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The DOJ's Single-Firm Conduct Report: Promoting Consumer Welfare Through Clearer Standards for Section 2 of the Sherman Act

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On September 8, 2008, the Department of Justice (the “Department”) issued a 213-page report entitled *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (the “Single-Firm Conduct Report” or “Report”).¹ The Report examines whether and when certain types of single-firm conduct may violate Section 2 of the Sherman Act by harming competition and consumer welfare. The Report serves three purposes. First, it summarizes and synthesizes views expressed at the joint Department and Federal Trade Commission (“FTC”) hearings, recent legal and economic scholarship, and court decisions regarding single-firm conduct. Second, it provides transparency by explaining the Department’s enforcement views in this important area of the law. And third, it makes progress toward the goal of developing sound, clear, objective, effective, and administrable standards for Section 2 analysis. Those standards best promote competition and consumer welfare—the goal of the antitrust laws—because they better

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¹ U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) [hereinafter SINGLE-FIRM CONDUCT REPORT], *available at* <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

identify and prohibit conduct that harms the competitive process and avoid interfering with the beneficial competition that drives innovation and economic growth.

The Single-Firm Conduct Report has been greeted with much discussion. The Department offers this article to add to the conversation by describing the background of the report, setting forth some of its key conclusions, and addressing some of the public commentary on the report. What this article does not attempt to do, however, is supplement or substitute for the report itself—the report stands on its own, and the reader is invited to review the report in its entirety or to review at least the report’s six-page executive summary.

I. BACKGROUND

In an April 2006 Federal Register notice, the FTC and the Department formally announced that they would hold a series of hearings on unilateral conduct, to be followed by a report.² These became the “Federal Trade Commission and the Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition,”³ which involved 29 hearings held over the course of a year (June 2006 to May 2007) and featured over 100 panelists and thousands of audience members. The FTC and Department staff carefully sought out and agreed upon hearing panelists from

² Consumer Benefits and Harms: How Best to Distinguish Aggressive, Pro-Consumer Competition From Business Conduct To Attain or Maintain a Monopoly, 71 Fed. Reg. 17872, 17873 (Apr. 7, 2006) (“A public report that incorporates the results of the Hearings, as well as other research, will be prepared after the Hearings.”).

³ The hearing record, including transcripts of the hearings, presentations, written statements from panelists, and public comments, is available on the FTC’s website at <http://www.ftc.gov/os/sectiontwohearings> and the Department’s website at http://www.usdoj.gov/atr/public/hearings/single_firm/sfchearing.htm.

every constituency and viewpoint. The result is an impressive hearing record that includes agendas, submissions, transcripts, and other information.

The development of single-firm conduct analysis, of course, began long before 2006. By the beginning of the hearings, significant recent developments in single-firm conduct analysis already included the Supreme Court's decisions in *Illinois Tool Works* (2006) (tying),⁴ *Trinko* (2004) (refusals to deal),⁵ and *Brooke Group* (1993) (predatory pricing),⁶ the agencies' hearings on intellectual property practices⁷ (which led to their joint "IP2 Report" in 2007⁸), the Department's *Microsoft* case,⁹ the FTC's *Rambus* litigation,¹⁰ and numerous other agency and private actions. As FTC Chairman William E. Kovacic recently noted in explaining the need for the hearings, "[a]n examination of U.S. antitrust experience with dominant firms" shows "how greatly law and policy have changed over time," and "three decades" of "developments in antitrust and enforcement

⁴ Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

⁵ Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

⁶ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

⁷ Hearings information and materials can be accessed on the agencies' websites. DOJ/Antitrust, Competition and Intellectual Property Law in the Knowledge-Based Economy, *available at* <http://www.usdoj.gov/atr/hearing.htm>; Federal Trade Commission, Competition and Intellectual Property Law in the Knowledge-Based Economy, *available at* <http://www.ftc.gov/opp/intellect>.

⁸ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) [hereinafter IP2 REPORT], *available at* <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf>.

