High Court [Seoul High Ct.], 94Gu34120, Dec. 14, 1995, § 2.Da. (S. Kor.), *aff'd*, Supreme Court [S.Ct.], 96Nu2019, June 6, 1996 (S. Kor.).

<sup>251</sup> KFTC 2007-137, 2006SuhGyung2380, § 2.Da.

Although the absence of prior dealings is a strong vindicating factor, such absence does not automatically preclude a finding of anticompetitive intent in a refusal. *In re Elevator Antitrust Litigation*, a Second Circuit decision that refused to condemn elevator manufacturers' refusal to deal due to the absence of prior dealing between them and independent service providers,<sup>252</sup> is not easily reconcilable with *Lorain Journal*, a Supreme Court decision that found a Section 2 violation in the absence of prior dealing.<sup>253</sup> Even *Trinko*, the Supreme Court case from which the *In re Elevator* court derived its holding, impliedly acknowledged the continued validity of *Otter Tail*, a case that condemned a refusal in the absence of prior dealing.<sup>254</sup> The vindicating power of the absence of prior dealing is even weaker under Article 23 of the MRFTA. In *Jinro Ballantines*, the KFTC held that liquor importers' unconcerted refusals to supply a new wholesaler in the region were unfair despite the lack of any prior supply relationship because the refusals were due to the pressure from rival wholesalers<sup>255</sup> – one of the indicating factors introduced above. Under Article 23, even deviation from the refuser's practice with respect to those similarly situated to the refusee has been deemed sufficient to erase the vindicating aura of the absence of prior dealing between the parties.<sup>256</sup>

It has been argued that a refusal to deal with a rival deserves enhanced protection from antitrust liability because dealings between rivals tend towards the "supreme evil of antitrust: collusion."<sup>257</sup> This argument is particularly persuasive in the absence of an existing relationship between the rivals because if they are already dealing with each other presumably in a non-collusive manner, ordering the parties to continue the relationship is unlikely to significantly increase the risk of collusion. However, even in the absence of an existing relationship, the risk of collusion would be low if the parties compete for the entire market. In winner-take-all markets, exemplified by natural monopoly markets<sup>258</sup> or

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<sup>252</sup> 502 F.3d 47, 48-54 (2d Cir. 2007).

<sup>253</sup> Post-*Trinko* decisions support the continued validity of *Lorain Journal v. United States*, 342 U.S. 143 (1951). See, e.g., *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1297 (11th Cir. 2004).

<sup>254</sup> *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410 (2004).

<sup>255</sup> KFTC 2006-177, 2005GwangSa4184, 4185, §§ 1-2.

<sup>256</sup> See Seoul High Court [Seoul High Ct.], 2005Nu2744, (*Hite Beer II*), Apr. 27, 2006, § 3.Da.(3) (S. Kor.) (condemning a beer brewer's refusal to supply new wholesaler for being inconsistent with its practice with incumbent wholesalers), *aff'd*, Supreme Court [S. Ct.], 2006Du9924, Aug. 31, 2006 (S. Kor.).

<sup>257</sup> *Trinko*, 540 U.S. at 408.

<sup>258</sup> See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986).

exceptionally large bidding situations,<sup>259</sup> obligating competitors to deal with each other is unlikely to lead to collusion because such markets cannot be split and allocated among multiple parties.

In the alternative to the intent approach, which deems the absence of prior dealing as a proxy for the lack of exclusionary intent, consider taking the effect approach to a refusal to start dealing. All relationships, business or otherwise, involve relationship-specific investment that becomes of little use outside that particular relationship—e.g., equipment customized to service a particular product. Since this relationship-specific investment would not exist in the absence of an existing relationship, everything else being equal, a refusal to start dealing would be less likely to jeopardize the refusee's business than termination of an ongoing relationship and thus more likely to survive antitrust scrutiny under Article 23 of the MRFTA,<sup>260</sup> a provision that grants individualized injury independent significance apart from market-wide harm. This approach, however, would be less rewarding under other provisions that exclusively focus on the refusal's market-wide impact.<sup>261</sup>

#### E. *Vindicating Factor 2: Refusal to Deal with a Contract Breacher*

Perhaps the most straightforward way one can justify its refusal to deal is to show that the refusee is a poor partner undeserving of the refused relationship. The following sections will describe three types of partners that have been recognized in cases of the United States and Korea as those from whom a relationship may be justifiably withheld. The first of these is a breacher of a lawful contract.<sup>262</sup> Since a contract breach strongly suggests lack of trustworthiness, courts have been reluctant to find anticompetitive intent in refusals to deal with contract breachers.

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<sup>259</sup> See, e.g., KFTC 2011-177, 2010BuSa0687 (KAI). The bid should be large enough to constitute an independent market on its own; otherwise, forcing rivals to deal with each other can lead to bid rigging whereby projects are allocated among them.

<sup>260</sup> The same reasoning suggests that refusals to renew stand better chance of surviving Article 23 scrutiny than mid-term terminations because the reliance interest in continued relationships would be less in the former than in the latter. See Constitutional Court [Const. Ct.], 2006HunMa1033, (*Samsung Networks II*), Oct. 30, 2008, § 3.Na.(2) (S. Kor.) (supporting a lack of unfair intent with refusal's taking the form of nonrenewal rather than mid-term termination).

<sup>261</sup> Apart from its probative value to the intent and effect of a refusal in determining liability, prior dealings can also help the remedy phase by serving as a useful benchmark for damages or deal terms to be imposed. In the absence of prior dealings, terms of relationships the refuser has with the refusee's rivals may also provide useful guidance. See *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133 (9th Cir. 2004).

<sup>262</sup> Contract violations relating to an inability to make payments is left for the next section as most of these violations have their origin in poor performance, the topic of that section.

In the United States case, *Moore v. New York Cotton Exchange* a monopolist cotton exchange rejected an application to receive its quotations by another exchange. It did so on the grounds that the refusee's predecessor and its members had been convicted of running bucket shops<sup>263</sup> where, instead of transfers of stocks and commodities, bets were made on the price fluctuation of stocks and commodities. The Supreme Court held that the refusal was "entirely appropriate and legitimate" under Section 2 of the Sherman Act because the refusal was intended to protect the value of quotations from bucket shops, which were not only illegal but also prohibited by the contract the refusee would have entered into.<sup>264</sup> In the South Korean case *KBS*, no unfair intent was found under Article 23 of the MRFTA in a national broadcasting company's termination of an outside production company.<sup>265</sup> The Seoul Southern District Court found that the termination was justified by a number of contract violations by the production company, such as misappropriating funds received from the broadcasting company and making various false representations in a documentary film it produced for the broadcasting company.<sup>266</sup> Even government-authorized monopolists were allowed to refuse to deal with contract breachers. In *JU Network* and *Urban Gas*, both a monopolist mutual aid association statutorily established to protect consumers from harms of multi-level marketing and a government-regulated gas company that monopolized the regional gas supply market were held to lack unfair intent under Article 23 of the MRFTA. The respective courts concluded this by finding that the entities terminated their dealings with a multi-level marketer and a maintenance service provider, respectively, because the

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<sup>263</sup> 270 U.S. 593, 601-02 (1926).

