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# JUSTICE DEPARTMENT ISSUES REPORT ON ANTITRUST MONOPOLY LAW

***Report Provides Consumers, Businesses, and Policy Makers With Analysis of Single-Firm Conduct Under the Antitrust Laws***

WASHINGTON — The Department of Justice today issued a report informing consumers, businesses and policy makers about issues relating to monopolization offenses under the antitrust laws. The report, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act," examines whether and when specific types of single-firm conduct may or may not violate Section 2 of the Sherman Act by harming competition and consumer welfare.

The Department's report draws extensively on a series of joint hearings, involving more than100 participants, that the Department and the Federal Trade Commission (FTC) held from June 2006 to May 2007 to explore in depth the antitrust treatment of single-firm conduct. The 213-page report also incorporates commentary found in scholarly literature and the jurisprudence of the U.S. Supreme Court and lower courts.

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.

"Single-firm conduct offers some of the greatest challenges in antitrust enforcement today," said Thomas O. Barnett, Assistant Attorney General in charge of the Department's Antitrust Division. "While we need to identify and prohibit conduct that harms the competitive process, we also need to avoid interfering in the rough and tumble of beneficial competition that drives innovation and economic growth. This report draws on the rich body of commentary created during the hearings, judicial precedent, and scholarly research to help us better achieve both objectives. With standards that are more clear and administrable, businesses are more likely to comply with the law, violations will be easier to identify and remedy, and consumers will be better served."

The report discusses the important role that Section 2 plays in antitrust enforcement and the principles that guide that enforcement today. The report identifies and discusses a number of areas of consensus with respect to the proper treatment of single-firm conduct and highlights and examines those areas in which there is not yet consensus. The report seeks to make progress toward

the goal of developing sound, clear, objective, effective and administrable standards for Section 2 analysis. It addresses the following specific issues: monopoly power; conduct standards; predatory pricing and bidding; tying; bundled and single-product loyalty discounts; unilateral, unconditional refusals to deal with rivals; exclusive dealing; remedies; and international perspectives.

Among the observations in the report:

- Enforcement of Section 2 has been and should continue to be a key component of antitrust enforcement;

- 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;

- 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;

- Vague or overly inclusive prohibitions against single-firm conduct are particularly likely to undermine economic growth and to harm consumers.

- In contrast, Section 2 prohibitions that are based on clear and objective criteria, and that are carefully tailored to 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;

- The appropriate measure of cost in relation to predatory-pricing claims should identify loss-creating sales that could force an equally efficient rival out of the market, and such a measure should be administrable by businesses and the courts. In most cases, the best cost measure likely will be average avoidable cost;

- 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;

- Bundled discounting, although a common practice that frequently benefits consumers, can potentially harm competition in two different ways. Accordingly, depending on particular facts, either an analysis similar to predatory pricing is appropriate or an analysis similar to tying is appropriate;

- Antitrust liability for mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in Section 2 enforcement because compelling access is likely to harm long-term competition and courts are ill suited to be market regulators;

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

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

- Further consideration of monetary damages and penalties for Section 2 violations may be useful; and

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

An Executive Summary of the Department's report is attached. The full report can be found on the Department of Justice's web site at www.usdoj.gov/atr/public/reports/236681.pdf

**Background on Section 2 Hearings:**

The enforcement challenge involving Section 2 of the Sherman Act led the Department of Justice and FTC in June 2006 to embark on a year-long series of joint public hearings to study issues relating to enforcement of Section 2 against different types of single-firm conduct. The "Hearings on Section 2 of the Sherman Act: Single Firm Conduct as Related to Competition" took place over 19 days and featured 29 separate panels, in which 119 different panelists participated. The hearings covered a wide range of general topics, such as monopoly power, remedies, and international issues, as well as specific types of conduct, including predatory pricing and bidding, bundled and single-product loyalty discounts, tying and refusals to deal. Participants included members of the bar, economists and academics and representatives of the business community. The agencies also received numerous written submissions from participants and non-participants.

Complete information on the hearings, including transcripts, submissions and lists of participants, can be found at www.usdoj.gov/atr/public/hearings/single_firm/sfchearing.htm

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