Overview of the U.S. Antitrust Laws

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Topics

- Antitrust Overview
- Mergers
- Restraints of Trade
- Monopolization
Antitrust Enforcers

• Antitrust Division, U.S. Department of Justice
  – Criminal, injunctions, damages (to government)

• Federal Trade Commission
  – Injunctions, consumer redress (??)

• Private plaintiffs
  – Damages (trebled, with joint liability, attorneys’ fees)
  – class actions, injunctions

• State attorneys general (federal or state law)
  – Injunctions, consumer class actions
Key Antitrust Statutes

- **Sherman Act § 1 (1890)**
  - Contracts and conspiracies in restraint of trade
- **Sherman Act § 2 (1890)**
  - Monopolization and attempted monopolization
- **Clayton Act § 3 (1914)**
  - Exclusive dealing that lessens competition
- **Clayton Act § 7 (1914, loopholes closed in 1950)**
  - Corporate acquisitions that lessen competition
- **Robinson-Patman Act (1936)**
  - Price discrimination that lessens competition
Antitrust Objectives: The Old School

- Enhance consumer welfare through competition
- Limit market power
- Prevent unfair competition
- Ensure a level playing field
- Protect small and locally-owned businesses
- Guard against excessive economic power (the “rising tide of concentration” in “giant corporations”)
What has changed

• Change in philosophy
  – Antitrust policy now focuses on consumers, not resisting bigness or making life easier for competitors
    ➢ Ascent of the Chicago School

• Change in economic views
  – A modest increase in market concentration does not generally lead to collusive, anticompetitive behavior that raises prices.
    ➢ Decline of the Harvard School

• Advances in economic tools for analyzing markets

The Supreme Court has decided 14 cases in a row in favor of defendants.
The Chicago School
(bumper sticker version for lawyers)

• Goal is welfare, not rivalry.
  Lawrence Summers: “the goal is efficiency, not competition”

• Protect competition, not competitors

• Big efficient firms are good

• Restrictive business arrangements can benefit consumers
Antitrust Objectives: The New School

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- Limit market power
- Prevent unfair competition
- Ensure a level playing field
- Protect small and locally-owned businesses
- Guard against excessive economic power (the “rising tide of concentration” in “giant corporations”)
Antitrust Cases Filed by U.S. Department of Justice (by decade)

Source: Commerce Clearing House, Federal Antitrust "Bluebook"
Antitrust Cases Filed by U.S. Department of Justice (by decade)

Source: Commerce Clearing House, Federal Antitrust "Bluebook"
Private Antitrust Litigation:
New Cases Filed Each Year (1971-1999)

Source: Annual Reports, Administrative Office of the U.S. Courts
The Law of Mergers

Clayton Act § 7:
“No person ... shall acquire, directly or indirectly, the whole or any part of the stock ... or any part of the assets of another person ... where in any line of commerce ... in any section of the country, the effect ... may be substantially to lessen competition, or to tend to create a monopoly.”

Elements:
(1) Relevant product market (“line of commerce”)  
(2) Relevant geographic market (“section of the country”)  
(3) May substantially lessen competition
Merger Law Hall of Shame

- Du Pont – General Motors (1957)
- Brown Shoe – Kinney (1962)
- Von’s Grocery (1966)
- Procter & Gamble – Clorox (1967)

*Justice Stewart (dissenting in Von’s Grocery):*

“The sole consistency that I can find [in the Supreme Court’s decisions] is that in litigation under § 7, the Government always wins.”
Du Pont – General Motors (1957)

- In 1917-19, du Pont acquired 23% of GM’s stock (when GM had only 11% of the small auto market)
- In 1949, the Government challenged the acquisition
- Concern: GM bought most of its fabrics and finishes from du Pont, “foreclosing” competitors.
  - Du Pont’s sales to GM were only 2-4% of all fabric and finish sales.
- Supreme Court points out that GM is a “colossus,” the “first corporation to earn over a billion dollars.”
Brown Shoe – Kinney Shoe (1962)

- No market concentration: Over 800 U.S. shoe manufacturers. Top 24 had only 35%.
- Brown and Kinney combined had a 4.5% share of manufacturing market and 2.3% of retail market.
- But, in 32 cities, ranging in size from Topeka, Kan. to Hobbs, N.M., they sold over 20% of women’s shoes.
- Concern: Trend toward vertical integration
  - Brown might force its shoes into Kinney stores.
  - Threat to independent shoes stores
Brown Shoe – Kinney Shoe (1962)