<sup>264</sup> *Id.* at 602, 606. *See also* Golden Gate Acceptance Corp. v. Gen. Motors Corp., 597 F.2d 676, 678-79 (9th Cir. 1979) (holding dealer termination "justifiabl[e]" based on the dealer's breach of relocation and lease restrictions in contract).

<sup>265</sup> Seoul Southern District Court [Seoul S. Dist. Ct.], 2007GaHap2764, June 21, 2007, §§ 1.Sa, 2.Na. (S. Kor.).

<sup>266</sup> *Id.* at § 1. *See also* Constitutional Court [Const. Ct.], 2005HunMa818, (*Hyundai Motors*), Mar. 30, 2006, § 3.Na. (S. Kor.) (finding no anticompetitive intent under Article 23 in the nation's largest automaker's refusal to renew subcontractor based on the subcontractor's repeated contract violations); Supreme Court [S. Ct.], 2002Du332, (*Lotteria*), Mar. 10, 2006, § 2.Ra. (S. Kor.) (upholding under Article 23 the nation's leading fast food company's termination of franchisee for violating multiple provisions of franchise agreement). Refusals to deal in the franchise context occurring on or after November 1, 2002, have been subject to the Fair Franchise Transactions Act ("FFTA"), instead of the MRFTA. *See* Fair Franchise Transactions Act, available at [http://eng.ftc.go.kr/files/static/Legal\\_Authority/Fair%20Franchise%20Transactions%20Act\\_Aug%203%202007.pdf](http://eng.ftc.go.kr/files/static/Legal_Authority/Fair%20Franchise%20Transactions%20Act_Aug%203%202007.pdf) (last visited Feb. 20, 2014). Compared to the MRFTA, the FFTA imposes more restraints on franchisors' ability to terminate or limit supply to franchisees, *see* Articles 12-14, as the legislation is partly designed to level the playing field for franchisors and franchisees, *see* Article 1.

refusees had failed to properly account for their revenues or fees collected, thus violating their contracts with the entities.<sup>267</sup>

In fact, the vindicating power of the refusee's contract violation was such that even concerted refusals to deal, generally subject to stricter scrutiny than single-firm refusals, have been found to lack anticompetitive intent when preceded by such violation. In *Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, a purchasing cooperative of office supply retailers expelled one of its members, citing the member's failure to give notice as required by the cooperative's bylaw when the controlling stock ownership in the member had changed hands.<sup>268</sup> The U.S. Supreme Court noted that the bylaw could be a "means for monitoring the creditworthiness of [the cooperative's] members" and thus necessary to ensure the effective functioning of the cooperative, and held that the lower court's per se inference of "anticompetitive animus" from the expulsion of the member could not be justified.<sup>269</sup> Similarly, a concerted refusal to deal by several large Korean banks, which collectively controlled one out of every two ATMs in Korea, was upheld under Article 23 of the MRFTA. It was done so on the grounds that the presumption of anticompetitive intent in concerted refusals was sufficiently rebutted by the refusee bank's violation of an implied agreement not to use their joint ATM network for purposes other than to provide cash deposit and withdrawal services.<sup>270</sup>

For the refusee's contract violation to be a vindicating factor, however, the contract violated should not be an antitrust violation itself. When the violated contract is itself an antitrust violation, its anticompetitive intent gets imputed to the refusal employed in its furtherance. In *Osborn v. Sinclair Refining Co.*, a gasoline dealer agreed with an oil company to buy certain amounts of tires, batteries, and accessories of a particular brand as a condition of leasing service stations and buying gasoline from the company; when it failed to perform the condition, its lease and sales agreements were terminated.<sup>271</sup> The Fourth Circuit struck down the tie-in under Section 1 of the Sherman Act. However, on remand the lower court held that the termination was distinguishable from the illegal tie-in and declined to award damages

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<sup>267</sup> Seoul Central District Court [Seoul C. Dist. Ct.], 2006GaHap1133, (*JU Network*), Nov. 10, 2006, §§ 1, 2.Ma. (S. Kor.); Constitutional Court [Const. Ct.], 2006HunMa1083, (*Urban Gas*), Sept. 25, 2008, §§ 1.Ga, 4.Ma.(2) (S. Kor.).

<sup>268</sup> *Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 286-87 (1985).

<sup>269</sup> *Id.* at 296.

<sup>270</sup> Seoul High Court [Seoul High Ct.], 2002Nu1641, (*Hana Bank*), Oct. 23, 2003, §§ 1, 4 (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 2003Du14253, May 12, 2006 (S. Kor.).

<sup>271</sup> *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566, 568-69 (4th Cir. 1963).



caused by the termination.<sup>272</sup> On re-appeal, the Fourth Circuit held that the termination was also unlawful as it was based on the dealer's violation of an anticompetitive contract provision.<sup>273</sup> The court added generally that a refusal loses its *Colgate* protection when it becomes a deliberate tool in furthering a restraint of trade.<sup>274</sup> *Namyang Aloe*<sup>275</sup> involved a comparable situation, where a maker of aloe products terminated a distributor—driving it out of business—based on the distributor's violation of resale price and customer restrictions, which were subsequently condemned by the KFTC as violations of the MRFTA.<sup>276</sup> Emboldened by the KFTC's ruling, the distributor sought to recover profits it lost due to the termination.<sup>277</sup> The Seoul High Court denied the recovery saying it was the restrictions rather than the termination that were condemned by the KFTC.<sup>278</sup> The Supreme Court rejected this view, holding that the termination too violated Article 23 because its intent was to enforce unlawful trade restraints.<sup>279</sup>

Even when it is a unilateral policy, rather than a contract, that is violated, cases suggest that refusals based on violation of an efficiency-enhancing policy tend to avoid anticompetitive characterization. In *Morris Communications Corp. v. PGA Tour, Inc.*, a monopolist compiler of golf scores instituted a policy of requiring all who access its media center not to sell golf scores obtained there to non-credentialed third-parties.<sup>280</sup> Addressing a Section 2 challenge to the compiler's decision to withhold media center access from a company that openly resisted the policy, the Eleventh Circuit upheld the refusal. In this case, the court found that the

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<sup>272</sup> *Id.* at 570-71.

<sup>273</sup> *Id.* at 571-73.

<sup>274</sup> *Id.* at 573-75. *See also* *Sahm v. V-1 Oil Co.*, 402 F.2d 69, 70-72 (10th Cir. 1968) (finding it sufficient to allege a Section 1 claim against an oil company cancelled gas station's lease for not complying with vertical price fixing arrangement, which was per se unlawful at the time); *but cf.* *Norris v. Hearst Trust*, 500 F.3d 454, 466 (5th Cir. 2007) (holding that newspaper distributors terminated due to their refusal to participate in antitrust violations, did not suffer antitrust injury since it was neither consumer nor competitor of the refuser).

<sup>275</sup> Supreme Court [S. Ct.], 96Da54195, (*Namyang Aloe*), Apr. 22, 1997 (S. Kor.).

