

Client Alert

A report
for clients
and friends
of the Firm May 2009

Major Antitrust Enforcement Policy Shift Announced: DOJ To Take Aim at Market Leaders

Newly installed Assistant Attorney General for Antitrust, Christine Varney, announced this week in her first public remarks as chief antitrust enforcer that the Antitrust Division is reversing the prior administration's policy with respect to Sherman Act Section 2 enforcement.

Varney said that under the prior policy of "inadequate antitrust oversight" with respect to dominant firm conduct, markets have failed to self-police and that as a result, we now see numerous markets distorted; and further that "vigorous antitrust enforcement must play a significant role in the Government's response to economic crises to ensure that markets remain competitive." Specifically with respect to Section 2 enforcement, Varney said that vigorous enforcement of Section 2 of the Sherman Act will be part of the Division's contribution to the Government's multi-faceted response to the current market conditions, and stressed the importance of making the Division's position known by courts, practitioners and the business community.

For all businesses, but especially those with significant market positions, the announcement counsels taking a fresh look at any practices that could be construed to be exclusionary or predatory, such as below cost pricing, bundling, exclusive licensing arrangements, exclusive distribution practices, refusals to deal and other types of discriminatory or predatory practices.

In announcing the Division's withdrawal of its September 2008 report and policy guidance

"Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act," Varney said that she does not share the views espoused in the report that sound a call of "skepticism regarding the ability of antitrust enforcers – as well as antitrust courts – to distinguish between anticompetitive acts and lawful conduct . . ." and that she believes rather that "antitrust enforcers are able to separate the wheat from the chaff in identifying exclusionary and predatory acts." Varney also said that the report and prior policy went too far in considering efficiency justifications for exclusionary and predatory acts and that such practices result in harm to consumers through higher prices, reduced product variety, and slower innovation.

Unequivocally, the Assistant Attorney General for Antitrust said: "For these reasons, I hereby withdraw the Section 2 Report by the Department of Justice. Thus, effective today, May 11, 2009, the Section 2 Report no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act. The Report and its conclusions should not be used as guidance by courts, antitrust practitioners, and the business community."

Varney went on to say that "the Division will go 'back to the basics' and evaluate single-firm conduct against the tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave," and that the jurisprudence of leading Section 2 cases such as *Lorain Journal v. United States*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, and *United States v. Microsoft*, will form the basis of Division policy towards Section 2 enforcement in the new administration. In *Lorain Journal* and *Aspen Skiing*, the Supreme Court held conduct to violate Section 2 of the Sherman Act where a firm with significant market share takes affirmative steps to exclude smaller competitors from the market for its products. In the *Microsoft* case the DC Circuit similarly held that affirmative steps to exclude rivals, when taken by a firm with a significant market position, can lead to a Sherman Act Section 2 violation.

Varney said that it is the Division's position that the new policy is consistent not only with the landmark cases she discussed, but also with more recent Supreme Court pronouncements on single firm conduct such as *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, and *Pacific Bell Telephone Co. v. Linkline Communications, Inc. Trinko* and *Linkline* arguably lessen the scope of conduct actionable under Section 2, though Varney distinguished these cases, noting that they both arose in regulated industries.

It remains to be seen how the courts will respond to the Division's call for increasing the scope of actionable conduct under Section 2, but it is not universally agreed that courts will be in accord with the Division's view of the law.

Varney also said that criminal and civil enforcement of cartels under Section 1 of the Sherman Act, which she praised as having "obtained unprecedented success" in the prior administration, will continue to be an important part of the Division's enforcement policy. Finally, Varney said that the Division will continue its push forward with merger and civil non-merger investigations with a renewed interest in exploring "vertical theories and other new areas of civil enforcement, such as those arising in high-tech and Internet-based markets" and will emphasize "greater coordination with the FTC and foreign antitrust authorities," which may "assist in improving cartel, merger, and non-merger enforcement."

Proskauer Rose will monitor the Division's implementation of these new policy initiatives, their impact on business practices, and the best ways to avoid the attention of, or present antitrust concerns to, government antitrust enforcers during this impending uptick in enforcement.

**BOCA RATON • BOSTON • CHICAGO • HONG KONG
LONDON • LOS ANGELES • NEWARK • NEW ORLEANS
NEW YORK • PARIS • SÃO PAULO • WASHINGTON, D.C.**

Client Alert

The Antitrust and Trade Regulation Practice Group at Proskauer Rose LLP litigates on behalf of plaintiffs and defendants, and counsels clients in all areas of antitrust law, including Hart-Scott-Rodino Act compliance in mergers and acquisitions.

For more information on this policy change, please contact:

Alicia J. Batts

202.416.6812 – abatts@proskauer.com

Rhett R. Krulla

202.416.6833 – rkrulla@proskauer.com

John R. Ingrassia

202.416.6869 – jingrassia@proskauer.com

Other members of the group include:

Scott P. Cooper

310.284.5669 – scooper@proskauer.com

Mireille Dany

33.1.53.05.62.08 – mdany@proskauer.com

Christophe Lapp

33.1.53.05.62.00 – clapp@proskauer.com

Ronald S. Rauchberg - Co-Chair

212.969.3460 – rrauchberg@proskauer.com

Colin A. Underwood - Co-Chair

212.969.3350 – cunderwood@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

© 2009 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.

You can also visit our Website at www.proskauer.com