Federal Trade Commission

Thoughts on the Withdrawal of the DOJ Section 2 Report

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Thank you for the opportunity to present some introductory remarks on single-firm conduct enforcement in the United States. This is an area of significant interest on both sides of the Atlantic. In just the last few years, we have witnessed three Supreme Court decisions interpreting Section 2 of the Sherman Act,[1] the issuance and then the withdrawal of the Department of Justice's Report on single-firm conduct,[2] the European Commission's record fine against Intel for abuse of dominance, debate within the Courts of Appeals about how to handle

[*] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Darren Tucker, for his invaluable assistance in preparing this paper.

[1] *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber*, 127 S. Ct. 1069 (2007); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

[2] U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008) [hereinafter Report].

certain types of exclusionary conduct claims,[3] and several FTC Section 2 enforcement actions, particularly in the standard-setting context.[4]

I'm going to spend most of my time discussing the DOJ's single-firm conduct Report. First, I will provide some background regarding the Report and explain why, despite its withdrawal, I think the Report is still relevant. Second, I will describe my principal objections to the Report. Third, I will offer some ruminations on the future of Section 2 enforcement. And finally, I will discuss some procedural differences between Section 2 and Article 82 that are often overlooked.

I.

Let me begin with some background on the DOJ's Report. From June 2006 to May 2007, the DOJ and FTC held a series of joint hearings to explore the antitrust treatment of single-firm conduct. The agencies' goal was "to explore how best to identify anticompetitive exclusionary conduct for purposes of antitrust enforcement under Section 2 of the Sherman Act."[5]

On September 8, 2008, the Department of Justice issued a 213-page Report purportedly based on the hearings. Several things stood out about the Report. First, it included several safe harbors for actions by firms with monopoly or near monopoly power, which, by definition, are the firms covered by Section 2. Second, the Report advocated standards under which conduct would only violate Section 2 if the anticompetitive effects disproportionately outweighed the

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[3] *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008) (rejecting standard for evaluating bundled discounts applied in *LePage's Inc. v. 3M,* 324 F.3d 141, 162 (3d Cir. 2003) (en banc)).

[4] *See* Section III, *infra*.

[5] 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 (Apr. 7, 2006).

potential procompetitive benefits. And third, the Report expressed great concern with harm caused by over-enforcement of Section 2, which is often called Type I error.

The FTC declined to join the Antitrust Division's Report. Three of the four FTC Commissioners, including myself, issued a statement that criticized the Report as a "blueprint for radically weakened enforcement of Section 2 of the Sherman Act."[6] We explained that under the Report firms with monopoly power or near monopoly power would be able to engage in a variety of exclusionary practices "with impunity, regardless of potential foreclosure effects and impact on consumers."[7]

The Report was effective for only eight months. On May 11, 2009, the new Assistant Attorney General for Antitrust Christine Varney withdrew it, declaring that it "no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act."[8] She took particular exception to what she characterized as "an excessive concern with the risks of over-deterrence and a resulting preference for an overly lenient approach to enforcement."[9] The withdrawal of the Report resulted in front-page

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[6] Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice 1 (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf. Then-Chairman Kovacic issued a separate statement. *See* Statement of Federal Trade Commission Chairman William E. Kovacic, 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 (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf.

[7] Statement of Commissioners Harbour, Leibowitz and Rosch, *supra* note 6, at 10.

[8] Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era, Remarks prepared for the Center for American Progress 8 (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245711.pdf; *see also* Press Release, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.pdf.

[9] Varney, *supra* note 8, at 8.

headlines in the *New York Times* and *Washington Post*, notwithstanding that the withdrawal had been widely expected based on comments made at her confirmation hearing. Ironically, only two days after General Varney withdrew the Report, the European Commission announced a record fine under Article 82 against Intel for $1.45 billion.

You may ask what is there left to discuss about the DOJ's Report, now that it has been withdrawn. Actually, quite a bit. The debate about the proper scope of Section 2 was no more resolved by the withdrawal of the Report, as was the debate that was occasioned by its issuance. Despite the many flaws I see in the Report, there are many traditional Chicago school adherents who see much to admire in it. Despite General Varney's admonition that the "Report and its conclusions should not be used as guidance by courts, antitrust practitioners, and the business community,"[10] I expect that orthodox Chicago school adherents will continue to reference the Report as a model for Section 2 enforcement standards.