<sup>276</sup> Seoul High Court [Seoul High Ct.], 95Na46311, Nov. 15, 1996, § 1.Na.-Ra. (S. Kor.), *rev'd*, *Namyang Aloe*, 96Da54195.

<sup>277</sup> *Id.* at § 3.Ga.

<sup>278</sup> *Id.* at § 3.Na. At the time, Article 56 actions could challenge only practices already condemned by the KFTC. The amendment to MRFTA on December 31, 2004 removed this prerequisite. MRFTA, *supra* note 103.

<sup>279</sup> *Namyang Aloe*, 96Da54195, § 3.

<sup>280</sup> *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1290-92 (11th Cir. 2004).

intent of the refuser was to prevent its rivals from free riding on its investment in developing a “state-of-the-art” golf score compiling system.<sup>281</sup> RPM is another policy that frequently drives a refusal to deal. In *Callaway Golf Korea*, condemnation of a golf club importer’s termination of dealers violating its RPM policy was vacated on the ground that the importer was not afforded an opportunity to prove pro-competitive effects of its policy that may outweigh its anticompetitive effects, netting a gain to consumer welfare.<sup>282</sup>

The vindicating effect of a policy violation, however, appears to be weaker than that of a contract breach. While even monopolists are generally allowed to break off their relationships with contract breachers, firms may do the same with policy violators only if the efficiency gain from the policy would outweigh the exclusionary harm from the refusal.<sup>283</sup> One potential explanation is that the vindicating power of a policy violation relies almost entirely on the efficiency-enhancing nature of the policy in question. In contrast, the vindicating power of a contract violation draws not only on the contract’s lawful nature but also on the loss of trust caused by a promise being broken, which is absent in a violation of a unilaterally imposed policy. The credibility issue is not cured simply because the agreement violated happened to be unlawful.

Ironically, it is often when the unlawful agreement has come to an end that courts are brought in to penalize the refuser for *ending* the

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<sup>281</sup> *Id.* at 1290-92, 1294-96. *See also* *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188-91 (2d Cir. 1992) (upholding under Section 2 of Sherman Act a manufacturer’s termination of supply to a retailer for selling products to other retailers, irrespective of the manufacturer’s monopoly power, on the grounds that the no transshipment policy was to prevent counterfeiting and protect image and quality of its products from unapproved retailers).

<sup>282</sup> Supreme Court [S. Ct.], 2010Du9976, Mar. 10, 2011, §§ 1-2 (S. Kor.). When a policy is necessary for the efficient functioning of a lawful joint venture between competing firms, its violation may justify their concerted refusals. *See* *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.) (holding that agents of a van line lacked anticompetitive intent when they acted in concert not to deal with those unwilling to comply with van line’s exclusivity policy designed to prevent free-riding); Seoul High Court [Seoul High Ct.], 92Gu20257, (*Hankuk Super Chain*), June 24, 1993, § 2 (S. Kor.) (finding no unfair intent under Article 23 in a purchasing cooperative’s termination of a member for repeatedly violating policy essential to the functioning of the cooperative), *aff’d*, Supreme Court ([S. Ct.], 93Nu15663, Feb. 3, 1995 (S. Kor.)).

<sup>283</sup> *Compare* *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417-20 (5th Cir. 2010) (upholding refusal to sell based on the refusee’s resale price maintenance (“RPM violation”), on the grounds that the refusee failed to allege sufficient anticompetitive effects outweighing pro-competitive benefits) *with* Seoul High Court [Seoul High Ct.], 2011Nu10777, Apr. 19, 2012, § 2.Da. (S. Kor.) (striking down a refusal to supply based on the refusee’s RPM violation, on the grounds that the refuser failed to show sufficient pro-competitive benefits of the policy outweighing its anticompetitive effects).

unlawful agreement. One may argue that such condemnation simply compensates the refusee for the loss it suffers from the anticompetitive contract provision. A moment's thought, however, suggests that in the absence of the anticompetitive provision, the rest of the relationship would have been adjusted to compensate for the loss of benefits expected from the anticompetitive provision, or if that provision was what primarily drove the relationship, the relationship would not have been formed, which would mean the refusee did not lose anything to which it was otherwise entitled. This kind of windfall, and the accompanying risk of sandbagging – i.e., entering into a contract and suing later (when things do not go well) for the unlawful aspect of the contract which had been known to the plaintiff at the time the contract was entered into - may be avoided if the doctrine of unclean hands is accepted to deny the refusee the right to challenge the legality of an agreement to which it was a party. Yet, the U.S. Supreme Court expressly rejected this defense in a private antitrust suit, in favor of the reliance on separate, civil or criminal remedies,<sup>284</sup> and the Korean jurisprudence has yet to deny relief to the refusee on this ground.

Rejecting the defense of unclean hands is understandable when the attention shifts from the refusee's opportunistic act to its presumed lack of anticompetitive intent. Effective deterrence demands striking at the party deliberately attempting to restrain competition, not the one reluctantly agreeing to the restraint to benefit from the legitimate side of the relationship. To accept the defense of unclean hands in this context would only strengthen compliance with the unlawful restraint and thus encourage the refuser to incorporate such restraint in its future dealings. Rather, by condemning a refusal employed to enforce the restraint, courts can tackle the root cause of the problem: the refuser's intent to restrain competition.

#### F. *Vindicating Factor 3: Refusal to Deal with a Poor Performer*

A refusal to deal is also presumed to lack anticompetitive intent if the refusee is a poor performer. It is uncontroversial that the right to choose business partners based on their ability to perform is critical to competition on the merits. Accordingly, no truly performance-based refusal can be deemed to have anticompetitive intent, irrespective of any harm it may engender in the short run. Although performance is a vague term, it is not necessary to precisely define it in order to recognize poor performance. For instance, the refusee's inability to make timely payments is a fair ground for a performance-based refusal.

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<sup>284</sup> See *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138-40 (1968), *overruled on other grounds by* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Note, however, that the Court expressly refrained from deciding whether “truly complete involvement and participation in a monopolistic scheme could ever be a basis . . . for barring a plaintiff's cause of action.” *Id.* at 140.

