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What to make of the Department of Justice, Antitrust Division (“DOJ”)’s recent Unilateral Conduct Report¹ (“Report”)—does it point to a path through the Scylla and Charibdis of monopoly enforcement policy, as the current Assistant Attorney General for Antitrust portrays it,² or, to borrow the words of one of his predecessors but the sentiments of a majority of the Federal Trade Commission (“FTC”), does it portend *Giant Steps*³ in the wrong direction? I suggest that the Report, while perhaps not of such mythic proportions (despite its 181 page girth) nonetheless takes us a few halting steps down a promising path that we should continue along for a while and then reassess in, say, five years.

As a work of antitrust scholarship and analysis, the Report is clearly a success. The staffs of the DOJ and FTC have compiled and at least briefly addressed all the major

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¹U.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.

²Thomas O. Barnett, Asst. Att’y Gen., U.S. Dep’t of Justice, Antitrust Division, “Navigating Scylla and Charybdis: Three Stages in the Journey to Effective Section 2 Enforcement” (Sept. 23, 2008), *available at* <http://www.usdoj.gov/atr/public/speeches/237527.htm>.

³Charles James, Asst. Att’y Gen., U.S. Dep’t of Justice, Antitrust Division, “Giant Steps: On the Occasion of the Twentieth Anniversary of the 1982 Merger Guidelines” (Jun. 10, 2002), *available at* <http://www.usdoj.gov/atr/hmerger/11253.htm>.

and many less-than-major U.S. cases⁴ considering unilateral conduct. Perhaps even more useful is the collection and brief characterization of over 200 articles and books on the subject. And even if one disagrees with the ultimate policy recommendations, there is no question that the structured analytical discussion of this vast material illuminates many of the issues that need to be debated when trying to address unilateral conduct within the antitrust laws. If only to benefit from this prodigious scholarly work, I have no doubt courts and counselors will turn to this Report for years to come.

But what about the recommendations? Did DOJ get them right? From this practitioner's perspective, the key recommendations are the following:

- **Market Share Safe Harbor and Monopoly Power Presumption:** Entities with a market share of less than 50 percent should enjoy a safe harbor from being found to violate Sherman Act § 2,⁵ while those with a “durable” 66.7 percent or more should be rebuttably presumed to enjoy a monopoly that may violate the Act if they engaged in exclusionary conduct.⁶
- **Default Conduct Test:** Unless a more conduct-specific test applies, conduct should be unlawful if its “anticompetitive harms substantially outweigh its likely pro-competitive benefits;” the harms should be “substantially disproportionate,” not “comparable or close to comparable.”⁷

⁴Interestingly, there is almost no discussion of monopolization cases outside the United States, even though most of the analytical discussion purports to be based on economic theory rather than court decisions. Even if legal standards may vary, why not learn economic lessons from the experience and scholarship of other jurisdictions?

⁵Report at viii, 24, 30.

⁶*Id.* at viii, 23, 30.

⁷*Id.* at ix, 45-46.

- **Predatory Pricing:** To be illegal, a price should be below average avoidable cost (i.e., variable and fixed costs incurred only because of the predatory strategy) and there must be a dangerous probability that the investment in the below-cost prices will be recouped later through supracompetitive pricing in the relevant or some other market.⁸
- **Tying:** Tying should not be per se illegal but instead tested using the default disproportionality test.⁹
- **Bundling:** If competitors can offer a similar bundle, then use the predatory pricing test of average avoidable costs for the whole bundle and require recoupment.¹⁰ If not, there should be a safe harbor for bundles, priced so that competitive components are still above average-avoidable cost if all discounts are allocated to them (the “discount-allocation” test) and, outside the safe harbor, the disproportionality test should apply.¹¹
- **Single-product / First-dollar Loyalty Programs:** Although DOJ believes loyalty programs should be treated as a form of predatory pricing, it calls for more study of the “real-world impacts” of these programs.¹²

⁸*Id.* at ix, 65, 67-68.

⁹*Id.* at x, 90.

¹⁰*Id.* at x, 101.

¹¹*Id.* at x, 101-02, 105.

¹²*Id.* at x-xi, 116 (“The Department likely would apply a standard predatory-pricing test in analyzing most single-product loyalty discounts.”).

- **Exclusive Dealing:** There should be a safe harbor for exclusive dealing that affects 30 percent or less of the market. Outside the safe harbor, the disproportionality test should apply.¹³
- **Unilateral Refusals to Deal:** These should not play a “meaningful part in section 2 enforcement”¹⁴ and both the essential facilities doctrine¹⁵ and the implication of *Aspen Skiing*¹⁶ (that withdrawal from past cooperation with a competitor could be illegal) should be rejected.¹⁷

The Report does not address other kinds of conduct that might be associated with monopoly or near-monopoly, such as alleged abuses of intellectual property rights or of regulatory processes (e.g., pharmaceutical company FDA filings and challenges relating to patented medicines).¹⁸ Presumably, in DOJ’s view, if challenged as unilateral conduct under Sherman Act § 2, these should be tested under the default disproportionality test.