To be sure, the actual impact of the Report to date appears to be quite modest. The issuance of the Report did not mark a shift in Section 2 enforcement philosophy at DOJ, but rather reflected the enforcement at DOJ over the prior eight years.[11] I am aware of no state or federal court decisions that cite to the Report, and its influence on the legal and economic literature has to date been limited.

But it is important to consider that the Report was issued only nine months ago. Keep in mind that the Antitrust Modernization Commission's report had little impact until almost a year later when the Ninth Circuit in the *PeaceHealth* decision adopted a modified version of the

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[10] *Id*.

[11] As has been noted elsewhere, the Antitrust Division did not initiate any Section 2 cases during the prior administration, although it did prosecute two that had been started under the Clinton administration. *See United States v. Dentsply Int'l Inc*., 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp*., 253 F.3d 34 (D.C. Cir. 2001).

discount attribution test proposed by the AMC for Section 2 bundled discounts[12] – which is almost certainly the greatest impact of the AMC to date. All of which is to say that the Report may be withdrawn but it – and the debate over the proper framework or frameworks for Section 2 cases – is not dead. The ongoing debate on the proper scope of Section 2 is alive and is likely only to be invigorated following General Varney's action last month.

II.

I will next explain my objections to the DOJ's Report.

The first and most serious problem with the Report was that it was too ambitious. The Report itself acknowledged that "it has proven particularly difficult to develop substantive consensus on the appropriate standards for evaluating single-firm conduct."[13] Yet the Report not only purported to summarize the case law, but went on to assert what the law *should* be. The Report did that by, among other things, articulating new standards to be applied to specific types of conduct. In doing so, the Report significantly overstated the level of consensus regarding the proper framework for analyzing single-firm conduct. One of the clearest lessons emerging from recent legal and economic commentary is that there is a lack of agreement respecting what the Section 2 law should be.

In my view the far better approach would have been for the Report to summarize what we learned from the hearings, identify outstanding issues in Section 2 enforcement, describe the conflicting positions on each of those issues, and suggest ways for further study. I would also liked to have seen the summaries of current Section 2 case law better distinguish between

[12] *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 94-100 (2007).

[13] Report at 175.

Supreme Court holdings and dicta in terms of their precedential value. A balanced report, such as that, would have made a substantial contribution to Section 2 development.

My second criticism is that the Report unnecessarily circumscribed the agencies' prosecutorial discretion by setting forth a variety of bright-line safe harbors that had little, if any, basis in Supreme Court precedent.[14] Those safe harbors were highlighted in boxes throughout the Report. For example, the Report adopted a rule of per se legality for refusals to deal by monopolists, regardless of purpose or effect.[15] This flew in the face of express language to the contrary in *Trinko*[16] and would needlessly adversely impact and constrain the agencies' ability to investigate and prosecute conduct that might harm consumers. Another example was the broad safe harbor applicable to loyalty discounts in the Report, which would treat those practices as legal if they either satisfied a standard predatory pricing test *or* rivals "remain on the market."[17] This immunization of all or nearly all loyalty discounts by a monopolist finds no support in the caselaw and might well harm consumers.

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[14] Report at 2-3 ("Where appropriate, the Department has set out 'safe harbors' to create certainty for businesses and encourage precompetitive activity. In other areas, the Department has articulated specific standards that should be applied."); *id.* at 46 ("The Department will continue to work to develop conduct-specific tests and safe harbors.").

[15] *Id*. at 129 ("The Department believes that antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.").

[16] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (stating that the right to refuse to deal with rivals is not "unqualified" and that a refusal to cooperate with rivals "[u]nder certain circumstances . . . can constitute anticompetitive conduct and violate § 2").

[17] Report at 105 ("Rivals' continued presence in the market casts serious doubt on the existence of anticompetitive effects—consumers continue to benefit from the bundled discounting as well as rivals' presence. Accordingly, the Department believes that if rivals have not exited the market as a result of the bundled discounting and if exit is not reasonably imminent, courts should be especially demanding as to the showing of harm to competition.").

To be sure, there can be a useful role for safe harbors and bright-line tests in antitrust enforcement. They can help create certainty for businesses and reduce litigation costs. But, as the Supreme Court has recognized, these tests are only appropriate in limited circumstances such as predatory pricing and predatory bidding claims, where the Court was concerned about the threat to consumer welfare from challenges to low prices.[18] It is important to bear in mind that Section 2 enforcement, by definition, only applies to firms with monopoly or near monopoly power, which is a small percentage of U.S. companies. That arguably makes the need for broad safe harbors and rules of per se legality in order to avoid over-enforcement less necessary than in some other areas of antitrust law.

