

CONSUMER NEWS

JUSTICE DEPARTMENT'S SECTION 2 REPORT SPARKS A HEATED DEBATE IN THE ANTITRUST COMMUNITY

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On September 8, 2008, the U.S. Department of Justice (“DOJ”), after a year-long collaboration with the Federal Trade Commission (“FTC”) to study antitrust enforcement under Section 2 of the Sherman Act, unilaterally issued a report setting forth the agency’s policy guidance on the subject.¹ That report has now been roundly criticized by a majority of FTC commissioners, drawing sharp attention to the two very different faces of U.S. antitrust law enforcement policy.² The report has also sparked a heated debate among antitrust policymakers and

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¹ U.S. DEPT. OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (Sept. 8, 2008), *available at* http://www.usdoj.gov/atr/public/hearings/single_firm/sfchearing.htm [hereinafter DOJ REPORT] (“Section 2 of the Sherman Act prohibits a firm from illegally acquiring or maintaining a monopoly, meaning the ability to exclude competitors and profitably raise price significantly above competitive levels for a sustained period of time. Unlike antitrust laws that prohibit anticompetitive mergers or other agreements among firms, Section 2 particularly targets single-firm conduct, such as decisions regarding whether and on what terms to sell to or buy from others. Although possessing monopoly power is not unlawful, using an improper means to seek or maintain monopoly power is unlawful where it can harm competition and consumers.”).

² Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), *available at* <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf> [hereinafter Statement of FTC Commissioners].

academics, leaving many wondering what affect, if any, the report will have on the future of antitrust enforcement.

THE YEARLONG INTRA-AGENCY STUDY

In June 2006 the DOJ and FTC began a year-long series of public hearings to study issues related to enforcement of Section 2 of the Sherman Act.³ The hearings, comprised of 29 separate panels of over 100 participants, took place over 19 days.⁴ Discussions at the hearings covered a broad range of topics, including specific types of single-firm conduct like predatory pricing, bundling, tying, and refusals to deal.⁵ The study was meant to culminate in the release of a joint report “draw[ing] on the rich body of commentary created during the hearings, judicial precedent, and scholarly research.”⁶

THE DOJ ISSUES ITS REPORT

What began as a joint undertaking, however, has ended with the DOJ alone issuing its 213-page report, titled “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act.”⁷ The document purports to “identif[y] and discuss a number of areas of consensus with respect to the proper treatment of single-firm conduct.”⁸ It confirms a rebuttable presumption of monopoly power “[w]hen a firm has maintained a market share in excess of two-thirds for a significant period and its market position would not likely be eroded in the near future.”⁹

Additionally, though it admits no single test for anticompetitive conduct works well in all cases, the DOJ’s report “encourages the continuing development of conduct-specific tests and safe harbors.”¹⁰ This comports with the report’s apparent primary goal of setting forth “standards that are more clear and administrable,” as the DOJ believes that “[v]ague or overly

³ Press Release, U.S. Department of Justice (Sept. 8, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/236975.htm [hereinafter DOJ Press Release].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ DOJ REPORT, *supra* note 1.

⁸ DOJ Press Release, *supra* note 3.

⁹ *Id.*

¹⁰ *Id.*

inclusive prohibitions against single-firm conduct are particularly likely to undermine economic growth and to harm consumers.”¹¹

Many of the more specific findings of the report likewise confirm the agency’s preoccupation with the potential harm or “chilling effect” on investment and innovation that can be caused when antitrust law results in over-enforcement or the creation of “false positives.” For example, the report makes the following conclusions:

The historical hostility of the law to the practice of tying is unjustified, and the qualified rule of per se illegality applicable to tying is inconsistent with the U.S. Supreme Court’s modern antitrust decisions and should be abandoned;

Bundling discounting [is a] common practice that frequently benefits consumers . . . ;

Antitrust liability for mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in Section 2 enforcement . . . ;

Exclusive-dealing arrangements foreclosing less than 30 percent of existing customers or effective distribution should not be illegal; and