To hear the FTC Commissioners tell it, these recommendations constitute such giant steps beyond what courts have held Sherman Act § 2 to mean¹⁹ that they pledge “to

¹³*Id.* at xi, 140, 141.

¹⁴*Id.* at xi, 129.

¹⁵*Id.* at 129; *cf.* *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383, 411 (1912) (seminal case); *MCI Communs Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (leading modern formulation of the doctrine).

¹⁶*See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 475 U.S. 585, 604 & n.31 (1985) (analyzing “Ski Co.’s decision to terminate the all-Aspen ticket [as] a decision by a monopolist to make an important change in the character of the market” which might give rise to § 2 liability).

¹⁷Report at 126 (The “Department believes that a firm’s termination of a prior course of dealing generally should not be a significant factor . . .”).

¹⁸I do not, of course, mean to suggest that a patent, say, confers a “monopoly” that is necessarily economically relevant for antitrust purposes, but only to note that the Report completely avoided the vexed questions at the intersection of patents and antitrust law and the closely related areas of regulatory structures that confer or protect substantial market power.

¹⁹“Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice,” available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

fill any Sherman Act enforcement void” when DOJ implements the Report’s conclusions.²⁰ As far as the law is concerned, the Commissioners are perhaps not wrong. Indeed, I think one might not too unfairly characterize the recommendations as putting a thumb on the alleged monopolist’s side of the scales. But surely going beyond the existing law was the point of the Report—not just to summarize the limited, often vague, and sometimes conflicting guidance from the Supreme Court and Courts of Appeals but to develop additional guidance for prosecutors, courts, counselors, and companies. This is nothing new. The DOJ’s 1982 Merger Guidelines, for instance, did just that despite criticism and doubt at the time.

Most striking to me, however, is that the recommendations largely boil down to (1) market-share based safe harbors, (2) the average-avoided-cost pricing test (allocated if for non-competitive bundles), and (3) the substantially-disproportionate effects-balancing test. This sounds like only a small step beyond today’s case law on market shares, the “appropriate measure of cost” predation standard, and the effects-balance test we already have in principle. Perhaps the economic reality of monopolization and attempted monopolization reflects such uniformity across disparate kinds of conduct. I would certainly think that having a small number of fundamental tests not substantially different from current ones would be welcomed by courts and counselors. But I wonder whether this simplicity does not reflect rather the continuing ignorance we all have about the actual economic effects of monopoly and “exclusionary conduct,” whether and which of

²⁰*Id.* at 11 (“This Commission 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.”).

those effects are or are not socially beneficial, and the consequences of various possible policies for addressing these effects.

Indeed, this economic ignorance is reflected in the Report. To be sure, quite a few eminent economists of industrial organization shared the fruits of their studies in testimony during the hearings, including one whole morning devoted to the topic,²¹ and at least one fifth of the secondary literature cited in the Report appears to be about economics.²² Nonetheless, there is precious little discussion in the Report of empirical studies of monopolies or their behavior and effects on competition and consumers. Those few explicit discussions of empirical data merely underscore how limited the data are.²³

This is no mere quibble. One of the seven guiding “principles” and recurring themes of the Report is to craft, to the extent possible, standards that prevent anticompetitive conduct without suppressing legitimate competition—i.e., balancing the overdeterrence of “false positives” against the underdeterrence of “false negatives.”²⁴ Clearly the principle is a good one and attempting to set policy to achieve the correct

²¹See Report at 184 (listing 7 members on the September 26, 2006, panel devoted to “Empirical Perspectives”); “DOJ/Antitrust: Single-Firm Conduct and Antitrust Law September 2006 Agenda,” http://www.usdoj.gov/atr/public/hearings/single_firm/sfcsept.htm (providing links to speakers’ presentations and a transcript of the testimony).

²²I counted some 210 articles and books in the Table of Authorities, of which 42 were published in journals or books devoted to economics by at least 28 economists. This understates the “economic” literature cited because it excludes “law and economics” journals and even largely economic articles that happened to be published in our wonderfully catholic “antitrust” journals. But the point is clear: the Report did not ignore economic scholarship.

²³See Report at 57 (“Although theoretically a rational strategy, actual evidence on the frequency of predatory pricing, nonetheless, is limited.”), 113 (quoting Prof. Herbert Hovenkamp as asking “Where is the empirical evidence that [loyalty] discounts in these situations usually are pro-competitive?”), and 140 (noting about exclusive dealing that “[t]he limited empirical literature available is consistent with these theories of pro-competitive benefits” and citing three sources). *But cf. id.* at 56 & n.85 (quoting Judge Richard Posner’s report of “recent scholarship” about predatory pricing and noting a handful of economic articles).

