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CLIENT ALERT

FTC, DOJ Hold Hearings On Refusals to Deal With Rivals Under Sherman Act

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On July 18th , the FTC and DOJ held the second in their series of summer hearings on single firm conduct, covering refusals to deal with rivals. Panel participants included William J. Kolasky, former Deputy Assistant Attorney General in the Antitrust Division, R. Hewitt Pate, former Assistant Attorney General in the Antitrust Division, Robert Pitofsky, Professor of Antitrust and Trade Regulation Law at Georgetown and former Chairman of the FTC, Steven Salop, Professor of Economics and Law at Georgetown University, Thomas Walton, Director of Economic Policy Development at General Motors, and Mark Whitener, former Deputy Director of the FTC's Bureau of Competition.

There was a clear division among panelists on whether the current, generally permissive state of refusal to deal law under *Trinko* is appropriate. Several, including Messrs. Pate and Whitener, advocated the view that a unilateral, unconditional refusal to deal with a rival should never be prohibited by law. Others, including Professor Salop, argued that there are still instances of strategic behavior that injure consumer welfare and should be addressed by Section 2.

Even those panelists most committed to the freedom of a monopolist to refuse to deal were critical of certain aspects of the law as it stands under *Trinko* . In particular, *Trinko* leaves open the question of a monopolist's change in its course of action as proof of anticompetitive intent. And *Trinko* still suggests reliance on intent evidence, and failed to directly repudiate the essential facilities doctrine.

Panelists on the other side, however, focused on the establishment of an administrable and responsive standard to prevent losses of consumer welfare due to strategic refusals to deal by monopolists. Professor Salop testified that standards based on the “no economic sense” test were as undesirable as a *per se* legality rule, leading to a focus on losses suffered by the monopolist itself rather than on those suffered by the consumer.

Professor Salop proposed a three-part test for a refusal to deal that should be prohibited by Section 2: 1) the refusing actor must be a monopolist both in the upstream market for the input in question and in the downstream market; 2) the refusing actor's rival must have made a bona fide offer for the input above a “non-exclusion benchmark price” that is based on the monopolist's marginal cost, output margin, and the sales the rival will divert from the monopolist, and 3) the refusal must threaten to raise prices above the competitive equilibrium. This standard, Professor Salop submitted, would compensate for monopoly profits lost as customers switch to the rival, but would not compensate for consumer-beneficial price effects stemming from the rival's greater efficiency.

Despite wide-ranging disagreement throughout the discussion, participants generally agreed that additional empirical work would help to evaluate refusals to deal (i.e. whether they significantly chill innovation, assign liability in “false positive” cases, and lead to various forms of state direction of markets) and to determine future enforcement of the Sherman Act in this area. Several participants noted that the main current effect of refusal to deal law comes not through the threat of federal enforcement, which has not been active for some time, but through firms' dread of private enforcement actions under uncertain and undefined standards.

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