

CLIENT ALERT

FTC/DOJ Open Joint Hearings on Single Firm Conduct

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On Tuesday, June 20, 2006, the FTC and DOJ held the opening session of their summer hearings on Section 2 of the Sherman Act. The panel included Deborah Platt Majoras, Chairman of the FTC, Thomas Barnett, Assistant Attorney General for Antitrust at the Department of Justice, Dennis Carlton, Professor of Economics at the University of Chicago Graduate School of Business, and Herbert Hovenkamp, Professor of Law at the University of Iowa College of Law.

Introducing the series of hearings, Chairman Majoras emphasized the importance of undistorted product markets in securing prosperity to the world's economies, and the continuing difficulties national competition authorities have had with the regulation of single-firm conduct. She set out the range of market conduct that will be considered during the hearings, including:

- Predatory pricing
- Refusals to deal
- Loyalty/bundled/market share discounts,
- Tying and bundling
- Exclusive dealing

The panelists offered a variety of general aspirations for principles governing single-firm conduct. These included:

- Principles should curb harms to consumer welfare arising from anticompetitive conduct by firms with monopoly power
- Principles should not curb procompetitive conduct
- Principles should not focus on harm to competitors, which is an inadequate proxy for harm to competition/consumer welfare
- Principles should be transparent and consistent in order to facilitate prediction of enforcement outcomes (partially motivated by the desire to avoid inadvertent chilling of legitimate conduct)

In addition, panelists previewed some of the “universal principles” that have been proposed as standards for identifying anticompetitive single-firm conduct of all types, including:

- Conduct that makes no economic sense in the absence of anticompetitive effects
- Conduct that involves a short-term sacrifice of profit under some measurement of cost, with the potential for recoupment after another firm leaves the market
- Conduct that has the effect of excluding an equally efficient rival
- A more heterogeneous approach, employing different principles for different types of conduct

The first session of the joint hearings, on predatory pricing, will take place on Thursday, June 22, 2006. The session will focus on appropriate standards for predatory pricing behavior. Several panelists expressed their hope that the Supreme Court would take

up the *Weyerhaeuser* case, in which the 9th Circuit declined to apply the *Brooke Group* predatory pricing test in the predatory buying context. Referring to *Weyerhaeuser*, the panel outlined a series of issues to be considered during the June 22nd hearing, including the appropriate measure of cost in a predatory pricing case, whether a single such measure of cost is appropriate for all industries, and the adequacy of remedies currently employed in such cases.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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