Chief Justice Warren for the Supreme Court:

“we cannot fail to recognize Congress’ desire to promote competition through the protection of small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing concerns in favor of decentralization.”
Von’s Grocery (1966)

- Merger of two grocery store chains in Los Angeles that together accounted for 7.5% of the market
- Concerns:
  - chain stores were growing at expense of independents
  - “two already powerful companies [were] merging in a way which makes them even more powerful”
    - Small chains were growing
    - But the top two chains were losing share
- Implication: If top 8 firms have 40% of market, it is “concentrated,” and any merger between such firms is illegal
Procter & Gamble – Clorox (1967)

• P&G entered a new market – household bleach – by acquiring Clorox, with a 49% share

• **Concerns:**
  – P&G had economies of scale in advertising and promotion.
  – Rivals would compete less aggressively against P&G than against an independent Clorox
  – P&G might otherwise have built its own bleach business
  – As a “potential” entrant, P&G disciplined the existing rivals.

“Possible economies cannot be used as a defense…”
The Merger Guidelines

- **1968 Guidelines (Donald Turner)**
  - Concentration ratios (i.e., share of top 4 firms)

  - HHI measurement of market concentration
  - SSNIP test for relevant market
  - Importance of low barriers to entry
  - Efficiency

- **1992/1997 Guidelines**
  - Adopted by both DOJ and FTC
  - Refinements
Herfindahl-Hirschman Index

- The HHI is the sum of the squares of each firm’s market share. For example, in a market with two firms having 90% and 10% shares, the HHI would be 8200.

- Under the Guidelines, “Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase ... of more than 100 points are likely to create or enhance market power .... The presumption may be overcome” by further analysis.

- Caveat: “the Agencies have often not challenged mergers involving market shares and concentration that fall outside the zones”

- Recent practice: Mergers are subject to challenge only if post-merger HHI > 2000 and delta > 500.
Market Definition Under the Guidelines

A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a “small but significant and non-transitory” increase in price, assuming the terms of sale of all other products are held constant.

A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test.
Horizontal Mergers under the Guidelines: Part 1 – Market Parameters

1. Define relevant product and geographic markets based on SSNIP
2. Identify players in the market; estimate market shares
3. Calculate HHI and change in HHI as a result of the merger
Horizontal Mergers under the Guidelines: Part 2 – Competitive Effects

1. Is the market already concentrated? Would the merger significantly increase concentration?

2. Likelihood of “coordinated interaction”: actions that are profitable for each firm only as a result of the accommodating actions of other firms

3. Likelihood of “unilateral effects”

4. Likelihood that new entry would counteract those effects

5. Efficiency gains from the merger

6. Is the “failing firm” defense applicable?
Vertical Mergers

- The DOJ/FTC Non-Horizontal Merger Guidelines (1984) theoretically govern vertical mergers
- The agencies challenge comparatively few such mergers
- When they do, the merger usually involves highly concentrated markets, and the concern is that the transaction will give the merged firm both the incentive and the ability to foreclose competitors and raise prices in the upstream or downstream markets
- This concern arises most frequently in defense industries, see e.g., Northrop Grumman (DOJ consent 2002)
**Decreased level of merger review**

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<td>2001-2003</td>
<td>2.3%</td>
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Source: J. Baker & C. Shapiro (June 2007)
Percentages are as a percent of HSR filings

“The federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish.”

Maytag-Whirlpool Merger (2006)

- Combined 70% share of washers and dryers
- Well-established rival brands (GE, Kenmore, Frigidaire)
- Successful entry by LG and Samsung
- Most sales are to large retailers, which have the ability to resist price increases by merged company
  - Best Buy stopped carrying Maytag, switched to LG
- Foreign manufacturers have capacity to substantially expand production. So do US manufacturers.
- Proven cost savings and efficiencies from merger.

- No unilateral effects: Merger would not allow Maytag to raise prices
- No coordinated effects: LG and Samsung want to increase shares, not settle for low shares and higher prices
Sherman Act, Section 1

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the separate States, or with foreign nations, is declared to be illegal.

Every person who shall make any contract, combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $100,000,000 if a corporation, or, if by any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”
Section 1 Elements

1) Contract, combination or conspiracy
   - In other words, an agreement
   - “a conscious commitment to a common scheme designed to achieve an unlawful objective”
   - Two separate participants (not just affiliates)

2) In restraint of trade
   - Every contract “restrains”
   - Only unreasonable restraints are covered by § 1
Was there an agreement?