In *Americom Distributing Corp. v. ACS Communications Inc.*, a headset distributor fell behind its payment obligation to the manufacturer and, without any notice to the manufacturer, cancelled a protective arrangement under which a bank would collect payments directly from the distributor's customers and pay the manufacturer before paying the distributor.<sup>285</sup> Shortly after learning of the cancellation, the manufacturer suspended and eventually terminated its supply to the distributor, and the termination was held sufficiently accounted for by the distributor's habitual failure to make timely payments, without the aid of the alleged conspiracy between the manufacturer and its new distributor.<sup>286</sup> In *KT SkyLife*, a television broadcasting station stopped sending standard and high definition signals to a satellite broadcasting station that had been receiving the signals for simultaneous rebroadcasting, citing the latter's failure to make required payments.<sup>287</sup> The Seoul Southern District Court found that the public nature of the broadcasting business notwithstanding, the refuser's willingness to resume transmission whenever the refusee has made its payments belied the alleged intent of the refuser to destroy the refusee's business or to achieve other unlawful ends.<sup>288</sup>

Besides a failure to make payments, there are other indications of poor performance. Poor judgment, such as throwing a long time customer and his son through a plate glass window,<sup>289</sup> is one example, but poor sales and promotion appear to be more common bases for performance-related terminations. In *Becker v. Egypt News Co., Inc.*, a monopolist wholesaler of a unique racetrack publication terminated a retailer for "poor promotion" of the publication and "poor condition of stands in the way of decals, signs, pamphlets, etc.," as well as declining sales while the attendance at the racetrack went up.<sup>290</sup> Opining that the retailer "deserved"

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<sup>285</sup> *Americom Distrib. Corp. v. ACS Commc'ns, Inc.*, 990 F.2d 223, 225 (5th Cir. 1993).

<sup>286</sup> *Id.* at 226. *See also* *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1247 (5th Cir. 1975) (finding no Sherman Act violation in the termination of a contractor when the contractor had a tendency to make tardy payments and its indebtedness to the refuser averaged \$127,000).

<sup>287</sup> Seoul Southern District Court [Seoul S. Dist. Ct.], 2011KaHap198, Apr. 12, 2011, § 1 (S. Kor.).

<sup>288</sup> *Id.* at § 3. *See also* Seoul High Court [Seoul High Ct.], 2001Nu4971, (*Hite Beer I*), Sept. 26, 2002, § 2.Da. (S. Kor.) (finding no unfair intent under Article 23 of MRFTA in a refusal to supply a distributor that failed to meet its obligations designed to ensure it pay off its debt to the supplier), *aff'd*, Supreme Court [S. Ct.], 2002Du11059, July 9, 2004 (S. Kor.); Constitutional Court [Const. Ct.], 2008HunMa497, (*Kyungnam Textile*), Feb. 25, 2010, § 3.Ga.-Na. (S. Kor.) (upholding textile company's termination of an exclusive distributor when the distributor had incurred substantial indebtedness to the refuser).

<sup>289</sup> *See* *Germon v. Times Mirror Co.*, 520 F.2d 786, 787 (9th Cir. 1975).

<sup>290</sup> *Becker v. Egypt News Co., Inc.*, 713 F.2d 363, 365 (8th Cir. 1983).

the termination, the Eighth Circuit found that the refuser's intent was not to drive a competitor out of the market but to protect its distribution right by choosing an efficient retailer for its area of responsibility.<sup>291</sup> In *Chosunilbo*, a newspaper publisher's refusal to renew a dealer was held to be performance-based because the dealer failed to take initiatives to increase stagnating sales during the five years it had been the exclusive dealer in the region, and even though the dealer delivered more copies than some other dealers, the dealer's delivery rate was lower than its neighboring dealers.<sup>292</sup>

Notwithstanding the abundance of cases upholding performance-based terminations, the vindicating effect of poor performance is unlikely to be as strong as that of a contract or policy violation discussed above because poor performance is harder to prove for its inherently subjective nature. The refusee usually disagrees that it performed so poorly as to warrant termination.<sup>293</sup> Performance is probably less blameworthy as well, as it is less likely to be intentional than a violation of a contract or policy. Few would perform poorly intentionally whereas breaching a contract or policy can often be a rational strategy, such as when detection is rare and the cost of compliance would exceed its benefit.<sup>294</sup>

Because of the inherent subjectivity involved, terminations claimed to be performance-based have often been second-guessed as to whether poor performance was a pretext disguising a true, anticompetitive intent. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the refuser claimed the termination of the joint ticket was to "disassociate itself from [] what it considered the inferior skiing services" offered by the refusee.<sup>295</sup> However,

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<sup>291</sup> *Id.* at 365, 367-70. *See also* Sargent-Welch Scientific Co. v. Ventron Corp. & Ventron Instruments Corp., No. 72 C 2330, 1979 WL 1588, at 2-3 (N.D. Ill. Feb. 16, 1979) (upholding a microbalance maker's termination of a distributor under Section 2 of the Sherman Act regardless of the maker's monopoly power, finding that the termination was due to sharp and steady decline in sales rather than tying enforcement).

<sup>292</sup> Seoul Central District Court [Seoul C. Dist. Ct.], 2009KaHap1948, Jan. 18, 2010, § 3 (S. Kor.).

<sup>293</sup> *See, e.g.*, Supreme Court [S. Ct.], 2003Da15501, (*Daejeon Expo*), Feb. 10, 2006 (S. Kor.). Here, a firm hired by a city to manage its science park was terminated for an inadequate number of visitors and poor maintenance of the park. *Id.* at § 1. The Supreme Court found that these were insufficient to justify termination because the city too contributed to the failure, and held that the refusee could recover from the city 40% of the total loss it had suffered. *Id.* at §§ 4-5.

<sup>294</sup> *See* Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) ("Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered . . . . To penalize such adjustments . . . is to discourage efficient reallocation of community resources.").

<sup>295</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 609-10 (1985).

this claim was belied by the refuser's willingness to associate with inferior products in other markets and also by the fact that the joint ticket did not prevent skiers from spending all their coupons on the refuser's allegedly superior facilities – which would result in a higher portion of profits for the refuser in the following years.<sup>296</sup> Pre-textual use of poor performance was also found in *Pasteur Milk*, where the Supreme Court of Korea vacated the lower court's judgment that upheld a dairy producer's refusal to approve a terminated dealer's transfer of dealership rights to a third party.<sup>297</sup> There, the court recognized that the terminated dealer had poor sales, missed one dealership meeting and one company-sponsored fieldtrip, and failed to follow a milk delivery protocol for a few customers.<sup>298</sup> However, the court viewed these missteps insufficient to preclude the finding of an unfair intent in the refusal to approve the dealership transfer, which was done on top of the unchallenged termination of the dealer.<sup>299</sup>

That being said, these cases are exceptions that prove the rule that, with neither jurisdiction recognizing an antitrust duty to deal with a poor performer, poor performance by the refusee goes a long way towards vindicating the innocent intent of the refuser.

#### G. *Vindicating Factor 4: Refusal to Deal with an Antagonistic Partner*

The last type of partner with whom refusals to deal tend to be upheld for lack of anticompetitive intent is a partner that antagonizes the refuser. One would assume, if not deem it necessary, that parties to a

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<sup>296</sup> *Id.* See also *Milsen Co. v. Southland Corp.*, 454 F.2d 363, 367-68 (7th Cir. 1971) (finding error in lower court's judgment that the termination of a franchisee was solely based on the franchisee's fee arrearage when a threat of termination for fee arrearage was selectively exercised to enforce the refuser's alleged price-fixing and tying arrangements).