Remedies for conduct that is found to violate Section 2 should re-establish the opportunity for competition without unnecessarily chilling competitive practices or undermining incentive to invest and innovate.¹²

FEDERAL TRADE COMMISSIONERS RESPOND

The very same day the Section 2 report was released, all four current FTC Commissioners (one seat is vacant) issued statements. A bipartisan majority of FTC commissioners quickly and unequivocally distanced themselves from the report in a statement of harsh disapproval.¹³ Commissioners Pamela Harbour (I), Jon Leibowitz (D), and Thomas Rosch (R) roundly denounced the report as “a blueprint for radically weakened enforcement of

¹¹ *Id.*

¹² *Id.*

¹³ Statement of FTC Commissioners, *supra* note 2, at 1.

Section 2” that “goes beyond the holdings of the Supreme Court cases upon which it relies” and “seriously overstates the level of legal, economic, and academic consensus regarding Section 2.”¹⁴

The Commissioners additionally fault the DOJ for creating broad safe harbors for dominant firms and “impos[ing] rigorous burdens of proof on both public and private plaintiffs” outside of those safe harbors that “will be difficult, if not impossible, for plaintiffs to meet.”¹⁵ They conclude that the report “erects a multi-layered protective screen for firms with monopoly or near-monopoly power,” behind which “dominant firms would be able to engage in [anticompetitive] practices with impunity, regardless of potential foreclosure effects and impact on consumers.”¹⁶

The Commissioners’ statement points to four fundamental premises they believe the DOJ’s report is based upon: 1) “the theory that the promise of monopoly profits drives firms to innovate and compete,” 2) “the risk of over-enforcement of Section 2 is greater than the risk of under-enforcement,” 3) “‘costs of administration’ [are] a factor weighing against enforcement of Section 2,” and 4) there is a strong “need for clear and administrable rules [and] this need has motivated courts to fashion ‘bright line’ tests.”¹⁷ Admitting that the “premises are not totally lacking in support from some of the witnesses at the Section 2 hearings, Supreme Court *dicta* in some cases, and additional scholarship,” the Commissioners nevertheless strongly disagree that the premises “represent the consensus, or even the prevailing[] views of the section 2 stakeholders.”¹⁸

For instance, they 1) feel that the report downplays the risks of under-enforcement or “false-negatives,”¹⁹ 2) argue that the DOJ’s disproportionality test, requiring anticompetitive effects to be “disproportionally” greater than procompetitive potential distorts the rule of reason standard, which has long held that a mere outweighing will suffice,²⁰ and 3) are wary of the DOJ’s reliance on economic theory.²¹ Their statement notes that “the recent warning of Justice Breyer bears repeating: while economic theory is an important consideration in applying antitrust law,

¹⁴ *Id.*

¹⁵ *Id.* at 10.

¹⁶ *Id.*

¹⁷ *Id.* at 2-4.

¹⁸ *Id.* at 4.

¹⁹ Statement of FTC Commissioners, *supra* note 2 at 3.

²⁰ *Id.* at 5.

²¹ *Id.* at 1-2.

economic theory is not tantamount to the law itself.”²²

Chairman William Kovacic (R) chose to issue his own statement, neither endorsing nor opposing the report, but lamenting the fact that the agencies’ joint deliberations had not resulted in a single document reflecting their common views.²³ Chairman Kovacic’s statement indicates he finds the report to be lacking in historical context: “an appreciation for [historical enforcement] trends ought to inspire caution before one embraces the proposition that U.S. antitrust doctrine and policy today expose dominant firms to significant, systematic risks attributable to over-inclusive liability rules.”²⁴ This seems to read as an admonition that the DOJ’s fear of false positive over-enforcement is unfounded.

