INTRODUCTION

The U.S. antitrust laws embody a commitment to preserving free markets unfettered by unreasonable restraints of trade. Free markets are the most effective means for allocating resources to their highest valued uses and maximizing consumer welfare. Competition sharpens firms' incentives to cut costs and improve productivity and stimulates product and process innovation. Competition necessarily results in some firms losing while others succeed. That risk creates a vibrant and dynamic rivalry that maximizes economic growth.

The antitrust laws protect this competitive process. Section 2 of the Sherman Act prohibits a firm from illegally acquiring or maintaining a monopoly in any market. This prohibition represents a key component of U.S. antitrust enforcement. Unlike section 1 of the Sherman Act or section 7 of the Clayton Act, section 2 specifically targets single-firm conduct by firms with monopoly power or a dangerous probability of attaining such power. Firms possessing monopoly power can reduce output and charge higher prices than would prevail under competitive conditions and thereby harm consumers.

Section 2 enforcement is an area of great debate within the antitrust world today. Legal and economic scholarship has revealed that many single-firm practices once presumed to violate section 2 can create efficiencies and benefit consumers. At the same time, there is a greater appreciation for the potential harm from excessive restrictions on single-firm conduct, particularly harm to innovation, which is the most important source of economic growth. These developments cause some to question whether certain unilateral conduct should be per se lawful, whether penalties for section 2 violations should be reduced, and even whether section 2 should be repealed.

Others, however, contend that certain potentially anticompetitive practices may be more prevalent, or at least more theoretically possible, than earlier scholarship suggested. In addition, some suggest that certain characteristics of today's markets, for example, the increasing emergence of network effects, make timely and effective section 2 enforcement even more important than in the past.

This debate led the Department of Justice (Department) and the Federal Trade Commission (FTC) in June 2006 to embark on a year-long series of joint hearings—involving 29 panels and 119 witnesses—to study issues relating to enforcement of section 2 against single-firm conduct.[1] The hearings covered a wide range of topics. Some were broad, such as the sessions on monopoly power, remedies, and international issues. Others focused more narrowly on specific conduct, including predatory pricing and bidding, tying, bundled and single-product loyalty discounts, refusals to deal with rivals, and exclusive dealing. Four of the sessions—held in Berkeley, California, and Chicago, Illinois—were devoted to hearing the views of business representatives.

The sessions included current and former antitrust enforcement officials from the United States and abroad, leading academic

[1] The hearing record, including transcripts of the hearings, presentations, written statements from various panelists, and public comments, is available on the Department's website for the hearings: http://www.usdoj.gov/atr/public/hearings/single_firm/sfchearing.htm.

economists and legal scholars, antitrust law practitioners, and representatives of the business community.[2] In addition, the Department and the FTC requested and received comments from lawyers, economists, the business community, consumers, academics, and other interested parties.

The Department expected that the section 2 hearings would help inform its enforcement efforts. In addition, the Department, along with the FTC, plays an important role in the United States as an advocate of sound competition law and policy before courts and in consultation with government agencies and legislatures. The Department fulfills this role by participating as amicus curiae in important antitrust cases, issuing guidelines and other policy statements, and conducting workshops on a wide variety of important antitrust issues. The hearings on section 2 unilateral-conduct standards are an important example of these broader efforts to ensure the law achieves its objective of maximizing economic growth by protecting the competitive process and consumer welfare.

There was consensus at the hearings and the Department agrees that firms with, or seeking to acquire, monopoly power can act in ways that should be condemned because they harm competition and consumers. There also was consensus regarding the need for sound, clear, objective, effective, and administrable rules enabling businesses to conform their behavior to the law and affording them a degree of certainty in their planning.

The Department approached this report by analyzing the extensive hearing record in the context of relevant case law and scholarship, with the objectives of clarifying the analytical framework for assessing the legality of single-firm conduct under section 2 and providing enhanced guidance to courts, antitrust counselors, and the business community. The report is divided into ten chapters.

Chapter 1 discusses the importance of section 2 and explicates the principles that guide section 2 enforcement.

Chapter 2 addresses monopoly power, exploring topics such as the definition of monopoly power, proof of monopoly power, and the role of market share, including market-share safe harbors, presumptions, and limitations.

Chapter 3 discusses the importance of a framework for legal analysis and examines several general tests that commentators have proposed for evaluating section 2 claims.

Chapters 4–8 explore individual categories of conduct that have been challenged under section 2 and, where appropriate, recommend specific tests to be applied and specific factors to be considered.

Chapter 4 discusses predatory pricing and bidding.

Chapter 5 discusses tying.

Chapter 6 examines bundled and single-product loyalty discounts.

Chapter 7 analyzes unilateral, unconditional refusals to deal with rivals.

Chapter 8 addresses exclusive dealing.

Chapter 9 deals with the critical subject of remedies, identifying remedial goals and examining the benefits and costs of different remedies.

Chapter 10 addresses issues raised by the proliferation of antitrust regimes throughout the world and how U.S. federal enforcement agencies, international organizations, and others are attempting to ameliorate conflicts and seek convergence in the competitive analysis of single-firm conduct.

The Department remains committed to vigilant and sound enforcement of section 2 and to the development and application of sound, clear, objective, effective, and administrable tests. Such tests can provide businesses guidance that will more effectively deter violations. They also enhance enforcement efforts by reducing the time and expense of litigating alleged violations and justifying strong remedies when violations are proved.

Where appropriate, the Department has set

[2] A list of the participants in the hearings, along with their affiliations at the time of their participation, is provided in the Appendix.

out "safe harbors" to create certainty for businesses and encourage procompetitive activity. In other areas, the Department has articulated specific standards that should be applied. In still other areas, the Department has identified issues for further study and evaluation. In all cases, the central tenets that the law is intended to protect competition and that enforcement decisions are to be based on sound facts and economics will continue to guide the Department.

The Department thanks the hearing panelists and those who submitted public comments for the contribution of their expertise and time to this project. The Department also thanks the University of Chicago Graduate School of Business and the Competition and Policy Center, the Berkeley Center for Law and Technology, and the Haas School of Business at the University of California at Berkeley for hosting sessions of the hearings.

Finally, the Department acknowledges and thanks the extraordinary efforts of the staff at the Antitrust Division and the FTC in planning, organizing, and conducting the hearings and in analyzing the extensive record.[3] Without their dedicated efforts, neither the hearings nor this report would have been possible.

[3] While the Department is grateful to the many FTC personnel for their contributions throughout the process, the Department remains solely responsible for the contents of this report.