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The U.S. Department of Justice ("DOJ") released a long-awaited report on Section 2 of the Sherman Act ("Report") on September 8, 2008.[1] Strikingly, although the Federal Trade Commission ("FTC") and the DOJ jointly held the 2006 hearings that led to the Report, the Report was issued under the DOJ's name alone.[2] Even more strikingly, three FTC Commissioners—a working Commission majority—immediately issued a statement roundly condemning the Report as improperly seeking to "erect a multi-layer, protective screen for firms with monopoly or near-monopoly power."[3] The FTC trio further expressed its readiness "to fill any Sherman Act void that might be created if the Department actually implements the policy decisions expressed in its Report."[4]

The agencies' spat over the Section 2 Report is not their first in the current administration. In one celebrated episode, the FTC and DOJ disagreed with one another

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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 "Report"], *available at* www.usdoj.gov/atr/public/reports/236681.htm.

[2] *See id.* at 3 n.3.

[3] STATEMENT OF COMMISSIONERS HARBOUR, LEIBOWITZ AND ROSCH ON THE ISSUANCE OF THE SECTION 2 REPORT BY THE DEPARTMENT OF JUSTICE, at 10 (Sept. 8, 2008) [hereinafter "FTC Statement"], *available at* http://www.ftc.gov/opa/2008/09/section2.shtm.

[4] *See id.* at 11. Chairman Kovacic issued a separate statement that sidestepped commenting on the merits of the Report.

in the Supreme Court on the substantive antitrust standard to apply to patent settlements.[5] But what is notable about the Report rift is that it exposes not only a disagreement over substantive Section 2 standards, but also a fundamental divergence over Section 2's place in antitrust enforcement. If there is a holy war raging over Section 2's content,[6] then the DOJ's unilateral release of its Report has produced something of a great schism.

The FTC's strident castigation of the DOJ might at first blush appear surprising, because in many places the Report appeared to adopt positions that could be labeled "mainstream." For example, on the question of Section 2's general test for illegality, the Report rejected the oft-suggested "profit sacrifice" or "no economic sense" tests, under which a firm violates Section 2 only if its conduct makes no business sense apart from augmenting monopoly power.[7] Rather than adopt these more conservative tests, the Report articulated a standard that both the DOJ and the FTC previously advanced in the Supreme Court: absent a more applicable particularized rule, conduct violates Section 2 when it produces anticompetitive effects disproportionate to pro-competitive benefits.[8]

Similarly, the Report endorsed the conventional positions that above-cost single-product pricing should be per se legal; that exclusive dealing, tying, and many other vertical practices can have pro-competitive benefits even when engaged in by a monopolist; and that direct proof of monopoly power from accounting profits should be

[5] *Compare* Brief for United States as Amicus Curiae, FTC v. Schering-Plough Corp. (No. 05-273 filed May 17, 2006), *available at* 2006 WL 1358441 *with* Supplemental Brief for the Petitioner (No. 05-273 filed June 12, 2006) (responding to DOJ brief), *available at* 2006 WL 1647529.

[6] Report, *supra* note 1, *at* 34 (quoting hearings).

[7] *See generally* A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct – Are there Unifying Principles?*, 73 ANTITRUST L. J. 375 (2006).

[8] *See* Report, *supra* note 1, at 45-46 & n.79 (citing DOJ's and FTC's merits brief in *Trinko*).

greeted with some skepticism.[9] Even on some of the hard, frequently recurring open issues—such as the legal test to apply to single-product loyalty discounts—the Report took no firm position, instead identifying the analysis that the DOJ likely would apply and circumstances that might warrant departures from it.[10] And the DOJ notably steered clear of two areas—"patent ambush" situations and settlements—where the FTC had taken the lead in enforcement in recent years.[11]

But probe a little deeper, and the reasons for the FTC's dismay that the DOJ's "enforcement positions" are "tougher—and in some cases much tougher—than existing standards as defined by Section 2 case law" become apparent.[12] The DOJ's baseline "disproportionately" test, the FTC observed, has been adopted by no Court.[13] The DOJ's analysis of bundled discounts, an issue which just a few years before the DOJ had told the Supreme Court required further percolation,[14] went beyond even the Antitrust Modernization Commission's recommendations by proposing an unmodified predatory pricing test when bundle-to-bundle competition is possible.[15] The DOJ opined, without qualification, that "antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement,"[16] even though the

[9] *See, e.g., id.* at 28-30, 60, 84-85, 96-97, 138-39.

[10] *See, e.g.*, 106-16 (loyalty discounts).

[11] *See, e.g.*, Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008); Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006).

[12] FTC Statement, *supra* note 3, at 5.

[13] *Id.* at 8.

[14] *See* Brief for the United States as Amicus Curiae, 3M Co. v. LePage's Inc. 14-15 (No. 02, 1865 filed May 28, 2004), *available at* 2004 WL 1205191.

[15] Report, *supra* note 1, at 129.

[16] *Id.* at 101.

