U.S. CHAMBER OF COMMERCE

Antitrust 101: Common Terms and Definitions

KEY LAWS

Sherman Act: The Sherman Act, established in 1890 as the first piece of antitrust legislation, proscribes unlawful business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Supreme Court and other federal case law have interpreted the Act as prohibiting conduct that harms the competitive process and consumers when it would create or maintain a monopoly. Conduct is found to be unlawful when a plaintiff proves the existence of anticompetitive effects (e.g., substantial foreclosure of rivals resulting in higher prices, reduced output, reduced quality, or reduced innovation) that are not outweighed by procompetitive efficiencies or legitimate business justifications.

Clayton Act: The Clayton Act, enacted in 1914, prohibits mergers and acquisitions when the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.

Federal Trade Commission Act: The Federal Trade Commission Act, enacted in 1919, is enforced by the Federal Trade Commission (FTC). Under this Act, as amended, the FTC is empowered, among other things, to prevent "unfair methods of competition." While the FTC Act may reach conduct beyond the Sherman Act, the FTC's 2015 "Statement of Enforcement Principles" clarifies that, in enforcing the FTC Act, the FTC will be guided by the same consumer welfare standard applied under the Sherman Act, and that "an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."

KEY TERMS

Abuse of dominance: In foreign jurisdictions the term is commonly used to capture anticompetitive behavior of firms that have significant market share. U.S. antitrust law is focused on prohibiting unlawful monopolization or attempted monopolization. Such conduct is only prohibited when a plaintiff proves the existence of anticompetitive effects (e.g., substantial foreclosure of rivals resulting in higher prices, reduced output, reduced quality, or reduced innovation) that are not outweighed by procompetitive efficiencies or legitimate business justifications.

Antitrust bundling claim: An antitrust bundling claim occurs when a firm offers only a package of goods and not the standalone goods. Pure bundling occurs when there are no alternative sellers of the component goods so only the bundle is available. Mixed bundling occurs when both the package and the individual goods are available from the bundling firm. It is important to note bundling has many procompetitive benefits, so the practice is not unlawful. Only after a careful rule of reason analysis can these types of claims rise to level of anticompetitive harm and become a violation of the law.

Antitrust tying claim: An antitrust tying claim is where a customer is interested in buying one product, but in order to buy this product the customer is coerced into buying separate products. It is important to note tying practices can have many procompetitive benefits, so the practice is not unlawful. Only after a careful rule of reason analysis can these types of claims rise to level of anti-competitive harm and become a violation of the law.

Bid rigging: Bid rigging is the way that conspiring competitors effectively raise prices when purchasers — often federal, state, or local governments — acquire goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process.

Cartel: A cartel refers to a group of companies, competing with each other, that form an agreement to set and control the prices for their industry or to allocate the market in a way that has them to agree not to compete against each other. Cartel arrangements along these lines are illegal under U.S. antitrust law and violations include criminal penalties.

Consumer welfare standard: The consumer welfare standard is a broad standard that values what consumers are willing to pay for, and tethers antitrust analysis to the methodological rigors of economics in terms of theories that can be tested and rejected by empirical analysis. Under the standard, antitrust intervention is only justified when the conduct at issue satisfies two tests: First the conduct must distort the competitive process such that equally efficient competitors are incapable of competing. Second, this conduct and distortion must result in harm to consumers. More simply, there must be both a cause and an effect that can be identified before antitrust intervention is warranted. As the FTC has said, it "does not decide who wins and who loses in the marketplace – consumers do that."

Efficiencies: Antitrust efficiencies are benefits from mergers or business practices that are of value to consumers. For example, efficiencies from vertical mergers often include quality improvements and faster and/or better innovation from coordination in product, design, and innovation efforts; and elimination of free-riding from the harmonization of incentives.

Essential facilities doctrine: The essential facilities doctrine, importantly, has never been recognized by the Supreme Court. The concept suggests that a company or its assets are so vital that other competitors should be given access for the competitor's use. The doctrine overlooks that a facility is rarely absolutely essential and underestimates the ability of determine rivals to create new ways of doing things or other workarounds to the resulting benefit of consumers. Under this doctrine, there is little incentive to invest. The idea that one company's hard work should be to the benefit of another company is not compatible with a free enterprise system that relies upon competition. In very limited contexts, outside of antitrust, there are regulatory circumstances, largely infrastructure related, where conditions for access are required under a regulation.

Exclusive dealing: An exclusive dealing contract prevents a distributor from selling the products of a different manufacturer, and a requirements contract prevents a manufacturer from buying inputs from a different supplier. As with other vertical restraints, they are generally procompetitive or benign. These arrangements are judged under a rule of reason standard, which balances any procompetitive and anticompetitive effects. Exclusive dealing is generally unlawful only when practiced by a monopolist.

Excessive pricing: Excessive pricing is the view that a company prices its products at too high of a price point. High prices are not prohibited by U.S. antitrust law. Antitrust avoids trying to subjectively determine the "correct" price, but instead relies on market forces to establish price points in the market. As the Supreme Court has stated: "The opportunity to charge monopoly prices is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth."

Relevant Antitrust Market: Antitrust law analyzing conduct within relevant antitrust markets, which require both product and geographic aspects. A relevant product market consists of all goods or services that buyers view as close substitutes. That means if the price of one product goes up, and in response consumers switch to buying a different product so that the price increase is not profitable, those two products may be in the same product

market because consumers will substitute those products based on changes in relative prices. But if the price goes up and consumers do not switch to different products, then other products may not be in the product market for purposes of assessing a merger's effect on competition. Antitrust goes awry if the relevant market is defined too narrowly or too broadly.

Market allocation: Market division or allocation schemes are agreements in which competitors divide markets among themselves.

Vertical mergers: Vertical mergers involve the integration of complements (like nuts and bolts or peanut butter and jelly), which does not reduce competition on its face. Unlike horizontal mergers, vertical mergers do not involve the combination of businesses that are either actual or potential competitors; thus, they result in at least some loss of rivalry and a combination of actual or potential substitutes.

Horizontal mergers: A horizontal merger involve the combination of businesses that are either actual or potential competitors.

Monopoly Power: Monopoly power is the ability to raise market-wide prices above or reduce output below the competitive level. As the Supreme Court has stated: "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."

Monopsony/Buyer power: Buyer power arises from monopsony (one buyer) or oligopsony (a few buyers), and is the mirror image of monopoly or oligopoly.

Per se violations: Certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed.

Predatory pricing claim: A predatory pricing claim argues prices are artificially low to drive competitors out of the market, only to later raise prices once competitors leave the marketplace. Generally, low prices benefit consumers. Consumers are harmed only if below-cost pricing allows a dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time. A firm's independent decision to reduce prices to a level below its own costs does not necessarily injure competition, and, in fact, may simply reflect particularly vigorous competition. Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare. This strategy can only be successful if the short-run losses from pricing below cost will be made up for by much higher prices over a longer period of time after competitors leave the market.

Price fixing: Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law.

Refusal to deal claim: A refusal to deal claim typically arises when one firm refuses to work with another firm. Refusals to deal are generally lawful except under very limited circumstances such as when a monopolists terminates a prior, profitable course of dealing with a rival that results in the monopolist sacrificing short-term profits.

Rule of reason: The rule of reason is a full-blown effects-based analysis under which plaintiffs must prove the existence of anticompetitive effects (i.e., substantial foreclosure that results in higher prices and/or reduced output, quality, or innovation) and show that they are not outweighed by procompetitive efficiencies or legitimate business justifications.

SOURCES

www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws

www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct

www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2

www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products

www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/markets

www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/markets