²⁴See, e.g., Report at vii (laying out seven “basic principles”) and 13 (discussing concerns about underdeterrence and overdeterrence).

balance is important. But where is the empirical evidence about the kinds, frequency, and effects of either “false positives” or “false negatives” in enforcement against unilateral conduct generally or specific kinds of unilateral conduct?²⁵

Finding the optimal balance of regulation is often hard enough, but doing it in the field of unilateral conduct is very hard from a theoretical perspective. As the Report notes, “often the *same conduct* can both generate efficiencies and exclude competitors.”²⁶ I would add that the commonly accepted touchstone of antitrust policy—protecting competition for the ultimate benefit of consumers²⁷—is not much less ambiguous, so long as we accept that merely having a monopoly position is not illegal. If the ultimate injury of failed policy (over- or underdeterrence) involving monopoly is proximately caused not by the monopolist’s exclusionary conduct, but by the rational and economically predictable price and output decisions of the (possibly lawful) monopolist, then we cannot simply look at predictable economic effects on consumers, either.²⁸ These problems may be so hard that they cannot be “solved” at all, but perhaps empirical data

²⁵*Cf.* Report at 16 & nn.89, 90 (discussing goal to avoid false positives and false negatives and divergent views about which is the greater problem now); *id.* at 17& n.92 (asserting in text that some believe the cost of false positives is higher in section 2 enforcement, but citing two witnesses supporting that view and two opposing it).

²⁶Report at 13 (emphasis in original).

²⁷Interestingly, discussing the need to achieve this proper balance, the Report refers not just to consumer welfare, but also to “economic growth and prosperity.” Report at 14. The Report does not further define or elaborate on this possible second goal of antitrust policymaking, but perhaps it is related to “innovation.”

²⁸*Cf.* *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998) (rejecting group boycott conspiracy claim under Sherman Act § 1 and remanding § 2 claim because in that case “consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is lawfully in the hands of a monopolist, . . . combined with a deception worked upon the regulatory agency”); Report at 12 (discussing *NYNEX*).

can resolve at least some of the ambiguities regarding what to worry about and which policies work or don't work.

Another theme returned to frequently throughout the Report is the goal of not removing a monopolist's incentive to innovate.²⁹ So important is innovation to the Report's conception of antitrust law, that the opening sentence elevates it to the same level as allocative efficiency.³⁰ Yet as Judge Posner is quoted as noting in his book *Antitrust Law*, "it is an empirical question whether monopoly retards or advances innovation."³¹

Economic theories are discussed throughout the Report; they form the core of both its analytical method and its implicit argument for legitimacy in policymaking. But the theories are almost always discussed as suggesting that some effect might or might not occur. Data without theory are useless: one cannot be sure what the data mean, often cannot even collect it, without having some idea of features to measure much less relationships explaining them. But theory without data is no sure guide for policy, either. Until tested against nature, theory is at best a hypothesis of what might be.

I do not fault the Report for relying so heavily on theory and failing to discuss empirical results more. No doubt the authors did what they could with the empirical results that are available. The problem is that there is so little empirical knowledge. In the

²⁹See, e.g., Report at 87-88 (discussing concerns that barring technological tying by monopolists might deter their innovation), 119 & 123 (discussing concerns that compelling a monopolist to deal with a rival might deter innovation). An electronic search for words containing the stem "innovat" identified some 98 references in text and footnotes.

³⁰Report vii ("The U.S. antitrust laws reflect a national commitment to the use of free markets to allocate resources efficiently and to spur the innovation that is the principal source of economic growth.").

³¹Report at 11 n.49 (quoting RICHARD A. POSNER, *ANTITRUST LAW* 20 (2d ed. 2001)).

end, however, policy has to be made with whatever guidance is available. In this regard, I consider the hearings, with their “testimony” by “stakeholders” including antitrust and economic scholars, seasoned antitrust law practitioners, and representatives of business and consumers, to have been an excellent mechanism for policymakers to seek guidance. In an area of law that functions essentially as economic regulation by “law enforcers” rather than full-time (and fully empowered) regulatory agencies, acting in courts of general jurisdiction interpreting statutes of extreme brevity, the enforcement agencies wield an exceptionally powerful pen when setting policy. The more open and inclusive the policymaking process, the more likely good and legitimate policy will be set. As reflected by these hearings and several others before them, convened by DOJ and the FTC both, such hearings can provide a sound basis for changing or further refining antitrust policy.

Which leads me to conclude with a modest suggestion. Let DOJ implement its policy preferences, but treat them as an experiment and then hold another set of hearings in five years to assess the results. If the FTC is right that the Report’s recommendations go too far, then perhaps implementing them under the watchful eye of governmental and independent economic scholars will yield useful empirical data upon which to base future policy adjustments. Involve economists even more in initial enforcement decisions, so that they can develop specific hypotheses and collect well-defined data both after and before intervention. If we do not like the results of the Report’s recommended policies, then DOJ and FTC may have a firmer, empirical basis to correct them. In a possibly

perverse way, a split between DOJ and FTC on enforcement against unilateral conduct might also permit other useful empirical comparisons.³² I would count it a true success if the Report ultimately leads us to reduce our ignorance of monopoly's true anticompetitive effects and of the costs and benefits of specific intervention policies.

³²Although it might seem unfair or unjust for different legal standards to apply, for instance, to different industries depending on which of these two enforcement agencies usually takes jurisdiction, the murky area of antitrust law has long seen persistent differences across Circuit Courts of Appeal.