

Antitrust Law

I. Sherman Act

a. Section 1: Collusive Conduct/Conspiracy

- i. Must be more than one party involved – not applicable within one company
- ii. Entity comprised of persons/corps. With separate economic interest can collude – trade organizations
- iii. Types of agreements
 1. horizontal
 - a. same level in the production/marketing of a product
 - b. most closely scrutinized for potential collusion – legitimate business justification for such agreements weakest
 2. vertical
 - a. different levels in value chain
 - b. Some deals closely scrutinized for obvious anticompetitive potential:
 - i. Exclusive dealing – manufacturers limit competition at retail level
 - ii. Tying agreements – seller with a dominant position for one good requires buyers to purchase other products from it as well
- iv. Per Se Rules
 1. bright line rules – practices generally so competitive and lacking in justification that held illegal without inquiry into circumstances:
 - a. price fixing
 - b. dividing markets
 - c. participating in group boycotts
 2. apply primarily to horizontal agreements
 3. some vertical agreements – resale price restrictions
- v. Rule of Reason
 1. applies to Sherman 1 cases that are not per se
 2. requires assessment of both anticompetitive and procompetitive impact of agreement
 3. Joint Venture agreements usually subject to rule of reason analysis

- a. If JV creates new market efficiencies or new products – procompetitive
- b. Courts consider each ancillary restraint (factor constraining competition) to determine whether necessary to achieve procompetitive purposes

b. Section 2: Monopolistic Conduct

- i. Requires both Monopoly Power and Monopoly Conduct/Abuse

- ii. Monopoly Power/Market Power

- 1. power of firm to act independently of market forces in setting price
- 2. Market Share key – to determine, need to consider:
 - a. Substitutes
 - b. Geographic markets
- 3. Barriers to entry

- iii. Monopoly Conduct

- 1. conduct that excludes competition that is not explained by general requirements of competition on the merits of a company's products
- 2. monopolizing conduct need not be otherwise illegal/unusual – ok for small companies

II. Clayton Act – prohibition of business transactions, particularly mergers, if they substantially lessen competition

III. Federal Trade Commission Act

- a. created Federal Trade Commission – expertise in antitrust
- b. Section 5: prohibition against
 - i. unfair methods of competition
 - ii. unfair or deceptive acts or practices in or affecting commerce

IV. Robinson-Patman Act

- a. protect small retailers
- b. prohibits types of price discrimination

V. Hart-Scott-Rodino Act

- a. Added Section 7A to Clayton Act
- b. Regulates mergers – requires pre-merger notification to government in cases involving large companies

VI. State Statutes

- a. Most states have antitrust laws – “little FTC Acts”
- b. Broad language prohibiting unfair and deceptive practices
- c. Often special provisions to protect consumers

VII. Interpretation of Antitrust Laws

- a. Primary responsibility for interpretation – federal courts
- b. Dept. of Justice and FTC play role through
 - i. enforcement activities
 - ii. formal and informal guidelines in areas of emerging concern
 - 1. – Merger Guidelines 1982

VIII. Analysis of Mergers

- a. Horizontal – most suspect
- b. Vertical –
 - 1. complex rule of reason analysis
 - 2. consideration of barriers to entry
 - 3. market distortion impact
- c. Conglomerate
 - 1. least scrutinized
 - 2. look at possibility that unmerged companies would have introduced increased competition in markets

IX. Exemptions

- a. Express Statutory Exemption
 - i. Organized Labor
- b. Implied
 - i. Patents
- c. Political Activity
 - i. Ability for competing companies to organize political action to reduce competition
 - ii. Trade organizations highly scrutinized – can't drift into actual collusion
- d. State Action Exemption