<sup>297</sup> Supreme Court [S. Ct.], 97Nu19427, (*Pasteur Milk*), June 9, 2000, § 2 (S. Kor.), available at <http://www.asianlii.org/kr/cases/KRSC/2000/16.html> (last visited Feb. 2, 2014).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* On remand, it was found that the dealer's poor sales were partly due to the producer's cancellation of a promotion subsidy and there were extenuating circumstances regarding other failures. From these findings, the court inferred the refuser's intent was to punish a recalcitrant dealer, which was unfair under Article 23. See Seoul High Court [Seoul High Ct.], 2000Nu9221, June 28, 2001, § 4(2) (S. Kor.). See also Supreme Court [S. Ct.], 2001Du1444, (*Naray & Company*), Oct. 25, 2002, § 2 (S. Kor.) (finding that cutting off a paging service dealer's access to a electronic customer network was unfair under Article 23 because although the dealer failed to add new customers and fell behind on pager payments, the dealer's business depended on the access and there were less restrictive ways to collect payments); Daejeon High Court [Daejeon High Ct.], 98Na268, (*Livestock Feed*), May 27, 1999 (S. Kor.) (striking down dealership termination claimed to be performance-based, citing dealership's improved sales in recent months and promotion efforts).

voluntary commercial relationship get along with each other. When they do not, it is only natural they part ways, and the force of law should not be invoked to “weld together two business entities which have shown a propensity for disagreement, friction, and even adverse litigation.”<sup>300</sup> Antagonistic behavior is distinguishable from breach of contract or poor performance in that it implies no fault on the part of the actor, either the moral wrong of promise-breaking or simple incompetence. In fact, it is entirely possible that an antagonistic partner to one is a cooperative and helpful partner to another, probably because an antagonistic relationship is rarely attributable to actions of a single party. Thus, to the extent that an antagonistic relationship is traceable to the refuser’s wrongful conduct, its vindicating effect would diminish—often to a point weaker than that of the foregoing vindicating factors.

There are few signs that better illustrate an antagonistic relationship than a lawsuit between the parties. In *TRI, Inc. v. Boise Cascade Office Products, Inc.*, a customer told its supplier it would not buy any products made by a manufacturer founded by its former employee, and the supplier subsequently cut down its purchases from that manufacturer substantially.<sup>301</sup> Noting that the former employee had unsuccessfully brought race discrimination and defamation claims against the customer, the Eighth Circuit held that this lawsuit was a legitimate basis for the refusal.<sup>302</sup> The same result obtained in the unfair trade practices context in *High Tech Communications, Inc. v. Panasonic Co.*, where the court failed to find a single case in which “the federal courts, or the Federal Trade Commission held that a manufacturer’s *unilateral* decision to terminate sales to a distributor in retaliation for a lawsuit constitutes an unfair trade practice when there is no threat of actual monopolization.”<sup>303</sup> A narrow exception is that when a refusal is intended to hinder an ongoing lawsuit against the refuser, which unhindered is

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<sup>300</sup> *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 134 n.3 (5th Cir. 1979) (citation omitted).

<sup>301</sup> *TRI, Inc. v. Boise Cascade Office Prods., Inc.*, 315 F.3d 915, 916-18 (8th Cir. 2003).

<sup>302</sup> *Id.* at 917-19.

<sup>303</sup> *High Tech Commc’ns, Inc. v. Panasonic Co.*, No. 94-1477, 1995 WL 65133, at 3 (E.D. La. Feb. 15, 1995). *See also* *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 875, 889 (9th Cir. 1982) (holding that record distributors’ refusal to supply retailers after settling the retailers’ Robinson-Patman claim against it was legitimate because a continued relationship entailed litigation risk outweighing any benefit from the relationship); *House of Materials, Inc. v. Simplicity Pattern Co., Inc.*, 298 F.2d 867, 871 (2d Cir. 1962) (opining that business relationships need to be “reasonably harmonious” and thus a lawsuit between the parties may provide a “sound business reason” for termination); *accord* *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1358-59 (Fed. Cir. 1999).

likely to be successful, courts may in equity enjoin the refusal pending the lawsuit to protect the integrity of the judicial process.<sup>304</sup>

*Real Estate Network* is an Article 23 case that upheld a concerted refusal by a group of real estate agents directed at members of a rival group, where there were multiple lawsuits raging between the two groups.<sup>305</sup> The bad blood harkened back to when the founder of the rival group was a member of the refusing group.<sup>306</sup> While being a member, the founder encouraged fellow members to switch from an electronic real estate information network operated by the refusing group to an outside network.<sup>307</sup> As the switch caused a rift within the group, he and other like-minded members left the group to found the rival group.<sup>308</sup> Since the separation, members of these groups brought various lawsuits against each other.<sup>309</sup> The information network had since been spun off as an independent company.<sup>310</sup> But by using the control the refusing group still maintained over the network company, it effectively withheld access to that network from members of the rival group.<sup>311</sup> In view of the enmity exhibited between the two groups, the Seoul High Court found that the refusing group's withholding of the access was intended to protect the interest of its members from the rival group's encroachment.<sup>312</sup>

A refusal is particularly likely to be held to lack anticompetitive intent if the duration of the refusal is limited to the length of a lawsuit between the refuser and the refusee. In *Mutual Fund Investors, Inc. v. Putnam Mgmt. Co.*, a mutual fund investment group discharged an

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<sup>304</sup> Compare *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 728-29 (3d Cir. 1962) (enjoining pendente lite a refusal "calculated to frustrate [the refusee's] litigation") and *Milsen Co. v. Southland Corp.*, 454 F.2d 363, 365-67 (7th Cir. 1971) (enjoining pendente lite a franchisee termination that might "effectuate" anticompetitive practices) with *Orson, Inc. v. Miramax Film Corp.*, 836 F.Supp. 309, 310-12, 314 (E.D. Pa. 1993) (declining to order a movie distributor to keep licensing its films to a movie theater during the theater's antitrust lawsuit against the distributor, on the grounds that those films were not essential to the theater's business and the theater failed to show a likelihood of success of its antitrust claims).

<sup>305</sup> Seoul High Court [Seoul High Ct.], 2001Nu15209, June 24, 2004, § 2.Da. (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 2004Du8514, Mar. 30, 2007 (S. Kor.).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* But cf. Constitutional Court [Const. Ct.], 2006HunMa1033, (*Samsung Networks II*), Oct. 30, 2008, § 3.Na (S. Kor.) (finding no exclusionary intent in the termination of a subcontractor based on the refuser's lack of market power rather than the refusee's multiple lawsuits against the refuser).



employee for planning to found his own firm and, when he subsequently did found the firm, refused to deal with it and brought a successful state unfair competition action against it in state court to boot.<sup>313</sup> On the employee's Sherman Act challenge to the refusal, the Ninth Circuit pointed out that the refusal had lasted only during the pendency of the state action, after which the parties entered into a sales agreement.<sup>314</sup> The court held that since the refusal was to protect the company's sales network from potential exploitation, it was a "reasonable business practice unaccompanied by monopolistic or predatory intent."<sup>315</sup> *Woolim* is a comparable Article 23 case where an oil supplier's temporary refusal to deal during the pendency of a legal action was upheld for lack of unfairness.<sup>316</sup> There, the oil supplier, upon being notified by a distributor of its intent to switch suppliers, sought to enjoin the switch, arguing the notice was untimely.<sup>317</sup> Having suspended its supply while seeking the injunction, the supplier resumed its supply after the injunction was obtained.<sup>318</sup> In the view of the Seoul High Court, these facts supported neither the charge of abuse of superior bargaining power nor the charge of unfair interference with the distributor's business.<sup>319</sup>

