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Re: Comments Regarding Section 2 Hearings, Project No. P062106

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses of every size, sector, and region, appreciates the opportunity to submit these comments to the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") regarding the hearings being held on Section 2 of the Sherman Act. The Chamber applauds the FTC and the DOJ for holding these hearings on this very important topic. We work continuously to promote the fundamental principles of our free enterprise economy and recognize that the free market system is essential to ensuring a vibrant and productive economy. An effective and balanced system of antitrust law is critical to ensuring the efficient operation of our economy and we believe that this policy will perform best if it rests on a sound understanding of business realities in a global economy and a strong commitment to eliminate or reduce unproductive, anticompetitive objectives that reduce competitive vigor.

Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits monopolization and attempts to monopolize, theoretically making an antitrust violation out of purely unilateral conduct. There is general agreement that Section 2 usefully deters firms from engaging in conduct that has no redeeming features. But there is widespread disagreement about the proper scope of Section 2 liability and the standard that should be used to distinguish legal conduct from illegal conduct. According to Judge Richard Posner, this "is the biggest substantive issue facing antitrust." Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev. 229 (2005) (symposium article).

The Chamber believes that Section 2 should be interpreted and enforced carefully and predictably. The lack of a clear legal standard against which to judge unilateral conduct imposes significant costs on the economy. Nevertheless, the Chamber does recognize the complexity of the issue and feels that these hearings and the final report will be a valuable addition to furthering the productive debate on Section 2 enforcement practices.

Courts and antitrust enforcement agencies have had—perhaps understandable—difficulty distinguishing robust competition from conduct that may in the long-run have anticompetitive effects. As commentators have long observed and even the Supreme Court seems to recognize, robust competition and too robust, anticompetitive behavior both look the same in the short-run, when courts and enforcement agencies are typically asked to render their judgments. *See, e.g.,* Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 346. *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984) (noting the difficulty of "distinguishing robust competition from conduct with long-run anticompetitive effects").

Firms defending antitrust claims stand directly in the line of fire. No firm relishes the prospect of ruinous liability. Uncertain liability rules and huge potential damages give firms an incentive to shy away from conduct that, although entirely legitimate, can reasonably be expected to attract antitrust scrutiny. As the Supreme Court observed in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, when antitrust law leads firms to pull their competitive punches, it undermines its only legitimate objective—increasing consumer welfare through lower prices, increasing output, and improving the quality of goods and services. 475 U.S. 574, 594 (1986).

Tying Arrangements

The U.S. Chamber recommends that tying claims be brought into the general unilateral conduct fold. Tying arrangements occupy a strange place in the antitrust pantheon. Tying arrangements are often considered to be a prime example of unilateral power. But courts review them under an idiosyncratic standard with roots in Section 1. More than fifty years ago, Justice Frankfurter put tying arrangements in the same class as bid rigging and price fixing, asserting that "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil v. U.S.*, 337 U.S. 293, 305 (1949). Scores of commentators have observed that tying arrangements serve many procompetitive purposes and do not deserve the contempt reserved for actions that have no redeeming competitive purposes. *E.g.,* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 372-375 (Free Press 1993); Richard A. Posner, *Antitrust Law* 197-207 (U. Chi. Press 2001); Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 Minn L Rev 1013 (1985).

Reacting to the consistent and stinging criticisms, the Supreme Court has over the past two decades engaged in a bit of judicial legerdemain. The Supreme Court has simultaneously affirmed its commitment to *per se* condemnation of tying arrangements while constructing a peculiar set of criteria that must be satisfied before the sanction applies. "It is," the Court asserts, "far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *per se*." *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 9 (1984).

However, according to the Court, plaintiffs seeking to prove a tying claim must establish that (i) the seller conditioned the sale of one product on the purchase of another; (ii) the seller has "appreciable economic power" in the tying product market; and (iii) the arrangement "affect[ed] a substantial volume of interstate commerce." *Eastman Kodak Co. v. Image Tech Servs., Inc.*, 504 U.S. 451, 462 (1991). *See also Jefferson Parish*, 466 U.S. at 13-4 ("[W]e have condemned tying arrangements when the seller has some special ability—usually called "market power"—to force a purchaser to do something that he would not do in a competitive market.")

This test is doubly odd. As the four concurring Justices in *Jefferson Parish* observed,

> tying doctrine incurs the costs of a rule of reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial.

Id. at 34.

Cf. Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. __, 126 S. Ct. 1281 (2006) (unanimously overruling the well-established doctrine that market power can be presumed solely because defendant holds patent over tying product).