My third criticism is that the Report downplayed the risk of under-enforcement (Type II error), while emphasizing the risks of over-enforcement (Type I error). The Report's introduction did pay lip service to the harm from under-enforcement of Section 2. For example, the Report acknowledged that failure to condemn violations of Section 2 might not only shield the individual firm's exclusionary conduct, but also might "empower other dominant firms to adopt the same strategy."[19] While the Report espoused the view that markets are self-correcting, it admitted that this process "may take substantial time" during which consumers may be harmed and the dominant firm may develop new exclusionary practices to prolong its market

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[18] *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*., 127 S. Ct. 1069 (2007).

[19] Report at 14; *see also id.* at 16 ("As with false positives, the cost of false negatives includes not just the failure to condemn a particular defendant's anticompetitive conduct but also the loss to competition and consumers inflicted by other firms' anticompetitive conduct that is not deterred.").

dominance.[20] Finally, the Report acknowledged the difficulty for courts to restore competition once it has been lost.[21]

Nevertheless, it is clear that the Report viewed these as relatively minor considerations compared to the much greater risk of over-enforcement. Page after page, the Report described the dangers of false positives, citing to, for example, the writings of Judges Bork, Posner, and Easterbrook; Justice Scalia's *Trinko* opinion, the *Brooke Group* opinion, and a handful of hearing witnesses that were clearly not representative of all Section 2 stakeholders. The repeated references to *Trinko* never mentioned that there was a regulatory safety net in that case in the event that the refusal to deal injured customers. Likewise, the Report glossed over the fact that *Brooke Group* involved a practice (predatory pricing) where the risk of false positives is especially acute.

The result of this one-sided weighing of risks were the safe harbors that I previously mentioned and the disproportionality test. Under that test, which was to be applied in the absence of a conduct-specific rule, a Section 2 plaintiff would have to demonstrate that the harm to competition substantially outweighed the benefits.[22] That test was inconsistent with rule-of-reason analysis, which simply asks whether the anticompetitive harm outweighs the procompetitive effects. The disproportionality test required a prohibitively high burden of proof and would cripple effective enforcement against monopolistic abuses.

My fourth criticism is that the witnesses at the Section 2 hearings were not representative of the views of all Section 2 stakeholders, despite the efforts of both agencies to assemble

[20] *Id*. at 17.

[21] *Id*. at 14.

[22] *Id*. at 45.

balanced witness panels.[23] The result was that consumer interests were not fairly represented.[24] Even the witnesses testifying on behalf of business interests were not representative of most businesses.[25] There were few real business witnesses, i.e., persons actually employed by a corporation, and nearly all of those were in-house counsel, not actual business people.[26] By contrast, there was no shortage of testimony from academics and economists, who constituted the majority of the hearing witnesses.[27] There was also no shortage of testimony from the

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[23] One of the principal goals of the hearings, as reflected in the Federal Register notice announcing the program, was participation from a wide range of interested parties, particularly witnesses with real-world experience with conduct raising Section 2 concerns. *See* 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 (Apr. 7, 2006) ("[T]he agencies are soliciting public comment from lawyers, economists, the business community, consumer groups, academics (including business historians), and other interested parties. . . . The Agencies encourage submissions from business persons from a variety of unregulated and regulated markets, recognizing that market participants can offer unique insight into how competition works and that the implications of various business practices may differ depending on the industry context and market structure. The Agencies seek this practical input to provide a real-world foundation of knowledge from which to draw as the Hearings progress. Respondents are encouraged to respond on the basis of their actual experiences. The goal of these Hearings is to promote dialogue, learning, and consensus building among all interested parties . . . .").

[24] No consumers or organizations representing consumer interests testified in the hearings. Three panels were devoted to business concerns; none was devoted to consumer concerns. *See* Report app.

[25] Representatives from fourteen companies testified during the hearings: American Airlines, AMD, Broadcom, Cisco, Eastman-Kodak, General Electric (2), General Motors, Hewlett-Packard, Intel (2), Microsoft, Qualcomm, Red Hat, Royal Philips Electronics, and Verizon. Only three witnesses were from firms that prosecuted Section 2 claims (AMD, Broadcom, and Red Hat), and those witnesses were cited sparingly compared to those representing, for example, Microsoft and Intel. Attorneys from the U.S. Chamber of Commerce and the Generic Pharmaceutical Association also testified at the hearings.