• This is the key issue in conspiracy cases
• A “wink and nod” can be an overt agreement
• The hard cases involve “suspicious” parallel conduct by competitors without direct proof of a conspiracy or agreement.
• But parallel conduct can result from “competitive business strategy unilaterally prompted by common perceptions of the market.”
The oligopolistic “collusion” problem

- Lawyers and economists have different ideas about the concept of an “agreement”
- “Tacit collusion” a/k/a/ “conscious parallelism”
  - Without any overt agreement or direct communications, firms arrive at a parallel pattern of behavior
  - Each firm has expectations of how the others will act
    - Example: “Follow the leader” pricing
  - To many economists, this behavior can be indistinguishable from an overt agreement.
The evidence problem

• Judicial mindset: What kind of evidence is needed to allow a jury to infer the existence of a conspiracy?
  ➢ Ultimately, the jury must decide if there was an agreement – but how much evidence does the jury need
  ➢ Consciously parallel behavior is not enough proof
  ➢ Meetings and communications (“opportunities to conspire”) are not enough proof
Proving a conspiracy

- Direct proof ("smoking gun," confession)
- Circumstantial evidence.

- Test: "evidence must tend to rule out the possibility that the defendants were acting independently"
  - Conduct contrary to unilateral self-interest but for the existence of an agreement
    - Was the conduct so unusual that in the absence of an agreement, no reasonable firm would have found the action to be in its self-interest?
  - Too darned suspicious
Restraints of trade: Two legal categories

• “Rule of Reason”
  ➢ Most agreements fall into this category
  ➢ They violate § 1 only if anti-competitive harms outweigh pro-competitive benefits.

• “Per se” rule
  ➢ Special categories of agreements
  ➢ “Naked restraints” that are almost never justified
  ➢ Easier burden of proof for plaintiffs. No need to prove competitive harm
The Rule of Reason

Model Jury Instruction

“you must first determine whether the plaintiff has proven that the challenged restraint has resulted in a substantial harm to competition in a relevant product and geographic market.

If [so], you must consider whether the restraint produces countervailing competitive benefits.

If you find that it does, then you must balance the competitive harm against the competitive benefit.”

Source: American Bar Association Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, Instruction 3A (2005)
The Rule of Reason -- continued

Model Jury Instruction

“In determining whether the challenged restraint has produced competitive harm, you may look at the following factors:

- the effect of the restraint on prices, output, product quality and service;
- the purpose and nature of the restraint
- the nature and structure of the relevant market ...
- the number of competitors in the relevant market and the level of competition among them...; and
- whether the defendant possesses ‘market power.’ ”

Source: American Bar Association Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, Instruction 3A (2005)
The bygone list of “per se” offenses

- Price-fixing and bid-rigging by competitors
- Territory and market divisions by competitors
- Maximum resale price maintenance agreements
- Minimum resale price maintenance agreements
- Territorial limits imposed vertically
- Group boycotts
- Tying agreements by firms with market power

The goal was to provide clear rules.
The problem was the rules went much too far.
The “Per Se” Rule Hall of Shame

- **Albrecht** (1968, overruled 1997)
  - It was *per se* illegal for newspaper publisher to require that its independent carriers agree not to charge more than the advertised price of the newspaper.

- **Schwinn** (1967, overruled 1977)
  - It was *per se* illegal for bicycle manufacturer with 12% share to assign exclusive territories to its distributors.

- **Fortner I** (1969, effectively overruled 2006)
  - It might be *per se* illegal for a manufacturer of prefab houses to offer low-interest loans *only* to people who purchased its homes.