Kovacic points to what he calls the “double helix” of two intertwining schools of thought, the Chicago School and the Harvard School, as the source of modern “presumptions and precautions that disfavor intervention by U.S. courts and enforcement agencies.”²⁵ He concludes that if these “judicial perceptions of overreaching by private suits are narrowing the zone of substantive liability, public agencies eventually may be unable to do their job.”²⁶ In essence, Chairman Kovacic’s primary concern is that burdens imposed on private litigants will be carried by public agencies trying to prosecute cases, hinting that the DOJ may be writing itself out of a job by seeking to erect such barriers.²⁷

DOES THE DOJ’S POSITION FAVOR BIG BUSINESS?

Many critics agree with Commissioners Harbour, Leibowitz and Rosch that the DOJ’s report “prescribes a legal regime that places [the] interests [of firms that enjoy monopoly or near monopoly power] ahead of the interests of consumers.”²⁸ A

²² *Id.*

²³ Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act 1 (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf> [hereinafter Statement of Chairman Kovacic].

²⁴ *Id.* at 2, 4-5.

²⁵ *Id.* at 5, 7.

²⁶ *Id.* at 8.

²⁷ *Id.*

²⁸ Statement of FTC Commissioners, *supra* note 2, at 1.

New York Times editorial recently minced no words when it called the Report “a deregulatory gift aimed at getting pesky antitrust enforcers off the back of big business.”²⁹ The article criticized the suggested standard that proof of harm to competition be “disproportionately” greater than the potential gains to consumers, saying “[t]he new doctrine bends over backward to protect big firms.”³⁰

Although the DOJ’s report reassures readers that Section 2 will “continue to be a key component of antitrust enforcement,”³¹ critics emphasize the agency’s record of inaction in this arena, pointing out that “[t]hroughout the entire Bush administration, [the DOJ] has not brought a single case against a dominant firm for anticompetitive behavior,” but has instead “argued enthusiastically on behalf of monopolists before the Supreme Court.”³² The DOJ’s “hands-off stance” has been called “conspicuous and troubling,” especially in the wake of the agency’s recent decision not to challenge the Whirlpool-Maytag merger and its permissive settlement of the monopolization case against Microsoft.³³ Senator Herb Kohl (D-Wis.), chairman of the Senate Judiciary Committee’s antitrust subcommittee said the DOJ’s report is “an assault on the Sherman Act,” and represents just “another anti-competition and anti-consumer decision by this Antitrust Division.”³⁴

In stark contrast is the FTC, which has remained active in Section 2 enforcement during the Bush administration, some claim because its five commissioners hold staggered terms and must vary in their party affiliations.³⁵ FTC Chairman Kovacic has whimsically described the relationship between the two agencies as “an archipelago of policy makers with very inadequate ferry service between the islands,” noting that in “too many instances when you go to visit those islands the inhabitants come out with sticks and torches and try to chase you away.”³⁶

²⁹ *Another Thumb on the Scales*, N.Y. TIMES, Nov. 1, 2008, at A22.

³⁰ *Id.*

³¹ DOJ REPORT, *supra* note 1.

³² *Thumb on the Scales*, *supra* note 30.

³³ Jonathan B. Baker, *Turning on Itself: How Dueling Agencies in the Bush Administration Made Mincemeat of Antitrust Regulation Policy*, THE NEW REPUBLIC, Sept. 15, 2008, available at <http://www.tnr.com/politics/story.html?id=97981a77-c668-421b-947a-a8282ca3b121>.

³⁴ Peter Whoriskey, *Justice’s Monopoly Guidelines Assailed*, WASH. POST, Sept. 9, 2008, at D01.

³⁵ *Id.*

³⁶ FTC Commissioner Claims DOJ Attorneys Chase Him Away With

Assistant Attorney General Tomas O. Barnett (before his resignation, effective November 19, 2008) defended the DOJ's report as being "pro-consumer."³⁷ Though he agreed that prohibiting bad behavior by monopolists is important, Barnett also stressed the need "to avoid interfering in the rough and tumble of beneficial competition that drives innovation and economic growth."³⁸

