
The Department of Justice Section 2 Report: A Schism in Federal Antitrust Enforcement?

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On September 8, 2008, the Department of Justice released a new report entitled *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, (the "Report"). The Report is an important statement of DOJ's enforcement intentions regarding single-firm conduct and provides significant new policy guidance concerning specific business practices that have given rise to government monopolization cases in the past. The Report focuses on seeking to articulate administrable enforcement principles to address unilateral conduct that threatens the competitive process without chilling hard competition—perhaps the single most vexing challenge in antitrust enforcement.

The Report grows out of a joint project that began in 2006 between DOJ and the Federal Trade Commission, which shares antitrust enforcement responsibilities with DOJ. The project included a year-long series of joint hearings, with 29 separate panels and 119 witnesses covering a wide range of topics and perspectives.

Despite having participated in the hearings, the FTC ultimately declined to join or endorse the Report. Indeed, the Report brought an immediate and extraordinarily sharp rebuke from a majority of the FTC Commissioners. Commissioners Harbour, Leibowitz and Rosch issued a [Statement](#) claiming that the Report, "if adopted by the courts, will be a blueprint for radically weakened enforcement of Section 2," and that the enforcement principles DOJ sets forth "would place a thumb on the scales in favor of firms with monopoly or near-monopoly power" and do not sufficiently protect the interests of consumers. The FTC Commissioners' reaction underscores—and may well intensify—an ongoing clash between the two agencies over enforcement of federal antitrust law in the area of single-firm conduct.

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