An antagonistic relationship tends to vindicate a refusal of a charge of anticompetitive intent even when the antagonistic relationship does not involve adverse litigation between the parties. In *Fulton v. Hecht*, a greyhound breeder's testimony at a government hearing caused a dog track owner to lose the lucrative summer dates it had usually been awarded.<sup>320</sup> Subsequently, the breeder's contract with the dog track was not renewed, and the breeder challenged the nonrenewal under Section 2 of the Sherman Act.<sup>321</sup> The Fifth Circuit held that the track owner's retaliation did not establish its monopolistic intent because, while the testimony resulted in less profitable dates awarded to the owner, the owner would have received the same number of racing days with or without the testimony.<sup>322</sup> In *Chicken Franchise*, a chicken restaurant franchisor

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<sup>313</sup> *Mutual Fund Investors, Inc. v. Putnam Mgmt. Co.*, 553 F.2d 620, 623 (9th Cir. 1977).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 627.

<sup>316</sup> Seoul High Court [Seoul High Ct.], 94Gu39927, May 23, 1996, § 2.Da.-Ra. (S. Kor.), *aff'd*, Supreme Court [S. Ct.], 96Nu9003, Sept. 8, 1998 (S. Kor.).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at § 2.Da.

<sup>319</sup> *Id.* at § 3.Ra.

<sup>320</sup> *Fulton v. Hecht*, 580 F.2d 1243, 1245-46 (5th Cir. 1978).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 1247.

refused to renew a franchisee that led a protest against its policy of requiring franchisees to relocate and expand their operation.<sup>323</sup> The Constitutional Court held that the refusal violated neither the notification requirement in Article 13 of the Fair Franchise Transactions Act (“FFTA”) nor the principle of trust and good faith in Article 2 of the Civil Act.<sup>324</sup> Though the court’s discussion was focused on lack of substantial harm to the franchisee, the case lends support to the notion that the intent to disengage an uncooperative partner is generally not deemed unfair.<sup>325</sup>

Similarities notwithstanding, a difference between the two jurisdictions is revealed when the refusee’s antagonistic conduct was triggered by the refuser’s conduct that is not competition-restraining but still wrongful. In *NYNEX Corp. v. Discon, Inc.*, a remover of telephone equipment alleged that it was replaced with a competing service provider for not going along with the telephone company’s scheme to deceive regulators and defraud customers.<sup>326</sup> While recognizing the scheme’s potential impropriety, the Supreme Court nevertheless held that the termination could not injure market-wide competition since the telephone company already lawfully monopolized the telephone service market and the removal service market was competitive with no discernible barriers to entry.<sup>327</sup> The Court made it clear that absent some market-wide harm, improper reasons such as “nepotism,” “personal pique,” and even “pure malice” do not state a claim under the federal antitrust laws.<sup>328</sup>

The scope of the wrongs recognized under Article 23 of the MRFTA is broader. In *Pasteur Milk*, a milk distributor protested its supplier’s decision to have its distributors bear the loss it had caused by supplying spoiled milk.<sup>329</sup> Subsequently, the distributor was not renewed

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<sup>323</sup> Constitutional Court [Const. Ct.], 2009HunMa582, June 30, 2011, § 3.Ga. (S. Kor.).

<sup>324</sup> *Id.* at § 3.Na.-Da.

<sup>325</sup> *Id.* at § 3.Da. Article 13 of the FFTA has since been amended to require reasonable justification when refusing to renew a franchisee, but franchisee’s refusal to follow a contract term or policy customarily applicable to franchisees in similar situations is a valid basis for refusal. FFTA, Item 2, Clause 1, Article 13.

<sup>326</sup> *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 131-32 (1998).

<sup>327</sup> *Id.* at 136, 139.

<sup>328</sup> *Id.* at 136-37. *See also* *Balaklaw v. Lovell*, 14 F.3d 793, 796 n.7, 801 n.17 (2d Cir. 1994) (holding that even if hospital’s termination of anesthesiologist was an “economic vendetta” for the anesthesiologist’s “years of independent, reform-minded patient advocacy,” the termination was not a proper object of antitrust action since no market-wide harm was alleged); *Bay City-Abrahams Bros., Inc. v. Estee Lauder, Inc.*, 375 F. Supp. 1206, 1209-10, 1215 (S.D.N.Y. 1974) (holding that intent to retaliate for refusee’s discharge of personal friend was insufficient to make the refusal a Section 1 violation, since alternative products to the refuser’s were readily available).

<sup>329</sup> Supreme Court [S. Ct.], 97Nu19427, (*Pasteur Milk*), June 9, 2000, §§ 1-2 (S. Kor.), available at <http://www.asianlii.org/kr/cases/KRSC/2000/16.html> (last visited Feb.

and its request to transfer its distribution rights to a third party was rejected.<sup>330</sup> On remand from the Supreme Court to make further findings of fact regarding the intent of the transfer request rejection, the Seoul High Court found that the rejection was at least in part in retaliation for the distributor's protest of the supplier's spoiled milk supply and held the rejection unfair under Article 23.<sup>331</sup> The case shows that the MRFTA's view on protecting competition includes protecting individual market participants from practices that are inconsistent with competition on the merits, even if those practices have no market-wide impact.

#### H. *Cautionary Tale: Refusal to Deal in Switching Partners*

The indicative or vindicating nature of the factors introduced so far may seem obvious. However, not all indicating or vindicating factors that appear obvious *ex ante* turn out to be so. One example that points to the danger of jumping to conclusions without conducting a serious case survey is a refusal to deal in switching partners.

In the United States, there is a strong presumption that firms may choose and switch their business partners as they see fit.<sup>332</sup> To say once a firm has chosen a partner, it must stick with the same partner barring a for-cause termination or mutual release from the relationship does sound somewhat draconian. Indeed, partner switching has been deemed to lack anticompetitive intent whether the switch was to another existing partner<sup>333</sup> or to a new partner,<sup>334</sup> whether or not there was a pre-termination agreement between the refuser and the new partner,<sup>335</sup> and

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<sup>330</sup> *Id.*

<sup>331</sup> Seoul High Court [Seoul High Ct.], 2000Nu9221, June 28, 2001, § 4 (S. Kor.).

<sup>332</sup> *See* Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972) (per curiam) ("It is indisputable that a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed prior to the seller's termination of A.").

<sup>333</sup> *See, e.g., id.* at 1094-95 (finding no violation of Section 1 of the Sherman Act in replacing dealer with others already on its distribution network); Alpha Distrib. Co. of Cal., Inc. v. Jack Daniel Distillery, 454 F.2d 442, 446-47, 454 (9th Cir. 1972).

