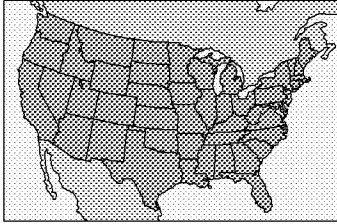


# United States

## OVERVIEW OF US ANTITRUST LAWS



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**W**ith passage of the Sherman Act in 1890, the US Congress enacted broad legislation to prohibit conduct that unreasonably restrains trade or creates monopolies. With further refinement by the Clayton Act (1914), Federal Trade Commission Act (1914), Robinson-Patman Act (1936), and Hart-Scott-Rodino Antitrust Improvements Act (1976), the US Congress enacted laws to regulate price discrimination, tying arrangements, exclusive dealing and mergers that substantially lessen competition.

### ENFORCEMENT OF THE ANTITRUST LAWS

The antitrust laws are enforced through criminal and civil penalties. The US Department of Justice (DoJ) has exclusive enforcement authority over criminal matters and can seek fines against corporations and individuals as well as prison sentences for individuals. The DoJ seeks criminal penalties only for per se antitrust violations, which are described in the next section of this article. In the past year, the DoJ has obtained approximately \$280 million in fines and convicted over 20 individuals who received one-year or longer jail terms for antitrust violations.

The Federal Trade Commission (FTC) and the DoJ have concurrent authority to seek civil penalties for antitrust violations. The DoJ enforces all of the statutes described below, except for the substantive provisions of the FTC Act. The FTC has exclusive jurisdiction to enforce the FTC Act, which prohibits “unfair methods of competition”. This provision of the FTC Act has been broadly construed to include restraints of trade, monopolization and attempted monopolization, and price discrimination. The FTC and DoJ each have authority to review mergers under Section 7 of the Clayton Act, which is also described below. Civil penalties can range from monetary fines to court-ordered injunctions to halt anti-competitive conduct.

Private plaintiffs (ie customers, suppliers and in some cases competitors) can also use the antitrust laws to seek damages or injunctive relief. Section 4 of the Clayton Act provides private plaintiffs with treble damages for successful suits as well as the ability to seek attorneys’ fees and costs.

State antitrust laws are enforced by state attorneys general and private parties. Most state antitrust laws mirror the federal laws. Some states have laws that permit indirect purchasers to sue for recovery under the states’ antitrust laws. By contrast, the federal antitrust laws only permit suits from parties that have been directly harmed by anti-competitive conduct.

### RESTRAINTS OF TRADE

The Sherman Act addresses anti-competitive conduct that restrains ➤

trade. Sherman Act Section 1 prohibits “contract[s], combination[s] ... and conspirac[ies] in restraint of trade”. Section 1 violations require: (i) two independent entities that form an “agreement”; (ii) that unreasonably restrains trade; and (iii) that affects interstate commerce. An agreement can be inferred by the conduct of the parties, ie it does not require an express or written agreement (see *Interstate Circuit v United States*, 306 US 208 (1939)). Unreasonable restraints of trade are analyzed under two types of analysis, the per se rule and the “rule of reason”.

Restraints of trade subject to the per se rule are limited to certain hard core antitrust violations. Per se violations can be agreements between two entities at the same level of commerce (ie horizontal agreements) to fix prices, restrict output, allocate customers, and rig bids. Per se violations also can be agreements between entities at different levels of commerce (ie vertical agreements) in which a supplier fixes the minimum resale price that a retailer must adhere to. These per se violations are so pernicious, without any redeeming value, as to be condemnable merely at the establishment of an agreement. *Continental TV, Inc v GTE Sylvania, Inc*, 433 US 36 (1977). Per se antitrust violations are very likely to be prosecuted criminally as well as civilly.

Conduct not subject to the per se rule is judged under the rule of reason, under which the anti-competitive harms of the conduct are weighed against the pro-competitive effects. The rule of reason analysis involves in-depth analysis of the relevant market, the effects of the conduct, possible business justifications of the conduct, and potential efficiencies (see *Chicago Bd of Trade v United States*, 246 US 231 (1918)). In most cases, the alleged violators must have “market power” in a relevant market in order for their conduct to be unlawful.