Despite appraisals to the contrary by the majority of FTC commissioners, Barnett has claimed the report is "consistent with the overall framework that has been endorsed by courts and scholars."³⁹ In a statement reacting to public commentary after the report, was issued, however, Barnett stated that the document was "meant to contribute to the public debate . . . not to resolve all areas of debate for all time."⁴⁰ He admitted that "[t]he majority of the report's conclusions were not based on the weight of the panelists' testimony, or even on the additional scholarly commentary cited in the report, but on judicial precedent, including recent Supreme Court case law."⁴¹ Barnett concluded his statement by defending the DOJ's primary goal in issuing the report: to set clear, articulable standards for Section 2 enforcement. He argued that "[a]bandoning objective standards in an effort to preserve the ability to pursue every theoretically conceivable harm is counterproductive."⁴²

CRITICS CLAIM MISSES OPPORTUNITIES

Some critics decry the interagency "rift between FTC's traditionalists and [the DOJ]'s non-interventionists," claiming it has "made mincemeat of antitrust regulation policy" in the U.S.⁴³ Indeed, it is an understatement to say that "it is an unwelcome surprise when the federal antitrust enforcement agencies can't

Torches, <http://www.antitrustreview.com/archives/831> (Feb. 1, 2007, 4:42 EST).

³⁷ Whoriskey, *supra* note 34.

³⁸ *Id.* (citing DOJ Press Release, *supra* note 3).

³⁹ Whoriskey, *supra* note 34.

⁴⁰ Thomas O Barnett and Hill B. Wellford, GLOBAL COMPETITION POLICY, The DOJ's Single-Firm Conduct Report: Promoting Consumer Welfare Through Clearer Standards for Section 2 of the Sherman Act, Oct. 2008, at 8, <http://www.globalcompetitionpolicy.org/index.php?id=1413&action=907>.

⁴¹ *Id.* at 11.

⁴² *Id.* at 15.

⁴³ Baker, *supra* note 33.

agree on the law,” given that these two agencies have been granted overlapping enforcement authority and have often collaborated in setting antitrust policy in the past.⁴⁴

Others point out “the missed opportunity of the report to study, and take seriously, the substantive law . . . in the many jurisdictions outside the United States.”⁴⁵ Although a number of witnesses from outside the U.S. participated in the hearings, the report includes few references to foreign law;⁴⁶ this when foreign law is increasingly taking a different approach from the U.S. For example, the European Commission’s competition policies have resulted in more unilateral conduct cases brought in Europe, in part because, as Neelie Kroes, European Commissioner for Competition Policy has stated, the U.S. is more concerned “about over-enforcement, about false positives, than in Europe,” whereas “[i]n Europe, [enforcers] are worried equally about over-enforcement and under-enforcement” because “[b]oth false positives and false negatives harm consumers.”⁴⁷

The European Commission has recently concluded its own study of exclusionary conduct by dominant firms, issuing a draft report titled “Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,” on December 3, 2008.⁴⁸ In it the EC formally adopts the “effects-based” approach it has already applied in enforcement actions like the one against Microsoft.⁴⁹ Though the EC claims “the

⁴⁴ The FTC and DOJ – “So Sorry, but When it Comes to Sherman Act Section 2 Conduct, We Can’t Agree on What the Law Is, or What it Should Be”, <http://www.masslawblog.com/2008/11/the-ftc-and-doj-so-sorry-but-when-it-comes-to-sherman-action-section-2-conduct-we-cant-agree-on-what-the-law-is-or-what-it-should-be/> (Nov. 4, 2008, 6:42 EST) [hereinafter “So Sorry . . .”].

⁴⁵ Spencer Weber Waller, *Hearing But Not Listening: Comparative Competition Law and the DOJ Monopoly Report*, GLOBAL COMPETITION POLICY, Oct. 2008, at 1, <http://www.globalcompetitionpolicy.org>.

⁴⁶ *Id.* at 2-3.

⁴⁷ DOJ, EC Antitrust Chiefs Provide Diverse Views on Unilateral Conduct by Dominant Firms, <http://traderegulation.blogspot.com/2008/10/doj-ec-antitrust-chiefs-provide-diverse.html> (Oct. 1, 2008, 11:47 EST).