⁹ United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

¹⁰ Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

policy since the 1970's have narrowed significantly the range of dominant firm conduct that is subject to condemnation.”¹¹

Chairman Kovacic, in a memorable phrase, has traced this evolution in single-firm conduct analysis to a “double helix” in the DNA of antitrust doctrine, with one strand being the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook, and the other being the Harvard School of Phillip Areeda, Donald Turner, and Stephen Breyer.¹² Both schools, the Chairman has noted, embrace broad reliance on economic theory; broad freedom for individual firms in implementing product, pricing, and distribution strategies; and close attention to institutional and administrability concerns in formulating and applying antitrust rules.¹³ Thus, by the time of the agencies’ single-firm conduct hearings, it was clear that the parameters of antitrust analysis already had changed greatly from what the Chairman terms the “more intervention-minded” policies of the 1970s.¹⁴

The development of the Single-Firm Conduct Report was a significant undertaking involving thousands of hours of work by the dedicated staff of the two U.S. antitrust agencies, both at the hearing and report writing stages. Even before the hearings concluded, FTC and Department staff began a collaborative effort to draft a report. After

¹¹ Statement of Chairman William E. Kovacic, Fed. Trade Comm’n, 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 2–3 (Sept. 8, 2008) [hereinafter Kovacic Statement], *available at* <http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf>.

¹² *Id.* at 5.

¹³ *Id.* at 5–6.

¹⁴ *Id.* at 3.

extensive consultations, it became clear that the FTC would not be able to join the draft report. Accordingly, the Department issued its own report to synthesize the testimony and submissions from the hearings, additional scholarly commentary, and court precedent.¹⁵ The Single-Firm Conduct Report is the Department's work, but the Department acknowledges the extensive and valuable contributions of FTC staff.¹⁶

II. KEY FINDINGS OF THE REPORT

The report contains an extensive treatment of a wide range of issues. Certain key findings of the report, however, may be listed as follows:

- Section 2 enforcement has been and should continue to be a key component of antitrust enforcement;¹⁷
- While market share does not itself prove the existence of monopoly power, it is an important factor. When 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, the Department normally will presume that the firm possesses monopoly power, absent convincing evidence to the contrary;¹⁸
- The Department is not aware of any court that has found a defendant to possess monopoly power when its market share was less than 50 percent. As a practical

¹⁵ The Department and FTC have a history of individual policy releases. The FTC released its "IP1" report without the Department in 2003; the agencies jointly issued the "IP2" report in 2007. Likewise, the Department issued its Horizontal Merger Guidelines in 1982 without FTC support; the FTC joined the Department in issuing the 1992 revision to them.

¹⁶ SINGLE-FIRM CONDUCT REPORT, *supra* note 2, at 3 n.3.

¹⁷ *E.g., id.* at vii, 2, 10–11.

¹⁸ *Id.* at 23.

matter, a share greater than 50 percent has been necessary for courts to find the existence of monopoly power;¹⁹

- No single test for determining whether conduct is anticompetitive—such as the effects-balancing, profit-sacrifice, no-economic-sense, equally efficient competitor, or disproportionality tests—works well in all cases. The Department encourages the continuing development of conduct-specific tests and safe harbors. Where no conduct-specific test has been developed, the Department believes that the disproportionality test previously endorsed by both the FTC and the Department is the best general test available to date;²⁰
- Vague or overly inclusive prohibitions against single-firm conduct are particularly likely to undermine economic growth and harm consumers. In contrast, Section 2 prohibitions that are (i) based on clear and objective criteria and (ii) carefully tailored to identify conduct likely to harm the competitive process are likely to increase economic growth and to benefit consumers: businesses are better able to comply with the law and avoid violations; antitrust enforcers can more easily identify and prove violations; effective and administrable remedies are more likely to be available; and aggressive but beneficial competition is less likely to be deterred;²¹
- The appropriate measure of cost in predatory-pricing cases should identify loss-creating sales that could force an equally efficient rival out of the market and be

¹⁹ *Id.* at 21–22.

²⁰ *Id.* at 46–47.

²¹ *Id.* at 2, 14, 34.

- administrable by businesses and courts. In most cases, the best cost measure likely will be average avoidable cost;²²
- The historical hostility of the law to tying is unjustified, and the qualified rule of per se illegality applicable to tying is inconsistent with the Supreme Court’s modern antitrust decisions and should be abandoned;²³
 - Bundled discounting, although a common practice that frequently benefits consumers, potentially can harm competition in two different ways. Accordingly, depending on the particular facts, either an analysis similar to predatory pricing or an analysis similar to tying is appropriate;²⁴
 - Antitrust liability for mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in Section 2 enforcement because
 - (i) compelling access is likely to harm long-term competition and innovation and
 - (ii) courts are ill suited to be market regulators;²⁵
 - Exclusive-dealing arrangements that in the aggregate foreclose less than 30 percent of existing customers or effective distribution should not be illegal;²⁶
 - Remedies for conduct found to violate Section 2 should re-establish the opportunity for competition without unnecessarily chilling competitive practices or undermining incentives to invest and innovate;²⁷ and

²² *Id.* at 60–61, 67.

