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Promoting Convergence On Anti-Monopoly Standards

By **Jane E. Willis and Matthew P. Garvey, Ropes & Gray LLP**

Law360, New York (September 30, 2008) -- It is well established that the offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinct from growth or development as a consequence of a superior product, business acumen or historical accident. United States v. Grinell Corp., 384 U.S. 563, 570-71 (1966).

A difficulty faced by antitrust enforcement authorities and antitrust law practitioners is determining whether monopoly power has been acquired lawfully or unlawfully and distinguishing (i) competitively harmful conduct by a monopolist or aspiring monopolist that should be prohibited from (ii) lawful, aggressive competition on the merits that should be encouraged.

In its recently issued 181 page report entitled Competition and Monopoly: Single-firm Conduct Under Section 2 of the Sherman Act, the Department of Justice attempts to present a comprehensive statement of its enforcement standards under Section 2 of the Sherman Act, drawing from views expressed by antitrust enforcers, academics, economists, and practitioners after extensive hearings.

In its report, the DOJ expressly recognizes that anti-monopoly law is an area where there is less consensus internationally than other areas of antitrust law and discusses the efforts that are being made to promote needed international convergence and cooperation in this area of antitrust policy.

In this regard, the final section of the DOJ's Report is devoted to the promotion of international convergence around the Report's general principles: that laws governing single-firm conduct protect consumers and competition generally, not individual competitors; that economics be used in enforcement analysis; and that enforcers focus on the effects of behavior.

The Report persuasively presents the need for convergence given the difficulties faced by companies doing business in multiple jurisdictions or globally: although antitrust laws are national or regional, markets are increasingly global.

The context of the Report is a time of increased proliferation of antitrust and competition laws:

while the U.S. and the European Union have long standing antitrust laws, China, India, and Brazil have only recently developed antitrust laws and policies and other countries will follow.

As the global economy develops, it is important for businesses that each jurisdiction's antitrust laws be transparent and predictable and there are additional benefits to the extent that antitrust laws are reasonably consistent across the global spectrum.

The Report presents the need to move toward voluntary international convergence on antitrust principles given the concerns faced by companies doing business in multiple jurisdictions. Companies who seek to do business globally face different antitrust standards in different countries.

By way of example, the European Union and the United States differ with respect to the share level necessary to constitute market power or monopoly power and the extent to which bundling products is viewed to be anticompetitive or beneficial to consumers.

Divergence in international legal standards causes several potential problems for companies seeking to do business internationally:

Because different countries have different approaches to competition law, firms planning a business strategy for multiple countries face the difficult task of ensuring compliance with each country's laws. Firms face high legal costs in obtaining guidance in a context where policies may be unclear and vary from jurisdiction to jurisdiction.

The existence of differing laws may chill conduct that is generally legal and beneficial to consumers. Companies doing business internationally often follow the "lowest common denominator" rule and adhere to the most restrictive legal jurisdiction, even though the proposed conduct may be lawful in other jurisdictions.

For example, when a firm considers a potential product design to use in multiple jurisdictions, the firm may not make the optimal decision, but rather a decision based on complying with the most restrictive competition laws.

A company seeking to threaten or commence an antitrust enforcement action against a competitor may engage in forum shopping and seek out the foreign competition authority with the most restrictive laws and that is the most likely to act on the firm's complaint.

A complaining company may also attempt to take multiple bites at the apple by encouraging authorities in multiple jurisdictions to commence enforcement actions against its competitor.

The risk of multiple enforcement actions creates the risk that an enforcement action is brought in a matter where the underlying conduct would be deemed lawful and pro-competitive in many other jurisdictions.

Differing laws create the risk of inconsistent remedies being imposed on companies doing business in multiple jurisdictions: namely, that one country will impose a remedy that has adverse effects in other countries.

In this regard, the DOJ is particularly concerned about the remedy of mandatory licensing of intellectual property because it may have harmful spillover effects in other countries and may limit a patent holder's ability to benefit financially from its patent.

As explained in the Report, each of these problems detracts from companies' ability to efficiently

do business internationally and from the goal of a seamless global economy.

As a result, the Report encourages voluntary convergence and cooperation through various efforts:

The Report endorses the use of formal bilateral cooperation agreements that require countries to notify each other about antitrust enforcement and to cooperate in investigations. The Report notes that cooperation is warranted on both individual cases and general competition policy issues.

The Report emphasizes the strong need for continued participation in international organizations focused on competition policy.

The International Competition Network (the "ICN") is an organization of competition agencies that seeks to promote greater substantive and procedural convergence among antitrust authorities.

The DOJ and the FTC have played a pivotal role in the ICN and the creation of the Unilateral Conduct Working Group which seeks to share best practices with respect to anti-monopoly enforcement.

In April 2008, at the ICN's annual conference in Kyoto, Japan, the ICN working group on unilateral conduct issued a number of recommended practices, including guidance regarding the assessment of substantial market power and dominance.

The DOJ and the FTC have taken a lead role in connection with the OECD Competition Committee of the Organisation for Economic Co-Operation and Development (OECD). The OECD Competition Committee has sponsored a series of roundtables on anti-monopoly law which have resulted in several reports relating to competition policy in connection with single-firm conduct.

The Report comments favorably on the efforts of the U.S. antitrust agencies to provide technical assistance to authorities in foreign countries who are formulating competition law and policy.

The Report specifically emphasizes the need for greater cooperation among international competition authorities on determining appropriate remedies to avoid the anticompetitive effects that a specific remedy imposed in one jurisdiction may have on consumers in another jurisdiction.

Although the DOJ expressly recognizes the need for voluntary international convergence, the DOJ's Report itself has not garnered the support of the relevant U.S. antitrust constituencies.

The Federal Trade Commission did not endorse the Report and three FTC Commissioners have criticized the Report stating that it "seriously overstates the level of legal, economic, and academic consensus regarding Section 2."

Moreover, the Report, by its nature, does not account for the role of courts and civil plaintiffs in determining the contours of the U.S. antitrust laws.

Nevertheless, the Report makes helpful progress towards reducing international divergence (i) by making the DOJ’s own enforcement guidelines transparent and (ii) by providing a comprehensive policy statement which may serve as a touchstone for discussion by the international community.

Despite the differences of opinion, the Report is a step towards encouraging U.S. agencies and foreign competition authorities to focus on the long-term goal of increased international convergence for the benefit of U.S. and foreign companies who seek to transact business on a multinational or global basis.

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