Horizontal restraints of trade subject to the rule of reason could include efforts to self-regulate industries through the enactment of industry-wide standards. Such activity could give rise to a Section 1 claim if the effect of such self-regulation amounts to a concerted refusal to deal. Non-compete agreements that are ancillary to an employment contract or sale of a business also are analyzed under the rule of reason to determine if they are reasonable in duration, scope and manner.

Most vertical restraints of trade are subject to the rule of reason and typically involve conduct between suppliers and wholesalers or retailers. Vertical restraints can include maximum resale price maintenance, which unlike minimum resale price maintenance is analyzed under the rule of reason (see *State Oil v Khan*, 522 US 3 (1997)). Vertical non-price restraints are also analyzed under the rule of reason, because they may stimulate interbrand competition (see *Business Elecs Corp v Sharp Elecs Corp*, 485 US 717 (1988)). Vertical non-price restraints include a manufacturer’s allocation of distribu-

tion territories, exclusive distributorships, and dealer terminations or refusals to deal.

## MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization. Monopolization cases are analyzed under the rule of reason, and are not typically subject to criminal penalties. A monopolization claim consists of the following elements: (i) monopoly power in a relevant market; and (ii) willful maintenance or acquisition of monopoly power through exclusionary conduct. The antitrust laws do not, however, prohibit legitimate monopolies generated “as a consequence of a superior product, business acumen, or historical accident”. *United States v Grinnell Corp*, 384 US 563, 570–71 (1966).

The first element, monopoly power, is the power to control prices or to exclude competition in a relevant market. Monopoly power typically requires a defendant to have a market share above 70% where entry barriers are high and existing competitors could not effectively increase production in response to anti-competitive practices.

The second element, willful acquisition or maintenance of monopoly power, requires that a firm: (i) harmed the competitive process and therefore harmed consumers; and (ii) had the general intent to acquire or maintain a monopoly through anti-competitive or exclusionary acts. Conduct that gives rise to monopolization can include predatory pricing, refusals to deal and monopoly leveraging. Courts will consider whether the defendant had a proper business justification for the act and whether the defendant will be able to recoup not only the expenses of the conduct (such as below-cost pricing) but also supra-competitive profits after rivals are driven from the market.

In *US v Microsoft*, 253 F3d 34 (DC Cir 2001), the court held that Microsoft’s exclusionary acts designed to harm rivals in the internet browser market combined with its high market share in the computer operating system market violated Section 2. These exclusionary acts consisted of: integrating Microsoft’s internet browser with its operating software, making it difficult to use a competing browser; using licensing agreements to discourage computer manufacturers from loading rival internet browsers on their products; and refusing to deal with internet access providers that advertised rival browsers to their users.

Attempted monopolization also is analyzed under the rule of reason. The elements of an attempted monopolization claim are: (i) an anti-competitive act; (ii) engaged in with specific intent to monopolize; and (iii) a dangerous probability of success (see *Spectrum Sports v*

*McQuillan*, 506 US 447 (1993)). The first element can be shown with the same conduct that satisfies the anti-competitive act for monopolization. The second element of attempted monopolization requires that a defendant specifically intend to monopolize, which is a more stringent showing than under monopolization. Again, market share is very important, with a 50% market share or higher generally needed to indicate a dangerous probability of success.

Recently, the FTC and DoJ have focused on the use of patent rights for anti-competitive purposes. While patents may confer a “legal monopoly” with respect to the product or process patented, this does not necessarily mean that the patent holder has an unlawful monopoly in a relevant market under the antitrust laws. A thorough market analysis may reveal that the patented technology has substitutes, which may substantially dilute a patent-holder’s alleged market power. The FTC and DoJ have held extensive hearings on the intersection of intellectual property and antitrust laws. These hearings have examined whether settlement of infringement suits, licensing, cross-licensing, extensions of patent rights, fraudulent procurement of patent rights, and other conduct could give rise to antitrust violations such as monopolization and attempted monopolization.