²³ *Id.* at 89–90.

²⁴ *Id.* at 95–96, 101.

²⁵ *Id.* at 129.

²⁶ *Id.* at 141.

- The Department will continue to explore ways of strengthening cooperation with counterparts in foreign jurisdictions and encouraging further convergence on sound enforcement policies in this important area.²⁸

These conclusions reflect the Department’s effort to refine and better enable enforcement while avoiding harm to competition and reducing administrative and compliance costs. They provide transparency and are already accomplishing the Department’s goal of promoting discussion and further development of Section 2 standards.

III. REACTIONS TO SOME COMMENTARY ON THE REPORT

We are encouraged by the public discussion sparked by the report. The analysis of single-firm conduct offers some of the greatest challenges in antitrust enforcement today, and the report itself states that it is meant to “contribute to the public debate in this complex but important area,”²⁹ not to resolve all areas of debate for all time. Some of the commentary on the report, however, reflects some misunderstanding of the report’s conclusions and the case law, scholarship, and testimony underlying them. Remarkably, some commentators appear not to accept the idea that sound, clear, objective, effective, and administrable standards for Section 2 are desirable. The following points should help to clear up these misunderstandings and reemphasize why consumers benefit from standards meeting those criteria.

(footnote continued from previous page)

²⁷ *Id.* at 145–47.

²⁸ *Id.* at 180–81.

²⁹ *Id.* at xii.

The report is a blueprint for more effective Section 2 enforcement that will enhance consumer welfare. The report focuses squarely on “protecting the competitive process and consumer welfare”³⁰ and recognizes that “[f]irms possessing monopoly power can reduce output and charge higher prices than would prevail under competitive conditions and thereby harm consumers.”³¹ The report emphasizes the importance of dynamic competition—the very type of competition that leads to creative destruction,³² the greatest enemy of entrenched monopolists—and recognizes that “[f]ree markets are the most effective means for allocating resources to their highest valued uses *and maximizing consumer welfare.*”³³ In the course of reiterating the Department’s commitment to Section 2 enforcement where competition and consumers are threatened, the report identifies some areas that could be improved in ways that would make Section 2 cases easier to prove. For instance, the report indicates that the Department will presume the existence of monopoly power for firms with a two-thirds market share when that share is not likely to be eroded in the near future. The Department adopted this view notwithstanding that some commentators³⁴ and even cases (such as *Alcoa*) have instead discussed establishing a market-share safe harbor at essentially that level,³⁵ and that many scholars, including the authors of a leading treatise, would set the presumption-

³⁰ *E.g., id.* at 2.

³¹ *Id.* at 1.

³² *Id.* at 14–15.

³³ *Id.* at 1 (emphasis added).

³⁴ *See id.* at 24 n.41.

³⁵ *See id.* at 21 (discussing *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945)).

creating share substantially higher than the report's two-thirds.³⁶ Similarly, the report also describes the Department's reasons for not endorsing the no-economic-sense test as the generalized test to be applied when no conduct-specific test is available.³⁷

The report recognizes both the economic theory that monopolies are self-destructive and that markets can be self-correcting and the reality that some monopolies are durable and any self-correction may take substantial time. The report quotes Judge Frank Easterbrook, who has observed that, "over time, [m]onopoly is self-destructive."³⁸ This is a basic economic principle that is unexceptional: the lure of monopoly profits attracts entry and the resulting competition erodes monopoly power. But that does not mean that all monopolies dissipate quickly; as the report observes, "some monopolies may prove quite durable, especially if allowed to erect entry barriers and engage in other exclusionary conduct aimed at artificially prolonging their existence."³⁹ The report also acknowledges that there may be circumstances where, "even when no current rival exists, an attempt to increase price above the competitive level may lead to an influx of competitors sufficient to make that price increase unprofitable."⁴⁰ This too is a fundamental and uncontroversial economic principle. In each case, the question of

³⁶ See, e.g., 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801a, at 319 (2d ed. 2002) ("Although one cannot be too categorical, we believe it reasonable to presume the existence of substantial single-firm market power from a showing that the defendant's share of a well-defined market protected by sufficient entry barriers has exceeded 70 or 75 percent for the five years preceding the complaint.").