The existing approach to tying arrangements does nothing to advance the cause of competition policy. The focus of attention in an antitrust case should be on whether the challenged practice threatens to raise prices or restrict output in a coherently defined market. With the exception of market power in the tying product market, however, none of these criteria sheds any light on whether competition is threatened in either market or, just as importantly, whether the obvious supply side benefits offset these anticompetitive effects. The current approach simply "does not correspond to any theory that could be used to distinguish procompetitive from anticompetitive tying." David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 90 (2005).

After more than half a century, the time has come to break with Justice Frankfurter's oft-quoted, but more often ignored, assertion. Tying arrangements do not warrant *per se* scrutiny, however ingeniously crafted. They should be subject to the same general standards that apply to exclusive dealing arrangements and other potentially exclusionary vertical restraints.

Essential Facilities Doctrine

The essential facilities doctrine is another antitrust anomaly. In theory, the essential facilities doctrine provides a firm with an opportunity to challenge a rival's decision to deny access to its property. But the Supreme Court has never expressly endorsed this theory of antitrust liability, and it has attracted considerable criticism from an impressive array of commentators.

The leading modern case applying the essential facilities doctrine is *MCI Communications Corp. v. AT&T* , 708 F.2d 1081, 1132 (7th Cir. 1983). MCI argued that AT&T had improperly refused to let it connect its telephone lines with AT&T's nationwide telephone network and that

interconnection was essential if MCI was to compete against AT&T in the long-distance business. The Seventh Circuit held that MCI had proven "that it was technically and economically feasible for AT&T to have provided the requested interconnections, and that AT&T's refusal to do so constituted an act of monopolization." *Id.* at 1133. The court stated:

> A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a "bottleneck") can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on nondiscriminatory terms.

Id. at 1132.

The Supreme Court has never acknowledged the existence of the essential facilities doctrine as a source of liability under Section 2. The two cases most widely cited as the source of the doctrine, *US v. Terminal Railroad Assoc.*, 224 U.S. 383 (1912) and *Associated Press v. US*, 326 U.S. 1 (1945), did not involve unilateral conduct. In both cases, the Department of Justice challenged decisions by a group of competitors to deny a rival access to a jointly created resource. Although the Court in both cases upheld a remedy granting the excluded rivals' access to the shared facility, neither case stands for the proposition that a stand-alone firm has an obligation to share its property with its rivals. Just last year, the Court expressly recognized that it had never endorsed the existence of the doctrine, though it declined the opportunity to repudiate it. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

Even as a figment, however, the doctrine has proved quite controversial. A wide cross-section of antitrust scholars, including Posner, Areeda, and Hovenkamp, has called for its abolition. Posner, *Antitrust,* 242-44; Herbert Hovenkamp, *Federal Antitrust Policy* 305 (2d ed. 1999); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 841 (1990). *See also* John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v. Trinko, 72 U. Chi. L. Rev. 289, 300 (2005). They and others have assembled a laundry list of objections to the doctrine: compelling firms to share their property with rivals poses a significant threat to innovation; mandatory sharing puts courts in the position of having to serve as public utility regulators, a function for which they are ill-equipped; and it runs counter to the view that firms do not have to share their property with others.

The "essential" facilities doctrine serves no justifiable purpose and the FTC and DOJ final report should recommend appropriate enforcement criteria.

The way the law is enforced, and its lack of clarity, has a considerable impact on companies decisions and can impose significant costs on the economy as a whole. While many aspects are established case law, enforcement agencies have great flexibility in their enforcement practices, the cases they bring, and the amicus curiae briefs filed that have significant influence on courts' decisions. We urge the FTC and DOJ to exercise restraint in the enforcement of Section 2 cases

and to formulate a clearer set of standards to reduce companies' risks when making their long-term business plan.

Remedies—Hearing Topic

The Chamber suggests that a hearing be held on remedies for Section 2 cases and address the topic in the final report. While the agencies may already be planning to address the topic, we were unable to identify it as a subject matter to be covered in any publicly available announcement. This is an important topic with regard to Section 2 violations and a closer look at its effects on competition would be a valuable addition to the comprehensive nature of these hearings. Remedies obviously transcend all aspects of the antitrust field, but they play a particularly important part in cases with ambiguous case law such as those involving Section 2 issues. Future potential liability is a vital aspect in the decision-making of a company when making certain business determinations.

The Chamber appreciates the opportunity to submit these comments to the FTC and DOJ for thoughtful consideration and review.

Sincerely,

R. Bruce Josten