## MERGER REGULATION IN THE US

Section 7 of the Clayton Act prohibits transactions in “any line of commerce or in any activity affecting commerce ... the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly”. In the US, the FTC and DoJ enforce this statute by applying their merger guidelines when analyzing allegedly anti-competitive acquisitions.

### Horizontal transactions

The FTC and DoJ have promulgated horizontal guidelines designed to analyze transactions between competitors in the same level of commerce. The horizontal guidelines follow a five-prong analysis.

### Market concentration

The horizontal guidelines require that the agencies examine the concentration in the relevant market both before and after the transaction. In order to determine the relevant market, the agencies must determine the relevant product market and the relevant geographic market in which the parties compete. The relevant market is determined by a test that analyzes whether a hypothetical monopolist of the combining parties’ products could profitably raise the price of its products by 5% to 10%. If consumers would switch to other products in

significant numbers to discipline such a hypothetical price increase, then those additional products are included in the hypothetical monopolist’s offerings and the test repeats itself until the hypothetical price increase can be sustained profitably. At that point, all of the products under the control of the hypothetical monopolist would be in the relevant market.

Once the relevant market has been determined, the agencies will measure the concentration by applying the Herfindahl-Hirschman Index (HHI). Depending on the results of this test, the agencies may determine that the transaction will not pose a threat to competition if the post-transaction market concentration is low enough, or may determine that more analysis is required if the transaction results in a moderately or highly concentrated market and the change in market concentration exceeds certain levels.

## COMPETITIVE EFFECTS

### Unilateral effects

The horizontal guidelines state that unilateral effects are most likely when the combined firm will hold 35% or more of the relevant market. Unilateral effects typically are price increases effected by the combined company without coordinated action by its rivals. If the combining parties’ products are considered by customers to be next closest substitutes to each other, then the possibility of unilateral effects is higher. If one of the merging parties was considered a “price maverick”, ie had significantly lower prices than rivals, then the possibility of unilateral effects also is higher. However, if rivals could quickly and easily reposition their products or increase production to more effectively compete with the combined company, then the possibility of unilateral effects is diminished.

### Coordinated effects

Coordinated effects can result if the transaction results in fewer market participants to the point where the remaining firms can better coordinate their prices or output, or other significant competitive terms. The key consideration is whether the remaining firms will be better able to detect and punish cheating by firms that do not adhere to the anti-competitive conduct. The agencies will consider whether there has been a history of coordinated activity in the relevant market, whether the products offered by the remaining firms are similar or homogeneous, whether there are standard levels of pricing or other competitive terms, and whether information on rivals’ prices, quantities sold, credit terms, discount patterns and other competitively sensitive information is readily available.

### Ease of entry

The third point in the horizontal guidelines analysis is the ease of entry into the relevant market. If there is ease of entry, then there can be no exercise of market power. Ease of entry is analyzed by determining whether entry would be “timely, likely and sufficient”. Timely entry is that which is likely to occur within two years of the transaction. Entry is likely if the entrant can achieve volumes that provide it with “minimum viable scale” and profitability at pre-merger price levels. To qualify as a defence, entry must be “sufficient”, meaning that entry must be significant enough to discipline the combined company’s prices to pre-merger levels.

### Efficiencies

The fourth point under the horizontal guidelines is whether the transaction will result in transaction-specific efficiencies. If verifiable, transaction-specific efficiencies are sufficient to offset any potential anti-competitive harm (ie cost reductions are passed on to consumers), such efficiencies will be taken into account by the enforcement agencies. However, efficiencies are unlikely to outweigh the potential competitive harm of a merger in a market where three competitors combine into two, or a merger to monopoly (see *FTC v HJ Heinz Co et al*, 246 F3d 708 (DC Cir 2001)). Creditable efficiencies include: economies of scale; lower production, distribution, marketing, and selling costs; and reduced overhead. Creditable efficiencies do not include tax savings or debt reduction.

### Failing firm defence

The final point under the horizontal guidelines is the “failing firm defence”, which applies if the target company would likely exit the market unless the transaction goes forward. The defence requires that no other possible acquirer is available which would result in less competitive concerns.