“It is easy to see how a big company with vast sums of money in its treasury could wield very substantial power in a credit market.”
Today’s list of “per se” offenses

• Price-fixing and bid-rigging by competitors
• Territory and market divisions by competitors
• Maximum resale price agreements (vertical)
• Minimum resale price agreements (vertical)
• Territorial limits imposed vertically
• Group boycotts if designed to coerce
• Tying agreements by firms with market power maybe
Examples of *per se* illegal price-fixing agreements among competitors

- Maximum prices
  - Maximum fees by physicians in foundation (*Maricopa*)
- Cash sales only – no credit (*Catalano*)
- Delivery terms; base point pricing (*Cement Institute*)
- Advance notice of price increases
- Purchase spot market surpluses (*Socony-Vacuum*)
- Common sales agent (*Citizen Publishing*)
- No advertising of prices
- Production limits and sales quotas (*OPEC*)
Other examples of *per se* illegal agreements among competitors

- Exclusive territories (*Topco*)
- Market division among potential competitors (*Palmer*)
- Allocation of customers
- Concerted refusal to deal (group boycott) if designed to coerce
  - Manufacturers refused to sell to wholesalers who resold directly to consumers (*Eastern States Retail Lumber*)
  - Refusal to sell to stores that carried pirated goods (*Fashion Originators’ Guild*)
  - Agreement by lawyers to stop representing indigents unless government increased their compensation (*Superior Court Trial Lawyers Ass’n*)
Elements of *per se* illegal tying

- Purchase of *A* is **conditioned** on purchase of *B*
  - Either an explicit agreement or else coercion
  - Price may be coercive (“only viable economic option”)
- *A* and *B* are **separate** products (separate demand)
  - Technological integration? (Microsoft browser)
  - Trademarks?
- Sufficient economic **power** over *B*
  - “Market power” (not necessarily “monopoly power”)
  - Ability to impose burdensome terms
  - Patents do not necessarily confer market power
Agreements among competitors judged by the Rule of Reason

- Joint ventures (unless disguised price-fixing or market division)
- Joint purchasing
- Blanket licenses (*Broadcast Music, Inc.*)
- Restrictions arising from legitimate cooperative activities
  - Sports leagues (*NCAA*)
  - Staffing decisions by hospitals
  - Ethical rules by professional associations (*National Society of Professional Engineers*)
  - Standard setting
- Information exchanges
Issues in broad-based industry ventures

- Limited membership (*Terminal Railroad Ass’n; AP*)
- Due process (*Silver v. NYSE*)
- Seal of approval
- Industry standards and secret patents
Information Exchanges

• More likely to raise concerns:
  ➢ Pricing information
  ➢ Future or current plans

• Less likely to raise concerns:
  ➢ Cost information
  ➢ Old information
  ➢ Independently-tabulated data that does not identify specific companies

*Note:* Information exchanges may be viewed as evidence of an agreement to fix prices.
Vertical restrictions under § 1

- Territorial and customer limits
- Resale price maintenance
- Exclusive dealing
Territorial and customer restrictions (non-price)

• Examples:
  – Exclusive territories (distributor can sell only in certain areas; retailer can open stores only in certain areas)
  – Customer restrictions (distributor can sell to retailers, but not consumers; or only to certain classes of stores)

• Once these vertical restrictions were *per se* illegal. Now judged by Rule of Reason

• Restrictions limit *intrabrand* competition, but they may promote *interbrand* competition

• Interbrand competition is usually more “important”

• Rule of reason challenges rarely succeed, except when there is monopoly power
Resale price maintenance

- Vertical agreement: Manufacturer requires its dealers or distributors to resell at specific prices (or at least not to sell below specific prices)
- In 2007, the Supreme Court overruled cases going back to 1911, which had found minimum resale price maintenance to be *per se* illegal. Now the Rule of Reason applies.
- The key policy trade-off:
  - Do we want a **clear rule** that might prohibit some benign business arrangements?
  - Do we want a **balancing standard** that is less predictable and spawns litigation?
Resale price maintenance (RPM)

Two distinct issues

1) Is there an actual agreement over resale prices?
   - If not, § 1 does not apply

2) If so, is the RPM agreement anti-competitive under Rule of Reason?
Is there an RPM agreement?

A manufacturer’s unilaterally announced pricing preference is not an agreement

- Suggesting resale prices is OK
- Announcing a policy of selling only to dealers that abide by manufacturer’s policies can be OK – BUT
  - Don’t demand that dealers agree to comply
  - Don’t threaten dealers who fail to comply
  - Don’t ask dealers to report on other

Context: Manufacturers should be free to select their dealers
Is the RPM agreement anti-competitive?

