JULY 2009, RELEASE ONE

GCP
THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

The State of Single-Firm Conduct Policy

U.S. Chamber of Commerce

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The State of Single-Firm Conduct Policy

The U.S. Chamber of Commerce[1]

On May 11th, Assistant Attorney General Christine Varney withdrew the Section 2 Report ("Report") that the previous Administration had issued September 8, 2008. Two months prior to the withdrawal, the Chamber authored a piece encouraging observers on all sides of the single-firm conduct policy debate to take a fresh look at the Report. Little did we know that the title of that essay, *Bathwater Out. Now What to Do with Economic Analysis? Antitrust Standards for Unilateral Conduct: Sense and Consensus,*[2] would foretell the current state of single-firm conduct policy not only in the United States, but throughout the world.

The Chamber is by no means clairvoyant, as the withdrawal came as no surprise. In her confirmation hearings, while being respectful for the contribution the Report made to the debate, Ms. Varney foreshadowed the withdrawal when she expressed serious concerns with its conclusions.

In announcing the withdrawal, the Department of Justice ("DOJ") press release complained that the Report argued for "extreme caution" with regard to single-firm enforcement. The day after the withdrawal, Ms. Varney spoke before the Chamber and further explained her decision. She indicated she believed in "the need for a clear Department policy regarding enforcement under Section 2." She further stated that the goal of the joint DOJ and Federal Trade Commission ("FTC") year-long examination "was to clarify the analytical framework for assessing the legality of single-firm conduct and to provide guidance to the courts, antitrust counselors, and the business community." She complimented the work that went into the now withdrawn Report stating, "To its credit, the Report provided a comprehensive evaluation of the history of single-firm enforcement and careful consideration of the risks and benefits of particular enforcement strategies." But she concluded that the conclusions of the report "missed the mark" and that "the greatest weakness of the Section 2 Report is that it raised many hurdles to Government antitrust enforcement."

While it was clear that the Administration would not let the Report stand, what remains unclear is what exactly is the single-firm conduct policy of the United States and

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[1] This submission was compiled by the staff of the Chamber's Global Regulatory Cooperation Project, Sean Heather, Executive Director.

[2] *See* U.S. Chamber of Commerce, *Bathwater Out. Now What to Do with Economic Analysis? Antitrust Standards for Unilateral Conduct: Sense and Consensus*, 3(1) GCP Magazine (Mar-09) *available at* http://www.globalcompetitionpolicy.org/index.php?id=1598&action=907.

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with respect to that policy what it will advocate internationally. In an attempt to replace the most extensive contribution to the policy debate surrounding single-firm conduct in the history of U.S. antitrust law, Ms. Varney has offered three cases as general guidance *Lorain Journal v. United States, Aspen Skiing Co. v. Aspen Highlands Skiing Corp*, and *United States v. Microsoft*.

The Chamber testified before the DOJ and the FTC in February 2007 as part of the field hearings that were held to provide a basis for the Report. In that testimony, the Chamber emphasized the need for antitrust rules and enforcement to be transparent, predictable, consistent across jurisdictions, and reasonably stable over time. The Chamber also pointed out that international divergence particularly with regard to single-firm conduct was and would continue to be a problem. Therefore it was critical—the Chamber posited—that the work on single-firm conduct being done by the DOJ and FTC serve not only to guide enforcement in the United States, but as an important advocacy tool internationally.

Instead the Chamber's high hopes for the DOJ and FTC process to deliberate and deliver such a critical policy position culminated in a display of domestic divergence. The immediate criticisms leveled against the Report by several Commissioners at the FTC were offered more as an emotional response to the DOJ's decision to unilaterally release the Report without the FTC, than a substantive and well documented rebuttal. The message to those following the single-firm conduct debate here within the United States was anything but clear. However, internationally the Report was summarily dismissed, so much so that it has been rumored that China decided not to translate the most comprehensive analysis of single-firm conduct ever undertaken by an enforcement authority (even if some of its conclusions might be controversial).

In our original essay that was published in *GCP Magazine* early this Spring, we argued that the tone of the criticism gave casual readers of the Report the impression that it took a superficial or ideological approach to this longstanding and complex problem. Further, the criticism suggests that the Report may have glossed over complexities, ignored authority or evidence contrary to its positions, or used faulty logic to go from premises to conclusions. But any fair reading of the Report shows that such assumptions would be wrong. The Report is extensively documented and carefully reasoned, based on the wide-ranging hearing records and a balanced survey of judicial decisions, legal and economic scholarship, and enforcement experience. That its conclusions are not the only ones that could be drawn based on the record does not make those conclusions unreasonable, nor does it justify the tone of the Report's harshest critics. Given the range of uncertainty and disagreement that persists among reasonable discussants, however, a fair reading of the Report indicates that it is comfortably within range of the "center." The positions taken are well-supported by

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mainstream scholars, practitioners, and leading judicial precedents.

While Ms. Varney's decision to withdraw the Report does not worsen the situation, it did nothing to provide the necessary clarity that businesses operating in the United States deserve. Offering three examples from U.S. case law is an insufficient substitute. The direction of U.S. policy with regard to single-firm conduct, which has significant ramification both domestically and internationally, requires more thorough guidance than references to cases that the current DOJ believes were rightly decided.

Press articles surrounding the withdrawal of the Report centered on the belief that this meant more rigorous enforcement going forward, anticipated a number of Section 2 cases would be brought, and began to speculate which companies would become immediate targets. Other articles suggested that this meant the United States was adopting the EU approach to single-firm conduct. Since the withdrawal, Deputy Assistant Attorney General for Economic Analysis, Carl Shapiro, in his remarks at a recent CATO Institute sponsored program, indicated that the increased scrutiny of single-firm conduct would not translate to "opening the floodgates." While this might provide some insight into the number of cases one might expect in the coming years, it does little to shed additional light as to the policy determinations that will guide the decision to bring those cases or how businesses may want to alter their conduct if they were to choose to do so to avoid being a target.

Internationally, both in Ms. Varney's speech to the Chamber and Mr. Shapiro's remarks at CATO it was made clear that the DOJ intended to continue to engage with and would continue to exert its influence on other jurisdictions. While it remains entirely possible to communicate with other enforcement jurisdictions globally on merger and cartel policy, it is hard to imagine what the U.S. government, which includes both the DOJ and the FTC, can or will credibly say internationally on single-firm conduct.

Since the initial criticism by three FTC Commissioners, the FTC has been nearly silent on single-firm conduct policy and the DOJ, while not outright rejecting the idea, has no current plans to issue a modified report. From the Chamber's perspective it is important to get the single-firm policy correct and then enforce it vigorously. It is critical that enforcement be transparent, predictable, consistent across jurisdictions, and reasonably stable over time. Currently with respect to single-firm conduct both at home and abroad it doesn't appear to be any of the above.

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