### Vertical transactions

Vertical transactions typically involve supplier-manufacturer combinations or transactions involving companies that produce two separate inputs that are used to manufacture a finished product. Vertical transactions are of concern if competitors are foreclosed access from an input that one of the combined companies produces (input foreclosure). Alternatively, concerns can arise if the transaction eliminates a supplier’s ability to sell to a major downstream customer (output foreclosure).

## PRE-MERGER NOTIFICATION

The Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) created a framework by which proposed acquisitions of either assets or voting securities that meet certain criteria must be notified to the agencies before they can be completed. In general, if the size of the transaction is more than \$200 million, then a notification likely is required. Or, if the size of the transaction is greater than \$50 million and one of the parties has at least \$100 million in total assets or annual net sales while the other party has at least \$10 million in total assets or annual net sales, then the transaction likely is notifiable. The rules for determining whether a transaction is notifiable are very complex, and counsel should be retained to perform the analysis.

If a transaction is notifiable, then the parties must each make a notification to the FTC and DoJ, the acquiring party must pay a filing fee (between \$45,000 and \$280,000, depending on the size of the transaction), and the parties must observe a 30-day waiting period in which the transaction may not close. The parties may request early termination of the waiting period, which is granted if the transaction raises no antitrust issues. The penalty for not filing when a notification is required is \$11,000 per day measured from when the transaction was consummated. Even if a transaction is not notifiable, it is still subject to the substantive antitrust laws. The FTC has challenged allegedly anti-competitive transactions that do not meet the HSR Act filing requirements even after these transactions have been completed.

If either the FTC or DoJ has concerns, one will request clearance from the other to proceed with an investigation. The cleared agency will then likely contact the parties and request certain information, which the parties can voluntarily submit. If the agency is not satisfied at the end of the 30-day waiting period, it will issue a request for additional information to each party that suspends the waiting period until the parties substantially comply with the request. Known as a “second request”, it is very extensive and typically requires that the parties provide documents and data and answers to detailed interrogatories. Once both parties have substantially complied with the second request, the agency has 30 days to decide whether to challenge the transaction in court.

## PRICE DISCRIMINATION

Section 2 of the Clayton Act, as amended in 1936 by the Robinson-Patman Act, prohibits price discrimination. A Section 2(a) violation consists of the following elements: (i) a difference in price; (ii) in sales to two different buyers from one seller; (iii) of goods; (iv) that are of a similar grade and quality; (v) that may substantially

lessen competition.

The first element is determined by comparing the net prices of the two sales. If there is a difference, then the element is satisfied. When comparing the prices of two sales, the sales must have occurred reasonably contemporaneously.

The second element requires two completed sales to two unaffiliated entities. An offer does not satisfy this element, nor does a transaction involving an intracompany transfer. However, a discriminatory sale by a manufacturer through a controlled wholesaler to a retailer may be actionable by the retailer against the manufacturer even though the retailer is an indirect purchaser. In this situation, the wholesaler must not have acted independently when setting the price to the retailer.

The third element requires that the sales involve commodities, not services or other intangible items. If the sale involves both commodities and services, the courts will examine the “dominant nature of the transaction”, to determine whether the sales are predominantly of goods or services.

The fourth element requires that the goods be of like grade and quality. Products that have physical differences which affect customer use or marketability are typically not of like grade and quality. Rather the goods must have nearly identical physical characteristics. The branding or packaging of the good does not have any consequence in analyzing this element.

The final element requires injury or potential harm to competition. The harm could occur at the supplier level, which is known as a primary line injury, or at the buyer level, which is known as a secondary line injury. A primary line injury case is similar to predatory pricing, in which a plaintiff must show below-cost pricing and a recoupment period in which the predator can maintain supra-competitive prices. A secondary line case requires that the favoured and disfavoured buyers compete either directly or indirectly. Also, a plaintiff must show injury caused by the discrimination such as lost profits or sales.

A seller that lowers its prices to a customer in order to “meet competition” is immune from a price discrimination claim.

Under the Robinson-Patman Act, the following discriminatory conduct is also prohibited: granting fictitious commissions or brokerage fees to a buyer, except if services are rendered for such commissions or fees; paying a buyer for promotions or advertising if equivalent concessions not offered to all competing buyers; and knowingly inducing a seller to offer a discriminatory price.