<sup>334</sup> *See, e.g.,* Chandler Supply Co. v. GAF Corp., 650 F.2d 983, 989 (9th Cir. 1980) (finding switch to new dealer "merely an attempt to improve its distribution system by eliminating a dealer considered ineffective and replacing him with a more efficient one"); Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1246-49 (5th Cir. 1975).

<sup>335</sup> *See, e.g.,* A. H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1305-07 (9th Cir. 1981) (subjecting vertical conspiracy between refuser and new dealer to remove current dealer to the rule of reason and saying the "right to suggest or initiate dealership changes does not reside exclusively in the manufacturer" because the "economic impact

even when the switch implicated bad intent<sup>336</sup> or a concerted refusal.<sup>337</sup> Korean jurisprudence, on the other hand, does not recognize partner switching as an independent vindicating factor, whether the switch was to an existing partner<sup>338</sup> or to a new one.<sup>339</sup> Even in those switching cases that lack unfair intent, the courts tended to rely on other reasons to vindicate the refusal, such as the refuser's lack of market power<sup>340</sup> and the refusee's contract violations<sup>341</sup> or other bad behavior,<sup>342</sup> rather than on the fact that the refusee was replaced with another company.

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resulting from a change in distributors is not altered merely because the dealer initiated contract or actively sought the change, provided the manufacturer ultimately makes the decision based on its independent business judgment"); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 244 (6th Cir. 1982) ("An agreement promising a new dealer the old dealer's business is presumptively reasonable.").

<sup>336</sup> See, e.g., *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 131-32, 136-39 (suggesting that, given the importance of "freedom to switch suppliers" to the competitive process, to the extent the complained of practice offended "proper standards of business morality," it should find its remedy in "unfair competition laws, business tort laws, or regulatory laws," but not antitrust laws) (internal quotation marks omitted); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 803-04, 809 (6th Cir. 1988) (upholding a switch to a distributor in which the refuser's executive held interest, on the grounds that "inherent conflicts of interest and self-dealing" did not amount to "illicit objectives" under the Sherman Act) (internal quotations marks omitted).

<sup>337</sup> See, e.g., *Cartrade, Inc. v. Ford Dealers Adver. Ass'n of S. Cal.*, 446 F.2d 289, 292-94 (9th Cir. 1971) (upholding joint switching of partners based on lack of exclusionary intent); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 77-80 (9th Cir. 1969); but see *Taxi Weekly, Inc. v. Metro. Taxicab Bd. of Trade, Inc.*, 539 F.2d 907, 911-13 (2d Cir. 1976) (finding sufficient evidence of exclusionary intent in taxi fleet owners' collective switching of trade paper).

<sup>338</sup> See, e.g., KFTC 2004-105. 2004GyungChok0433, § 2 (*Amore Pacific*) (condemning under Article 23 of the MRFTA the nation's leading cosmetics company's termination of a distributor to give exclusivity to another, on the grounds that the termination was in retaliation for the refusee's price-cutting).

<sup>339</sup> See, e.g., Seoul High Court [Seoul High Ct.], 94Ra187, Jan. 12, 1995 (S. Kor.) (*SK Energy*). In *SK Energy*, an operator of thirty-seven gas stations that had been the exclusive distributor of a supplier for over thirty years switched to a new supplier when the new supplier offered to help the operator pay off all its debt to the old supplier on top of offering a significant amount loan. *Id.* at § 1.Ga-Na. The Seoul High Court held that the new supplier unfairly lured a competitor's partner with an exorbitant amount of financial assistance in violation of Article 23 of the MRFTA, and since the switch was in furtherance of this illicit scheme, it was invalid. *Id.* at § 1.Na. The court added that the switch also violated the principle of trust and good faith in Article 2 of the Civil Act because the operator made no attempt to find a way to continue the relationship, despite the fact that the constant funding support it had received from the old supplier helped it grow from operating two service stations to thirty-seven. *Id.*

<sup>340</sup> See, e.g., Constitutional Court [Const. Ct.], 2005HunMa1005, (*Samsung Networks I*), Oct. 30, 2008, § 3.Ga. Da. (S. Kor.) (upholding a subcontractor substitution based on the refuser's lack of market power).

<sup>341</sup> See, e.g., Constitutional Court [Const. Ct.], 2005HunMa818, (*Hyundai*

Put differently, from the Sherman Act's market-oriented perspective, partner switching is presumed to lack anticompetitive intent since it matters little which particular firm gets the business so long as someone gets it. On the other hand, from the victim-oriented perspective of Article 23 of the MRFTA, partner switching that excludes the refusee from a market needs an efficiency justification to rebut the presumption of unfair intent.<sup>343</sup> Consistent with what has been seen in other kinds of refusal-to-deal cases, partner switching cases show that the broader meaning of competition read into Article 23 often allows the Article to reach practices that fall outside the purview of Section 2 of the Sherman Act and Section 5 of the FTC Act.<sup>344</sup>

#### V. CONCLUSION: INDISPENSABILITY OF INTENT ANALYSIS

Single-firm refusals are not per se lawful in any major jurisdiction, despite their virtually universal presence in business transactions, their seemingly passive nature, and the rather intrusive consequence of holding them unlawful. Since courts are generally reluctant to impose an affirmative duty to engage in certain transactions on private parties, when a private firm is found liable for refusing to deal, the court will tend to require that the refusal possess some reasonably attainable anticompetitive purpose. The probable or actual effect of the refusal is a valuable indicator of the refusal's intent. However, to hinge the legality of the refusal entirely on its effect risks transmuting the ultimate mission of antitrust laws – safeguarding free competition from deliberate attempts to undermine it – to conscripting private entities to transact with each other to affirmatively enhance social welfare.

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*Motors*), Mar. 30, 2006, §§ 3-4 (S. Kor.) (finding no unfair intent in a subcontractor's switching based on the refusee's multiple contract violations).

<sup>342</sup> See, e.g., Constitutional Court [Const. Ct.], 2001HunMa381, (*SI*), June 27, 2002, §§ 2, 3.Na. (S. Kor.) (upholding a subcontractor's switching based on the refusee's corrupt business practice).

<sup>343</sup> A similar difference is observed in the employment context: a non-arbitrary cause is generally required to terminate an employee in Korea, see Articles 23-24 of the Labor Standards Act, whereas employment is generally at will in the United States, see, e.g., Cal. Labor Code § 2922 (2011).

<sup>344</sup> Although neither the text of Section 5 nor the cases decided thereunder limit the section's jurisdiction to practices threatening market-wide injury, in practice, the section is still a far cry from a legitimate business morality statute. As of late, it has been argued that the FTC should apply Section 5 to a broader array of practices, but even those who argue for such expansion would limit the unfair method of competition authority to situations where the "health of competitive process" is threatened. See Kovacic & Winerman, *supra* note 99, at 945. Even the UDAP portion of Section 5 has shifted its focus from the immorality of a practice to substantial consumer harm threatened by it, see *id.* at 946, making the portion largely irrelevant to refusals to deal.

