US Department of Justice Issues Report on Enforcement Policy Under Section 2 of the Sherman Act

On September 8, 2008, the Department of Justice’s Antitrust Division (DOJ) released a much-anticipated report outlining its views on enforcement policy under Section 2 of the Sherman Act—“Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act” (the “Report”). Although the DOJ has stated that the Report reflects the substance of hearings on Section 2 (which, among other things, prohibits a firm from illegally acquiring or maintaining monopoly power) that were conducted jointly with the Federal Trade Commission (FTC) throughout 2006, the FTC has refused to endorse the Report, and several FTC Commissioners, including Chairman William E. Kovacic, issued statements questioning the DOJ’s analysis.

As a result of the schism between the two agencies, the Report is perhaps more properly viewed as a window into the DOJ’s current thinking on issues implicating alleged Section 2 violations, rather than reflecting the current state of Section 2 jurisprudence. Nonetheless, the Report offers provocative ideas that, if implemented, would change Section 2 enforcement activity as we know it.

Notably, the Report stresses a commitment to developing conduct-specific tests and safe harbors for alleged Section 2 violations when possible. In the absence of an applicable test or safe-harbor, however, the Report proposes that a “disproportionality test” be the appropriate standard for evaluating alleged anticompetitive conduct.

Under this disproportionality test, conduct would violate Section 2 when the harm to competition is disproportionate to the benefits accruing to consumers and the defendant. The disproportionality standard appears more rigorous than the usual balancing of procompetitive and anticompetitive effects under the traditional rule of reason standard, and appears to establish a higher threshold for Section 2 liability. In adopting the disproportionality standard, the DOJ Report rejected three other default standards of liability: one that considers the effect of exclusionary practices on the consumer (the “effects balancing” test), another that considers the defendant’s profits relative to the exclusionary effect of the conduct (the “profit-sacrifice” test), and a third that examines the business rationale for the conduct (the “no-economic-sense” test).

The DOJ also recommended a number of new safe harbors for defendants in Section 2 proceedings. For instance, the Report provides that, when evaluating the existence of market power, a safe harbor of at least 50 percent “warrants serious consideration by the courts.” Defendants with less than a 50 percent market share should be accorded the presumption that monopoly power is lacking. Conversely, the DOJ would infer monopoly power if a firm’s market share in a properly defined market is 66 percent for a significant period.

In predatory pricing cases, the DOJ would give safe harbor to a firm that sets prices above its average avoidable costs, thereby making above-cost pricing per se legal. This “price-cost” safe harbor would also apply to single product loyalty discounts and bundled discounts that are above cost. The Report also advocates that exclusive dealing arrangements that foreclose only 30 percent of existing customers or distribution channels in a defined market should be per se legal.
As noted above, the FTC declined to join or endorse the DOJ Report, highlighting a continuing rift between the two federal enforcement agencies. On the day the Report was issued, FTC Commissioners Pamela Jones Harbour, Jon Liebowitz and J. Thomas Rosch issued a joint statement describing the new policy as one that protects “firms that enjoy monopoly or near-monopoly power” and “seriously overstates” the prevailing level of consensus regarding Section 2.

Specifically, the Commissioners objected to the safe harbors emphasized in the Report and the “rigorous burdens of proof” imposed on public and private plaintiffs. These Commissioners emphasized that the FTC “stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report.” FTC Chairman Kovacic issued separate comments calling for “deeper empirical examination” into the impact of private rights on business decision-making.”

There are several important points to keep in mind about the DOJ’s Report:

- To the extent that the Report reflects the DOJ’s current enforcement policy, the proposed safe harbors clarify what type of conduct will give rise to Section 2 liability from the perspective of the Antitrust Division.

- Because the Report has been issued at the tail end of the current administration, there is substantial uncertainty as to whether the Report will continue to frame enforcement policies in the future.

- This uncertainty is exacerbated by the unusually forceful and public rebuke of the Report by the FTC Commissioners. Indeed, the FTC announced that it remains committed to prosecuting cases under Section 2—even on theories that may be inconsistent with the Report.

- Our recommendation is that companies weighing business practices that may touch on Section 2 issues continue to follow the dictates of earlier precedent established by the enforcements agencies and U.S. courts, but be mindful that the Report may signal a new approach to at least some aspects of Section 2 enforcement in the long run.


If you have questions about the DOJ Report or the changing landscape of Section 2 enforcement, please contact Jay Brown (+1 202 263 3275) or Jennifer Driscoll (+1 202 263 3860).

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