- **Bad facts**
  - Manufacturer has market power
  - Other manufacturers in the market also use RPM
  - Dealers proposed the price policy

- **Good facts:**
  - New entrant, or at least new product
  - RPM is needed to encourage dealers to provide services
  - Competitive market
Exclusive Distributorships

• Good facts:
  – Distributors have right to terminate on short notice (or contracts have short terms)
  – Less than 40% of market is “foreclosed” by exclusives
  – Competitors can reach customers via other channels

• Bad Facts:
  – The “best” or “most efficient” distribution channels are locked up by exclusive contracts
  – Widespread use of exclusive contracts in the industry
  – Manufacturer has dominant position
  – Manufacturer refused to do business with non-exclusive distributors
“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”
Elements of a Monopolization Claim

1) Within a relevant market

2) defendant possesses monopoly power

3) which it acquired, maintained, or enhanced by the use of exclusionary or predatory conduct.
The relevant market conundrum

- Lawyer perspective: First define the relevant market, then determine market shares. That determines monopoly power.
- Economist perspective: The market definition is just a tool to use when looking for monopoly power.
- Examples:
  - Cellophane vs. “flexible packaging materials”
  - Customer-defined markets (Whole Foods; Staples; Oracle)
What Is “Monopoly Power”? 

- Power to control prices and exclude competition in a relevant antitrust market, i.e., to profitably raise prices substantially above the competitive level for a significant period of time.

- “Monopoly power” is more than “market power”

- Factors:
  - Market share (>50% may be enough, or perhaps less)
  - Market share trends
  - Barriers to entry (e.g., IP, brand name/reputation)
    - Low barriers to entry may show no monopoly power
    - Entry and exit by other companies
  - The number and size of competitors
    - Do competitors act as a check on defendant’s ability to raise prices?
There Must Be “Anticompetitive Conduct”

“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.” Verizon Communications v. Law Offices of Curtis V. Trinko, LLP (2004)
ABA Model Jury Instructions (2005)

“In determining whether defendant's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.”
Traditional categories of exclusionary conduct

- Predatory pricing
- Tying arrangements
- Exclusive dealing
- Price “squeeze” (wholesale price > retail price)
- “Business torts” involving force or fraud (??)
Predatory Pricing

- **The fear**: Monopolist will cut prices so low that rivals are destroyed or disciplined. Monopolist can then raise prices and recoup the profits it sacrificed.

- **The facts**: Predatory pricing is rarely tried and rarely successful – but business managers love to talk about “killing the competition”

- **The litigation danger**: Monopolists should not be discouraged from cutting prices by the risk of antitrust suits

- **The legal standard**: Prices must fall below an “appropriate measure of cost” (AVC? ATC?)

- **The rationale**: The risk of “false positives” outweighs the risk of “false negatives.” Above-cost predatory pricing schemes are beyond the ability of judges to control.
Other Categories of Potentially Exclusionary Conduct

- Bundled discount pricing
- Refusing access to competitors
- Abuse of product designs or introductions
- Abuse of governmental process
Bundled discounts: The paradigm

- $M$ has a monopoly power in the market for product A, but not in the market for product B
- $M$ offers customers the opportunity to buy either A or B separately. (So no “tying” or “exclusivity”)
- $M$ offers a big discount on both A and B to customers who buy both products. So customers “lose” a discount on monopoly product A if they purchase B from a rival of $M$
- Is $M$ “leveraging” its monopoly power over A to increase sales of B?
- Rival producers of B complain that they must compensate customers for the loss of discounts on A
Bundling: Two competing visions

• **Let dominant firms compete vigorously**
  – Bundled discounts are lawful if designed to increase sales and not to eliminate competitors
  – Bundled discounts are lawful if one or more competitors could offer a competing bundle
  – Discounts are generally good, and the law must avoid “intolerable risks of chilling legitimate price competition”

• **Prevent dominant firms from leveraging monopoly power**
  – Monopolists must use “least restrictive alternatives”
  – Bundled pricing that “penalizes” customers for buying from competitors must have an “efficiency justification”
Refusing Access to Competitors

- *Aspen Skiing* (1985)
  - Of the 4 Aspen skiing mountains, $D$ owned 3, $P$ owned 1
  - For years, they had offered 4-mountain tickets
  - Then $D$ stopped cooperating. It would not even sell $P$ tickets at full retail prices.
  - Jury found $D$ sacrificed short-term profits to harm rival

  - Incumbent telephone monopolist allegedly refused to provide interconnection facilities to new rivals
  - Alleged violation of regulatory obligations is not an antitrust violation
  - Courts should not impose a duty to deal with competitors because there are no clear standards
Overview of the U.S. Antitrust Laws

David M. Schiffman

February 12, 2008