[26] All but one of the corporate witnesses were attorneys serving in the in-house legal departments of those businesses.

[27] 79 of the 138 panel witnesses (57%) were from academia or were practicing economists, at least on a part-time basis. Some witnesses testified on more than one panel.

antitrust defense bar.[28] I was also troubled by the Report's almost complete failure to disclose witnesses' financial interests relating to Section 2 litigation.

My fifth concern is that the Report suggested that the Merger Guidelines' SSNIP test (and hence critical loss analysis) is the only appropriate way to define the relevant market in a Section 2 case.[29] This is problematic for two reasons.

To begin with, application of the hypothetical monopolist test is fraught with peril in a monopoly maintenance case because the use of prevailing prices, as required by the test, can lead to defining overly broad markets. This is known as the Cellophane Fallacy.[30] To be sure, economists have proposed a variety of ways to account for this problem – such as estimating prevailing prices in the absence of monopoly power – but these techniques are "quite difficult" to apply in practice, as the Report itself acknowledged.[31]

Additionally, Sherman Act caselaw is clear that direct evidence – including evidence from the mouth of the defendant – may be used to define the relevant market. For example, the Sixth Circuit in *Conwood Co. v. United States Tobacco Co.* said that "[w]hether a company has monopoly or market power 'may be proven directly by evidence of the control of prices or the

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[28] 39 of the 138 panel witnesses (28%) were from defense firms. (There is some double counting with the figures in the prior footnote for lawyers holding simultaneous positions in law firms and academia.) There was only one witness from a plaintiffs' firm (Haglund Kelley in Portland), who was cited only twice in the Report.

[29] Report at 27 ("Despite its limitations in the Section 2 context, there exists no clear and widely accepted alternative to the hypothetical monopolist methodology for defining relevant markets." (citing three economists)).

[30] *See United States v. E. I. du Pont de Nemours & Co*., 351 U.S. 377 (1956).

[31] Report at 27 ("[D]etermining the competitive price is apt to be quite difficult . . . .").

exclusion of competition.'"[32] The Report acknowledged these cases but relegated the use of direct evidence to a kind of gatekeeping function.[33] Likewise, the "practical indicia" for defining markets described in *Brown Shoe*,[34] which have been applied in Section 2 cases,[35] were never even mentioned, much less discussed.

My sixth concern with the Report is that each type of exclusionary conduct was considered on a standalone basis. The Report adopted specific tests for certain types of exclusionary conduct, such as predatory pricing, loyalty discounts, price bundling, tying, refusals

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[32] 290 F.3d 768, 783 n.2 (6th Cir. 2002) (quoting *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97-98 (2d Cir. 1998)); *see also Am. Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946) (exclusion of competitors supported jury's monopolization finding); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) ("The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output."); *Spirit Airlines v. Northwest Airlines*, 431 F.3d 917, 950-51 (6th Cir. 2005) (reversing summary judgment for defendant because evidence of output reduction and price increases following plaintiff's exit from the market could show monopoly power); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107-08 (2d Cir. 2002) (per curiam); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("the existence of monopoly power is clear" where a firm can profitably raise prices substantially above the competitive level); *Re/Max Int'l v. Realty One*, 173 F.3d 995, 1018-19 (6th Cir. 1999) ("[A]n antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition."); *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) ("Market power can be proven by either direct or circumstantial evidence.").

[33] Report at 30 ("In some circumstances, an inability to find any anticompetitive effects may serve as a useful screen, enabling courts or enforcement officials to conclude quickly that a section 2 violation is implausible.").

[34] *Brown Shoe Co. v. United States*, 370 U.S. 294 325 (1962) (holding that the boundaries of a product market can be "determined by examining such practical indicia such as industry or public recognition of the []market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors").

[35] *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966); *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008); *HDC Medical, Inc. v. Minntech Corp.*, 474 F.3d 547 (8th Cir. 2007); *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004).

to deal with rivals, and exclusive dealing. I think there is some merit to doing this, because I do not subscribe to any of the "one-size-fits-all" tests that others have proposed.