³⁷ SINGLE-FIRM CONDUCT REPORT, *supra* note 2, at 39–43.

³⁸ *Id.* at 17 (citing Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984)).

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 25.

whether a particular theoretical principle applies is an empirical issue that must be determined on the basis of an investigation of real-world facts.

The report reflects legal, economic, and academic consensus regarding many aspects of Section 2 analysis, and testimony during the hearings was representative of a wide range of views regarding Section 2. The report notes where the Department found consensus in the hearing record, scholarship, and case law, and supports such findings with exhaustive references, including over 1,300 footnotes. The report also notes where consensus does not exist, but where the Department was able to provide useful guidance. An example is the report's presumption of monopoly power at a two-thirds market share, which, as noted above, is not a consensus position and is more pro-plaintiff than the position taken by many commentators. The FTC and Department staffs worked diligently to include over 100 panelists from a wide range of political viewpoints and constituencies. And while the hearings were an important foundation of the report, they were hardly the only or most important foundation. The majority of the report's conclusions were not based on the weight of panelists' testimony, or even on the additional scholarly commentary cited in the report, but on judicial precedent, including recent Supreme Court case law. Ultimately, enforcement decisions are tested in courts, not textbooks, and therefore the report takes as its lodestar a realistic assessment of judicial decisions.

The disproportionality test. The disproportionality test is drawn from joint FTC and Department practice as well as scholarly commentary. For example, the FTC and the Department stated in their 2003 amicus brief before the Supreme Court in *Trinko* that the proper test for Section 2 liability:

does not entail open-ended balancing of social gains against competitive harms [i]nstead, the harm to competition must be *disproportionate* to consumer benefits (in terms of providing a superior product, for example) and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition).⁴¹

This is the same test discussed in the report. Contrary to the suggestion of some courts and commentators, the rule of reason is not the norm for Section 2 analysis—rule of reason is a Section 1 concept,⁴² and has made its way into discussion of single-firm conduct analysis primarily through its role in tying cases, which, with the notable exception of the Department’s *Microsoft* case, have generally been analyzed under Section 1.⁴³ But even if the rule of reason were to come to be applied to Section 2 claims, one would need to determine how to apply it: as the Supreme Court has explained, “categories of analysis of anticompetitive effect are less fixed than terms like ‘*per se*,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.”⁴⁴ Section 1’s rule of reason is not, as some appear to believe, an “open-ended balancing” (to use the agencies’ words again) of gains and harms. Indeed, as several panelists emphasized at the hearings, courts seek to avoid balancing of harms and benefits through allocations of burdens of proof and production, market-share screens, presumptions, and the like. The

⁴¹ Brief for the United States & the Federal Trade Commission as Amici Curiae Supporting Petitioner at 14, *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682), *available at* <http://www.usdoj.gov/atr/cases/f201000/201048.htm> (emphasis added) (citations omitted) (internal quotation marks omitted).

⁴² *See, e.g.*, SECTION OF ANTITRUST LAW, AM. BAR ASS’N, INTELLECTUAL PROPERTY AND ANTITRUST HANDBOOK 48 (2005) (noting that, although standards applied in Section 2 cases “bear[] some similarity to the rule of reason test under Section 1, courts generally do not apply the term ‘rule of reason’ to Section 2 cases”).

⁴³ *See* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 33–38 (2006).

⁴⁴ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 780 (1999).

disproportionality test reflects a similar effort to reduce the need for balancing in the Section 2 context.

A safe harbor for above-cost pricing is established by Supreme Court precedent. One can reasonably debate the use of average avoidable cost as the proper measure of cost in predation cases. The Department has concluded that it is “typically the best cost measure to evaluate predation claims,”⁴⁵ but the report notes that there is not unanimity on this issue and there may be situations where another method of cost measurement is appropriate. Once cost is measured, however, the legality of above-cost pricing is settled law, and the Department broke no new ground in stating that above-cost pricing should be legal. The Supreme Court established this standard in *Brooke Group* in 1993,⁴⁶ and reconfirmed that view last year in *Weyerhaeuser*.⁴⁷

The agencies’ efforts to identify safe harbors and to develop clear standards for bundled discounts and loyalty discounts are longstanding. In fact, in these areas the report’s positions are not new and are consistent with prior joint statements by the FTC and the Department. For example, in their July 2008 joint submission to the OECD’s Working Party 3 on Co-Operation and Enforcement, both agencies (i) stated that “[t]he development of clear, administrable standards for analyzing bundled discounts would be furthered by use of an appropriate price-cost safe harbor;”⁴⁸ (ii) concluded that “[a]

⁴⁵ SINGLE-FIRM CONDUCT REPORT, *supra* note 2, at 65.

