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Antitrust Alert

DOJ Antitrust Division Report On Section 2 Enforcement Policy Exposes Rift With FTC

On Sept. 8, the Department of Justice Antitrust Division ("the Antitrust Division") issued a new policy statement concerning single firm conduct under Section 2 of the Sherman Act. The publication, entitled "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" ("Report"), provides a comprehensive analysis of the Antitrust Division's views and enforcement intentions on this subject, and is the culmination of two years of joint hearings with the Federal Trade Commission ("the Commission").

The Report is significant for three principal reasons: (1) it provides a number of clear guidelines and safe harbors that clarify the Antitrust Division's enforcement intentions with respect to Section 2 claims; (2) it makes clear the Antitrust Division's view that its enforcement of Section 2 claims is warranted only in limited circumstances; and (3) it lays bare the growing feud with the Commission regarding enforcement policy in potential Sherman Act Section 2 claims.

The Institution of Clear Guidelines and Safe Harbors

A principal objective of the Report is "to make progress toward the goal of sound, clear, objective, effective and administrable standards for analyzing single-firm conduct under Section 2 of the Sherman Act." Pursuant to that goal, the Antitrust Division articulates a number of "conduct-specific tests and safe harbors" designed to provide a degree of predictability with respect to the Antitrust Division's enforcement decisions and to avoid enforcement errors.

While some of the safe harbors articulated in the Report have been expressed before (in the DOJ/FTC Healthcare Guidelines, for example), the Report provides the first comprehensive articulation of these tests and standards in a single document. Thus, for example, the Report makes clear that exclusive dealings arrangements "that foreclose less than 30 percent of existing customers or effective distribution" will not be the subject of enforcement activity absent unusual circumstances. Conversely, the Report provides that if a firm maintains a market share in excess of two-thirds for a significant

 Editorial inquiries should be directed to James M. Burns at jmburns@williamsmullen.com or 202.327.5087 or Robert Shaw at rshaw@williamsmullen.com or 919.981.4310.

Please visit www.williamsmullen.com for more information about the Williams Mullen Antitrust Law Team.

period and market conditions suggest that its market share is unlikely to erode over time (due to new entry, enhanced competition from existing competitors, etc.), will be presumed to possess monopoly power.

The Report also carves out a safe harbor for predatory pricing analysis. Where the price of a product is above average total cost, the Antitrust Division will consider the price not to be predatory. In fact, the Report strongly suggests that pricing products above average avoidable costs should be *per se* legal. Significantly, this principle also pertains to bundled discounts, an issue that has been the subject of considerable controversy in the courts in the last few years.

To Avoid Enforcement Errors, Section 2 Enforcement Must be Exercised Cautiously

A second objective of the Report is the avoidance of enforcement errors. Specifically, the institution of Section 2 enforcement actions in circumstances where the alleged monopolist's conduct does not cause harm to consumers. Accordingly, at every turn the Report seeks to make clear that *substantial* and *readily-identifiable* harm to the market, and consumers, must exist before the Antitrust Division will take enforcement action.

To this end, the Report states, for example, that consumer loyalty discounts will only be challenged where "the discount produces harms substantially disproportionate to those benefits." Additionally, the Report reconfirms that a "plaintiff should be required to demonstrate that the discount forecloses a *significant amount* of the market" as an initial precondition to such an action. Similarly, the Report provides that tying arrangements will only be challenged "when (1) it has *no* procompetitive benefits, or (2) if the harm caused by the tie is *substantially disproportionate* to those benefits."

Finally, the Report expresses the view that requiring a competitor to deal with its rivals is rarely an objective that warrants the Antitrust Division's expenditure of its limited resources, because the harm to consumers from such conduct can be unclear. Thus, the Report expressly provides that "mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in Section 2 enforcement."

Disagreement with the FTC

As mentioned above, the Report followed two years of joint hearings on the subject with the Federal Trade Commission, and the Antitrust Division and the Commission ultimately reached a number of conflicting views on these subjects (which led to the Antitrust Division's unilateral publication of the Report). Thus, only hours after its issuance, FTC Commissioners Harbour, Leibowitz and Rosch fired back with strongly worded criticism of several of the Report's chief objectives and conclusions. (Commissioner Kovacic issued his own, more muted, response to the Report.)

For instance, the commissioners expressed strong caution against the Report's endorsement of "bright line" tests, asserting that they might lead to the underenforcement of the Sherman Act against firms whose market power hurt consumers in unforeseen circumstances. The commissioners also accused the Antitrust Division of divorcing itself from the constraints of long-standing federal case law and basing its conclusions on economic theory. Citing Justice Breyer, himself an enthusiast of law and economics approaches, the commissioners asserted that, "while economic theory is an important consideration in applying antitrust law, economic theory is not tantamount to the law itself." The commissioners also criticized the Report for "plac[ing] a thumb on the scales in favor of firms with monopoly or near-monopoly power" and for fostering policies that might err on the side of monopolists and against consumers.

The disagreement between the Antitrust Division and the commissioners was clearly exposed with respect to the issue of predatory pricing. While the Report embraces the use of "average avoidable costs" in analyzing predatory pricing conduct, the commissioners expressed the view that the application of this test could possibly allow some predatory pricing conduct to escape unchallenged, particularly where there are high start-up costs that constitute a barrier to entering the market but the subsequent "avoidable costs" are *de minimis*. Thus, they maintained that the proper test should remain whether the monopolist is selling products below its average variable costs or its average total costs.

The commissioners also specifically took issue with the Antitrust Division's view that a domi-

nant firm's refusal to deal with its rivals "should not play a meaningful role in antitrust enforcement," pointing to situations in which the firm owns a patent that it refuses to license to a rival and to case law analyzing the antitrust implications of patents.

Conclusion

The *joint* antitrust policy statements that have been issued by the Antitrust Division and the Commission over the years have played a significant role not only in the agency's enforcement decisions, but also on the manner in which the courts have interpreted many of these issues. Accordingly, given the disagreements between the Antitrust Division and the Commission on several of the subjects addressed in the Report it is unclear whether the Report will have as significant an impact on antitrust law as have the earlier joint statements. In addition, a new administration will undoubtedly set its own, new antitrust policy, and thus the views expressed in the Report could be short-lived. Accordingly, despite two years of hearings, it appears that true consensus on the principles that should apply to Sherman Act Section 2 law will remain somewhat uncertain for the foreseeable future.

For more information on this topic and other matters pertaining to antitrust law, please contact issue editors, James M. Burns, Robert M. Shaw or any member of the Williams Mullen Antitrust Team.

Williams Mullen Antitrust Team

James M. Burns, Chair
202.327.5087
jmburns@williamsmullen.com

James R. Cannon, Jr.
202.293.8123
jcannon@williamsmullen.com

Clifford A. Coppola
757.473.5331
ccoppola@williamsmullen.com

Patrick C. Devine, Jr.
757.629.0614
pdevine@williamsmullen.com

Arlene J. Diogesy
919.981.4096
adiosegy@williamsmullen.com

Patrick R. Hanes
804.783.6455
phanes@williamsmullen.com

M. Keith Kapp
919.981.4024
kkapp@williamsmullen.com

Matthew H. Leggett
202.327.5070
mleggett@williamsmullen.com

Eliot Norman
804.783.6482
enorman@williamsmullen.com

William A. Old, Jr.
757.629.0613
wold@williamsmullen.com

Robert W. Shaw
919.981.4310
rshaw@williamsmullen.com

Brian C. Vick
919.981.4023
bvick@williamsmullen.com

John L. Walker III
804.783.6463
jwalker@williamsmullen.com