The Report, however, did not identify the analysis to be applied when confronted with allegations of multiple forms of exclusionary conduct. Are we to examine each practice separately under the specific test described in the Report? Not clear. Are we to apply the disproportionality test to some or all of the conduct? Not clear. Are we to apply some type of "monopoly broth" test (which, by the way, is never discussed in the Report).[36] Also not clear. This is a significant shortcoming, given that, in my experience, rarely does a Section 2 plaintiff allege just a single form of misconduct.

My seventh concern is that there was little discussion regarding how evidence of intent might be taken into account in Section 2 cases. This shortcoming was particularly curious given that attempted monopolization is a specific intent offense.[37] One would think that evidence as to which conduct was intended by the defendant to result in anticompetitive consequences would be

[36] Some courts have suggested that a group of acts may constitute a violation of Section 2, even if no single act is found to be an act of monopolization. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (Sherman Act plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each"); *LePage's Inc. v. 3M,* 324 F.3d 141, 162 (3d Cir. 2003) (en banc) ("The relevant inquiry is the anticompetitive effect of 3M's exclusionary practices considered together."); *City of Anaheim v. S. Cal. Edison Co.,* 955 F.2d 1373, 1376 (9th Cir. 1992) ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981) ("The proper inquiry is whether, qualitatively, there is a 'synergistic effect'"); *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980) (characterizing a mix of exclusionary conduct as a "monopoly broth"); *Tele Atlas N.V. v. Navteq Corp.*, 2008-2 Trade Cas. (CCH) ¶ 76,417 (N.D. Cal. Nov. 13, 2008) ("To appreciate the effect of otherwise lawful acts, the jury must consider the acts' aggregate effect.").

[37] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (a showing of attempted monopolization required "a specific intent to monopolize"). Conspiracy to monopolize also requires a showing of specific intent. *See United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1947); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

highly probative, as some courts have suggested.[38] There was silence on the role of intent evidence in a monopoly maintenance case, other than a passing suggestion that it be disregarded in its entirety.[39] As for attempted monopolization, the Report's only (rather obvious) suggestion was that proper intent evidence should demonstrate "a specific intent to destroy competition or build monopoly"[40] but not "an intent to compete vigorously."[41]

My eighth and – I'm sure you'll be relieved – final criticism is the Report's frequent citation to Section 1 cases as though they were Section 2 cases. Historically, exclusive dealing, tying, bundled discounts, and other vertical non-price restraints were challenged under Section 1 of the Sherman Act or Section 3 of the Clayton Act. Rarely were they challenged under Section 2. Yet over the last decade, courts have sustained challenges to vertical restraints under Section 2 while dismissing the same claims under Section 1 or Section 3,[42] as claims based on Section 1

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[38] *See, e.g.*, *Chicago Bd. of Trade v. United States*, 246 U.S. 213, 238 (1918) ("[K]nowledge of intent may help the court to interpret facts and to predict consequences."); *Microsoft*, 253 F.3d at 59 ("Evidence of the intent behind the conduct of a monopolist is relevant . . . to the extent it helps us understand the likely effect of the monopolist's conduct."); *U.S. Football League v. NFL*, 842 F.2d 1335, 1359 (2d Cir. 1988) ("Evidence of intent and effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices.").

[39] Report at 104 ("[T]wo other panelists voiced concern about relying on evidence of either anticompetitive intent or business justification. One panelist stated that 'trying to . . . look for evidence of intent one way or the other is sufficiently manipulable or hideable that I'm worried about playing that game.'" (citation omitted)); *see also id.* at 6 (summarizing criticism of the specific intent requirement for an attempt offense).

[40] Report at 6 (quoting *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953)).

[41] Report at 6 (quoting *Spectrum Sports*, 506 U.S. at 459).

[42] *See, e.g.*, *United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc); *Conwood*, 290 F.3d at 783; *Microsoft*, 253 F.3d at 59.

or Section 3 became much more difficult for plaintiffs to sustain after the *Leegin*, *Kahn*, *Sharp Electronics*, *Monsanto*, *Jefferson Parish*, and *Sylvania* decisions.[43]

Let me give you an example of how this plays out in practice. In the *Microsoft* case, the district court dismissed the Section 1 exclusive dealing claim because Microsoft had not "completely excluded Netscape."[44] But the district court, and ultimately the D.C. Circuit, found that the same agreements supported liability under Section 2 even though the foreclosure was less than the 40-50% share usually required to establish a Section 1 violation.[45] Similarly, the D.C. Circuit found that some of Microsoft's efforts to integrate its browser violated Section 2 as an illegal tie. Yet the court reversed the district court's finding of liability under Section 1 and remanded for a rule of reason analysis.