⁴⁸ COMMISSION OF THE EUROPEAN COMMUNITIES, GUIDANCE ON THE COMMISSION’S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS (Dec. 3, 2008), *available at* <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>.

⁴⁹ Press Release, Commission of the European Communities, Frequently Asked Questions (Dec. 3, 2008), *available at* <http://europa.eu/rapid/press>

approach embedded in the Guidance Paper is a step towards more convergence with . . . some other jurisdictions, such as the U.S.," it also notes that the DOJ's report "differs from the Article 82 Guidance Paper on a number of issues – such as the way to balance the pro- and anti-competitive effects of a conduct, the role of market shares in assessing dominance and the assessment of pricing conduct."⁵⁰

In a world where global business means firms are subject to the laws of many jurisdictions, it is observed that the competition law of the European Commission, not the United States, increasingly serves as the model for nations around the world to develop their own competition laws.⁵¹ Critics feel the DOJ's report does global firms no favor by foregoing an important opportunity to reach consensus and establish some degree of uniformity in the law by instead clinging to its own "highly lenient rules."⁵²

INFLUENTIAL OR INCONSEQUENTIAL?

It must be remembered that the DOJ's report amounts to no more than policy guidance.⁵³ Though critics claim the report reads like "an attempt to lock in future administrations to a similar course,"⁵⁴ it is also believed it will likely have a "short shelf life."⁵⁵ As the deregulatory zeitgeist of the past eight years falls away and the country learns that unfettered markets are not always self-correcting, government regulation may again play a crucial role in protecting competition.⁵⁶ This could mean that the DOJ's report will "soon become a footnote in American antitrust jurisprudence."⁵⁷

In fact, shortly after the report was released, Barack Obama's campaign told reporters that "the Justice Department's position reflected the need for a more aggressive approach to

ReleasesAction.do?reference=MEMO/08/761&format=HTML&aged=0&language=EN&guiLanguage=en.

⁵⁰ *Id.*

⁵¹ Waller, *supra* note 45, at 3.

⁵² *Id.*

⁵³ Eric Lichtblau, *Antitrust report exposes rift between U.D. agencies*, INTERNATIONAL HERALD TRIBUNE, Sep. 9, 2008, available at <http://www.iht.com/articles/2008/09/09/business/antitrust.php>.

⁵⁴ Waller, *supra* note 45, at 1.

⁵⁵ *Id.* at 5.

⁵⁶ *Thumb on the Scales*, *supra* note 29.

⁵⁷ "So Sorry . . .", *supra* note 44.

antitrust enforcement in the next administration.”⁵⁸ Jason Furman, economic policy director for the campaign, said “[f]our more years of the Bush-McCain approach to antitrust will only lead to higher prices for American consumers and a less competitive environment for smaller businesses to thrive.”⁵⁹

Even though the report is not law, judges and litigators might still look to it for guidance, especially because one of its primary goals has been to establish standards that are, if nothing else, easy to apply.⁶⁰ Some have speculated that the report “may lie dormant during a Democratic administration, only to be revived at some unknown future date . . . when its approach to antitrust enforcement returns to favor.”⁶¹ For now, it is anticipated that the FTC and some of the more aggressive state antitrust enforcers will move forward “to fill any Sherman Act enforcement void that might be created” by the DOJ’s narrowing of Section 2 enforcement.⁶²

⁵⁸ Lichtblau, *supra* note 53.

⁵⁹ *Id.*

⁶⁰ Whoriskey, *supra* note 34.

⁶¹ “So Sorry . . .”, *supra* note 44.

⁶² Don Allen Resnikoff, Section 2 Enforcement: A State-Enforcement View of the DOJ Section 2 Report, THE ANTITRUST SOURCE, Oct. 2008, at 1, available at <http://www.abanet.org/antitrust/at-source/08/10/Octo8-Resnikoff10-24f.pdf> (citing Statement of FTC Commissioners, *supra* note 2, at 11).