Supreme Court in *Trinko* declined to endorse that position. And the DOJ suggested that a plaintiff's burden of proof for demonstrating anticompetitive effects ought to be heightened absent a practice's complete exclusion of a rival from the marketplace.[17]

Consequently, as the FTC lamented, the Report certainly is not confined to "identify[ing] outstanding issues in Section 2 enforcement" for the purpose of "suggest[ing] topics for further study to help resolve" them.[18] Its conclusions surely reflect the substantive views (many well known) of the current Assistant Attorney General in charge of the Antitrust Division; and the underlying methodological framework, as the FTC observed, appears grounded in a background assumption that "the risk of over-enforcement of Section 2 is greater than the risk of under-enforcement."[19]

If the Report reflects the DOJ's attempt to nudge Section 2 law against enforcement, the FTC's response exposes the opposite agenda. For example, with respect to unilateral refusals to deal, much to the antitrust community's surprise the FTC Statement suggested that an unconditional, unilateral refusal to license intellectual property could expose a firm to Section 2 liability.[20] And although many (including the DOJ in its Report) have advanced that decision theory—a balancing of concerns for over-enforcement, under-enforcement, and enforcement costs—should guide the content of specific Section 2 legal rules,[21] the FTC (in something of a departure from the position

[17] *Id.* at 105.

[18] FTC Statement, *supra* note 3, at 2.

[19] *Id.* at 3.

[20] *Id.* at 9.

[21] *See generally* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L. J. 435 (2006); Mark S. Popofsky,

taken in *Trinko*) expressed a preference for applying an unmodified rule of reason balancing test, absent compelling concerns for crafting a safe harbor.[22]

The FTC's reluctance to endorse the DOJ's positions is understandable, because two of the FTC's notable enforcement priorities—combating what it views as anticompetitive settlements by monopolists and thwarting *Rambus*-like "patent ambushes"—have encountered resistance from the federal courts.[23] A further "narrowing" of Section 2 liability would not aid these endeavors. But the FTC's efforts to "strongly distance" itself "from the enforcement positions stated in the Report"[24] evidence not merely specific doctrinal disagreements, but more fundamentally a different view of Section 2's place in the antitrust firmament. The FTC's central message is that it will continue to aggressively push the Section 2 "envelope" and will not cede primacy to the DOJ in competition-law advocacy.[25]

At a more fundamental level, the agencies' schism over Section 2 reflects that the U.S. antitrust community has not achieved a consensus over Section 2 of the Sherman Act. The *Microsoft* case unleashed a now decade-long effort to identify the underlying principles that should guide Section 2 legal rules and enforcement.[26] That effort generated innumerable scholarly articles, the Antitrust Modernization Commission's recommendations, important Section 2 cases in the federal courts, and the agencies'

Section 2, Safe Harbors, and the Rule of Reason, 15 GEO. MASON L. REV. 1265 (2008); *see also* Report, *supra* note 1, at 15-18.

[22] FTC Statement, *supra* note 3, at 4.

[23] *See supra* note 11 (citing cases).

[24] FTC Statement, *supra* note 3, at 5.

[25] *See id.*

[26] *See generally* Popofsky, *Defining Exclusionary Conduct*, *supra* note 21, at 438-41.

hearings. Although the antitrust enforcement agencies appear unified that some form of the rule of reason should inform the default or background Section 2 legal test, areas of divergence appear greater than areas of agreement. Such disagreement, as the FTC predicts, "undoubtedly will spark lively discussion and spur additional Section 2 scholarship."[27]

Finally, the agencies' feud likely will make it more difficult in the short run to convince non-U.S. enforcers that their counterparts to Section 2 should more closely mirror U.S. doctrine. After all, if America's federal enforcement agencies disagree as to Section 2's content, how can the agencies convince other enforcers, through the ICN and otherwise, to follow our example? Which "example" should foreign enforcers follow: the FTC's or the DOJ's? The DOJ sounded this warning in the Report.[28]

At bottom, then, the DOJ Section 2 Report marks an important skirmish "in a fierce exclusionary conduct definition war."[29] Absent a substantial change in personnel, we can predict the U.S. enforcement agencies will continue to disagree over many issues involving Section 2. The resulting dialogue between the agencies—and of greater importance, between litigants and federal courts, the ultimate arbiters of the Sherman Act's meaning—hopefully will produce judicially-crafted Section 2 legal tests that leave competition and consumers better off than alternatives. But we are not there yet. As previously observed: "If the Sherman Act is a 'charter of freedom,'" then "Section 2's place in that charter is unsettled. How courts select, implement, and refine Section 2 legal

[27] FTC Statement, *supra* note 3, at 11.

[28] *See* Report, *supra* note 1, at 175.

[29] Popofsky, *Defining Exclusionary Conduct*, *supra* note 21, at 435 (internal quotations omitted).

tests will determine whether Section 2 remains a vital component of the free enterprise system that the Sherman Act is designed to secure."[30]

[30] *Id.* at 482 (*quoting* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933)).