Put simply, the standards applied to vertical restraint claims under Section 2 are different from those applied in claims based only on Section 1 or Section 3. Yet the Report – and sometimes the commentators and witnesses – referenced Section 1 and Section 3 cases as though they were Section 2 cases. This had the effect of misstating the law in a way that suggested that courts have blessed vertical restraints practiced by monopolists. This is yet another way that the Report improperly sought to raise the bar to challenging conduct that might be illegal if practiced by a firm with monopoly or near-monopoly power.

[43] *Leegin Creative Leather Products, Inc. v. PSKS, Inc*. 127 S. Ct. 2705 (2007); *State Oil v. Khan*, 522 U.S. 3 (1997); *Business Elects. Corp. v. Sharp Elecs. Corp*., 485 U.S. 717, 724 (1988); *Monsanto Co v. Spray-Rite Serv. Corp*., 465 U.S. 752, 761 (1984); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Continental T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36 (1977).

[44] *United States v. Microsoft Corp*., 87 F. Supp. 2d 30, 53 (D.D.C. 2000).

[45] *Microsoft*, 253 F.3d at 70.

III.

So where does that leave the state of Section 2 enforcement? Of course, I cannot comment on the Antitrust Division's plans, but General Varney has already spoken several times on the topic. The two agencies have disagreed in the past on the propriety of certiorari on some FTC Section 2 cases.[46] I am hopeful that the agencies will see more eye-to-eye on these issues in the future.

But regardless of what happens at the DOJ, the FTC remains ready, willing, and able to challenge violations of Section 2 of the Sherman Act. Since 2000, the Commission has brought two monopolization cases in the standard setting context: *Unocal* and *Rambus*. In the first case, we alleged that Unocal failed to disclose its clean-fuel patents while helping to establish industry standards for reformulated gas that incorporated its technology. We reached a consent agreement with Unocal shortly after trial before an FTC ALJ.[47] In the second case, the Commission found that Rambus had failed to disclose certain DRAM patents to a standard setting organization that ultimately adopted standards covered by the intellectual property. The Commission found that this conduct violated Section 2, but the Court of Appeals for the D.C. Circuit reversed for lack of causation between the deception and the selection of the standard.[48] The agency has also challenged a number of reverse payment, or pay-for-delay, cases in the pharmaceutical industry; although, I should say that these were primarily Section 1 cases.

[46] *See, e.g.*, Statement of the Federal Trade Commission Declining To Join the U.S. Department of Justice Recommendation That the United States Supreme Court Review the Decision of the Court of Appeals for the Ninth Circuit In *linkLine Comms. v. Pacific Bell Telephone Company* (May 23, 2008), *available at* http://www2.ftc.gov/os/2008/05/P072104stmt.pdf.

[47] *In re Union Oil Co. of Cal.*, Docket No. 9305 (July 27, 2005) (decision and order), *available at* http://www.ftc.gov/os/adjpro/d9305/050802do.pdf.

[48] *Rambus, Inc. v. FTC*, 522 F.3d 456, 469 (D.C. Cir. 2008).

In addition, the agency has used its Section 5 authority to challenge unilateral conduct. In the *Valassis* case, a leading producer of newspaper inserts made public statements in an analyst conference call that amounted to an invitation to collude to raise prices and allocate customers. The case was resolved with a consent order.[49] In the *N-Data* case, we challenged a patent holder's breach of a predecessor's commitment to a standard setting organization to license certain Ethernet-related patents on defined royalty terms after the industry became committed to a standard incorporating the intellectual property. The FTC's claim was resolved through a consent order.[50]

IV.

Next, I'd like to talk briefly about two important procedural differences between Section 2 enforcement and Article 82 enforcement that are often lost in discussions about these two statutes. The first difference involves how these statutes apply to merger control. In the United States, the antitrust agencies can challenge a transaction both prospectively and retrospectively under Section 7 of the Clayton Act. For example in *United States v. E.I. du Pont de Nemours & Co*., the Department of Justice successfully challenged the acquisition of General Motors stock by DuPont approximately thirty years after the acquisition.[51] Although it is extremely unlikely that the U.S. agencies would attempt to challenge such an old transaction today, the agencies

[49] *In re Valassis Commc'ns, Inc*., FTC File No. 051 0008, Docket No. C-4160 (Apr. 19, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510008/0510008.shtm.