Then, what is this anticompetitive intent that is necessary to condemn the refusal? The review of the refusal-to-deal jurisprudence of the United States and Korea in this article shows that condemnation of a refusal under each nation's major antitrust provisions requires different types of anticompetitive intent, ranging from the narrow monopolistic intent under Section 2 of the Sherman Act to the broad arbitrary intent under Article 23 of the MRFTA.

This article's comparative review has led to several facts that support and several facts that undermine the finding of anticompetitive intent in a refusal both in the United States and in Korea. First, when a refusal is directed at a rival's partner, the rival's intent likely is to punish the partner for, and discourage others from, dealing with the rival and thereby to deprive the rival of its suppliers and customers. The second indicating factor this article found is often the consequence of the first factor—a refusal as urged by a rival of the refusee. Here, courts look at whether the pressure put on the refusing firm, which would be proportionate to the leverage the rival has on such firm, was so strong as to substitute the rival's exclusionary intent for the refusing firm's independent business judgment. Finally, the requisite anticompetitive intent was frequently found when a firm's refusal to deal blocked another firm's entry to the market that the refuser operated in or had plans to enter into in the foreseeable future.

The most prominent vindicating factor this article discusses is the absence of prior dealing between the refuser and refusee. Although termination of an existing relationship does not by itself indicate anticompetitive intent, termination of a voluntary relationship that had arisen in a competitive market is presumed to involve a profit sacrifice and thus requires an explanation. On the other hand, in the absence of an ongoing relationship, the refusee is put in a difficult position where it has to show that the refuser would have accepted the new relationship but for the alleged intent to foreclose the refusee. It was also discussed that courts tend to find no anticompetitive motivation in a refusal when the refusee violated a lawful contract or an efficiency-enhancing policy or performed poorly as evidenced by failure to make payment, poor sales, or lack of promotion efforts. The vindicating power of poor performance appears relatively weaker because poor performance, due to its inherently subjective nature, is prone to be used pre-textually. Both jurisdictions are reluctant to find anticompetitive intent when the refusee is antagonistic to the refuser (e.g., when they are adverse parties to a lawsuit), although the jurisdictions take somewhat different views when the bad relationship is traceable to some conduct by the refuser that is arbitrary but causes no market-wide harm.

The question being asked throughout this article is what is the requisite intent that would condemn a single-firm refusal under antitrust laws and what facts tend to establish, or defeat, such intent. Intent analysis

is not new in antitrust law,<sup>345</sup> but its role has diminished gradually, giving way to effect analysis. With the advent of sophisticated analytic tools, the empirical nature of effect analysis helps it gain even more traction while intent analysis, due to its less tangible nature, faces increasing skepticism regarding its utility and potential for progress.<sup>346</sup> To some extent, this skepticism is warranted since it is easier to ascertain a refusal's effect than its intent, and the ease of adjudication is beneficial as it lowers administration costs and makes the judicial process more transparent and more predictable. Nevertheless, these benefits of effect analysis do not change the fact that effect alone, however destructive to competitors or competition, are insufficient to turn a single-firm refusal with no anticompetitive intent into an antitrust violation. This is not intended to deny that these effects may at times be sufficient to establish the requisite anticompetitive intent in the absence of convincing business justification. But rather to point out the danger of elevating effect analysis to a point where it alone is deemed sufficient to condemn a practice that, at its core, consists of nothing more than saying no to a particular business offer.

It has been suggested that the legitimacy of a business practice under antitrust laws should depend on its impact on consumer welfare.<sup>347</sup> This suggestion, however, can be misleading if one forgets that protecting competition and protecting consumer welfare are the opposite sides of the same coin. As soon as one decides to pursue the latter goal disassociated from the former, the one is forced to set some baseline welfare to which consumers are entitled. Should the baseline be the status quo? Does this mean consumers ten years from now would be entitled to the same level of welfare regardless of any innovations that may occur in the meantime? If the baseline should be ratcheted up in some fashion, can this be done without imposing the preposterous legal duty to innovate on private businesses? At the end, the one cannot help but arrive at the process-oriented conclusion that consumers are entitled to whatever benefits that can be derived from a competitive market *and no more*. Then, it becomes clear that protecting this competitive process is what is meant by protecting consumer welfare. As applied to refusals to deal, this is to say a

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<sup>345</sup> See, e.g., Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657 (2001).

<sup>346</sup> See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.) ("Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition . . . Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation."); Scott A. Sher & Scott D. Russell, *Adding Bite to Exclusive Dealing?: An Analysis of the Third Circuit's Dentsply Decision*, ANTITRUST SOURCE 12 (May 2005) ("[H]ornbook antitrust law instructs that the focus of Section 2 should be on the effect that exclusionary conduct has on competition, not upon the intent behind it.").

<sup>347</sup> See, e.g., Bork, *supra* note 23, at 61.

refusal can ‘injure’ consumers only to the extent it was employed with the intent to exploit some kind of market failure in order to undermine the integrity of the competitive process.

The theoretical insufficiency of effect analysis aside, as a practical matter, any analysis of a business practice that focuses on the practice’s impact on consumer welfare has a potential danger of misleading people because the short-term consequence of a business practice will always be easier to predict and assess than its long-term consequence. This practical aspect presents a concern because the competition antitrust laws are designed to promote is by its very nature inefficient in the short run. The only reason a society would encourage multiple firms to engage in a largely redundant endeavor is a deep-seated faith in the positive second-order consequences that competition is believed to bring about in the long run.<sup>348</sup> Yet, the practical consequence of relying heavily on effect analysis could be to systematically overemphasize the readily-available evidence of short-term inefficiency and underestimate the hard-to-measure second order effect that can be observed only in the long run. Intent analysis can help restore the balance and help courts to give proper weight to the long-term effects by emphasizing that the core evil of a refusal to deal lies in the intent with which it was employed, not in its impact on individual victims or even market as a whole.

Intent rarely lends itself to direct proof but by looking at the factual components of each refusal, the article tried to identify those factors that can shed light on this intangible concept. This fact-oriented approach has potential to provide the business community with easily identifiable signs, which firms can subsequently utilize to minimize the risk of antitrust liability in exercising their freedom of association and freedom of contract. It may be objected, correctly, that none of these factors are dispositive, but this is to be expected in areas where intent plays a significant role—e.g., criminal law. The value of this approach rather depends on whether these factors advance an understanding of what courts mean by anticompetitive intent by providing a workable operative definition of the term. Finally, this fact-intensive approach is well suited for comparative legal research as it frees it from legal labels that confuse more than inform those not familiar with the peculiar meanings the labels have obtained in their respective jurisdictions. The article predicts that taking this approach in comparative law would lead to a higher degree of convergence being

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<sup>348</sup> See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) (“Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.”); *Standard Oil Co. of Cal. & Standards Stations v. United States*, 337 U.S. 293, 309 (1949) (“[I]t is the theory of the antitrust laws that the *long-run* advantage of the community depends upon the removal of restraints upon competition.”) (emphasis added).



found than was expected from the different ways laws are written around the world, as was found here with respect to single-firm refusals to deal between the United States and Korea.