⁴⁶ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁴⁷ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

⁴⁸ Organisation for Econ. Co-Operation & Dev., *Roundtable on Bundled and Loyalty Discounts and Rebates*, at 9, DAF/COMP/WP3/WD(2008)47 (June 10, 2008), available at http://www.ftc.gov/bc/international/docs/Bundling_US.pdf.

predatory-pricing approach to single-product loyalty discounts has certain advantages;”⁴⁹ and (iii) otherwise jointly stated positions similar or identical to those in the Single-Firm Conduct Report.

The report carries forward the prior conclusion of the FTC and the Department that antitrust liability for mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in Section 2 enforcement. The report observes that courts have been “very cautious” about “limiting the right to refuse to deal with other firms,” but does not claim that the cases establish a rule of per se legality.⁵⁰ At pages 125–26, the report quotes the 2007 joint FTC and Department IP2 Report for the language that refusals to deal “will not play a meaningful part in . . . antitrust protections.”⁵¹ This joint statement by the agencies regarding unconditional, unilateral refusals to deal applies whether or not the firm possesses monopoly power.⁵² Indeed, the statement is principally directed to firms that have monopoly power (or that have a dangerous probability of attaining monopoly power) because other firms need not worry about violating Section 2. The 2007 IP2 Report (like the Single-Firm Conduct Report) goes on to clarify that a *conditional* refusal to deal is more likely to raise antitrust concerns.⁵³

⁴⁹ *Id.* at 13.

⁵⁰ SINGLE-FIRM CONDUCT REPORT, *supra* note 2, at 18.

⁵¹ *Id.* at 124 (quoting IP2 REPORT, *supra* note 9, at 30).

⁵² *See, e.g.*, IP2 REPORT, *supra* note 9, at 16, 18, 19, 20, 22, 23, 24, 27 (discussing potential liability where defendant has “monopoly” power).

⁵³ *See id.* at 31; SINGLE-FIRM CONDUCT REPORT, *supra* note 2, at 119.

Abandoning objective standards in an effort to preserve the ability to pursue every theoretically conceivable harm is counterproductive and undermines the goal of enhancing consumer welfare. One hallmark of the report's focus on protecting competition and consumer welfare is its reiteration of the Department's commitment to developing pro-consumer Section 2 standards that are clearer, more objective, and more administrable. As those kinds of standards continue to emerge and crystallize, businesses will be more likely to structure their own affairs so as to comply with the law, violations will be easier to identify and remedy, and consumers will be better served. It is one thing to suggest that the report's standards and guidance could be improved; it is quite another to suggest that the search for clearer standards and guidance should be abandoned. Sound, clear, objective, effective, and administrable Section 2 standards benefit consumers and firms alike, and ultimately help prevent enforcement agencies from becoming engulfed in a vortex of unmanageable, unwinnable, or irremediable litigation. Consumers would be unequivocally hurt if the effort to develop those standards were abandoned and replaced with the notion that Section 2 should be construed to prohibit whatever happens to strike a judge, jury, or antitrust enforcer as unfair in an ex post review. The standardless and non-economic "I know it when I see it" approach to antitrust enforcement has—to return to Chairman Kovacic's evolutionary analogy—earned its extinction.

IV. CONCLUSION

As mentioned in the report, the Department welcomes informed debate. It appreciates the efforts of all those who have joined the debate over Section 2 with their own proposals for solutions and standards; after all, as Chairman Kovacic has observed,

“[i]f one fears one’s ideas cannot survive an open intellectual contest, it is time to get new ideas.”⁵⁴ The Department again encourages all interested parties to review the Single-Firm Conduct Report in depth, and looks forward to further improving its standards for assessing single-firm conduct in a manner that best promotes economic growth and enhanced consumer welfare.

⁵⁴ Kovacic Statement, *supra* note 12, at 1.