[50] *In re Negotiated Data Solutions LLC*, FTC File No. 051 0094 (Sept. 22, 2008) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

[51] *United States v. E.I. du Pont de Nemours & Co*., 353 U.S. 586, 597 (1961) ("the Government may proceed at any time that an acquisition may be said with reasonably probability to contain a threat that it may lead to a restrain of commerce or tend to create a monopoly of a line of commerce.").

regularly review consummated mergers for potential harm and have challenged a number of them in recent years.

By contrast, the EC Merger Regulation operates prospectively only. The EC has only one chance to review a transaction and cannot seek to unwind a transaction once it has been consummated. Nevertheless, Article 82 can play a "backstop" to the EC Merger Regulation and be used to challenge anticompetitive transactions ex post.

Indeed, a recent development in EC merger review is the view that Article 82 can serve as an effective deterrent to post-merger anticompetitive behavior. In the GE/Honeywell case, the Court of First Instance stated that "the Commission must, in principle, take into account the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct."[52] The court pointed to Article 82 in particular as a potential deterrent to companies behaving anti-competitively post-merger. The EC recently incorporated these principles into its guidelines for non-horizontal mergers.[53] The U.S. agencies do not follow this approach for several reasons including the ability to apply Section 7, which has a lower standard of proof, retrospectively.

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[52] Case T-210/01, *General Elec. v. Commission* [2005] ECR II-000 ¶ 73; *see also* Case C-12/03 P, *Commission v. Tetra Laval BV* [2003], ECR I-000 ¶¶ 74-76.

[53] Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings ¶ 46 (2008) ("[W]hen the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. Conduct may be unlawful *inter alia* because of competition rules or sector-specific rules at the EU or national levels.").

More specifically, if a merger results in increased prices, the merged entity may be liable under Article 82(a), which prohibits exploitative practices, including excessive prices.[54] Under this section, the EC (and the Community) can challenge "excessive pricing," which the courts have defined as a price having "no reasonable relation to the economic value of the product supplied."[55] This is, of course, a significant divergence from Section 2 of the Sherman Act, which does not condemn high prices. Challenges to "excessive prices" under Article 82 have been rare and successful challenges rarer still. Moreover, it appears that the Commission has sought only price controls as relief.[56] In theory, though, the full range of remedies under Section 82 would be available for excessive prices.

Additionally, a consummated merger could in theory be indirectly challenged under Article 82 if the merged company abused its market power. In this respect Article 82 and Section 2 function similarly, although the requirement to show monopoly power in the United States means that only a small percentage of mergers could effectively be challenged in this manner. As I previously mentioned, the more common approach in the United States is to challenge consummated mergers under Section 7 of the Clayton Act, which the antitrust agencies can enforce at any time.

A second important procedural difference between Section 2 enforcement and Article 82 enforcement is that the EC, unlike the U.S. agencies, is administrative in nature. That means that

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[54] Article 82(a) of the European Commission Treaty (one type of abuse of dominance is "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions").

[55] Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207 ¶ 250. To determine whether prices are excessive, courts consider the product's costs of production, prices of comparable products in the same and other markets, and profit margins of other products sold by the company. *See id*. ¶¶ 301-303; *Napp Pharms. v. Director General of Fair Trading*, [2002] Comp AR 13: European Commercial Cases 177.

[56] *See, e.g.*, *United Brands v. Commission*, 1978 E.C.R. 207.

a Commission decision to close an Article 82 investigation can be challenged by certain third parties, including consumer associations, third parties directly affected by the Commission's action, persons that actively participated in the Commission's investigation, and member states.[57] As a result, the Commission may be nudged into enforcement actions in marginal cases. There is nothing like that here, and that is arguably a powerful argument why over-enforcement is more of a concern than under-enforcement in the United States than it is in Europe.

V.

In sum, the withdrawal of the DOJ's unilateral conduct report was a welcome development: while the Report's demise may not have any direct effect on the FTC, the agencies' approaches toward Section 2 enforcement now appear to be in closer alignment than they have been in some time. And while important substantive and procedural differences remain, the withdrawal of the Report may also bring the U.S. agencies and the European Commission in closer alignment on unilateral conduct issues.

Thank you for your time and attention.

[57] *See* Article 230 ("Any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."); Article 232 ("Any natural or legal person may . . . complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.").