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Antitrust Law: An Introduction

Recent years have witnessed a resurgence of both public and political interest in antitrust. This In Focus provides an overview of the key federal antitrust statutes and their enforcement.

The Goals of Antitrust

The federal antitrust laws seek to protect economic competition. In contemporary doctrine, this emphasis on "competition" denotes a focus on the welfare benefits that result from competitive markets. The view that antitrust should be concerned exclusively with these welfare goals is often referred to as the "consumer welfare standard," though there are disagreements about that term's meaning and whether various versions of the "consumer welfare standard" accurately reflect current legal doctrine. Issues in these debates include the extent to which consumer benefits can offset harms to input suppliers, the extent to which efficiencies captured by producers can offset harms to consumers, and the relationship between harm to the "competitive process" and harm to economic welfare. Abstracting from these disputes, the "consumer welfare standard" can be understood as an alternative to theories that endorse the use of antitrust to pursue social and political goals other than economic welfare. Despite recent efforts to revive such goals, non-welfarist considerations exert little influence on the disposition of contemporary antitrust litigation. Antitrust cases generally turn on whether the conduct or transaction at issue enables the exercise of market power in ways that diminish consumer welfare, total welfare, or innovation.

The Key Antitrust Statutes

The Sherman Act

Section 1 of the Sherman Act prohibits restraints of trade that restrict competition unreasonably. A few categories of agreements, such as price fixing between competitors not engaged in joint productive activity, are *per se* illegal under Section 1. Most agreements, however, are evaluated under a standard called the "rule of reason," which requires fact-specific inquiries into a defendant's market power and an agreement's effects on competition. Examples of agreements that may trigger scrutiny under Section 1 include exclusivity clauses, tying arrangements, and information-sharing agreements among competitors.

Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and conspiracies to monopolize. Unlike Section 1, which applies only to agreements, Section 2 extends to unilateral conduct. Under Section 2, the acquisition and maintenance of monopoly power are not by themselves illegal. Rather, unlawful monopolization entails (1) the possession of monopoly power (typically inferred from a market share of at least 60% and substantial entry barriers) and (2) "exclusionary" conduct, meaning conduct that excludes rivals through means other than a "superior product" or "business acumen." Examples of conduct that may trigger scrutiny under Section 2 include exclusivity clauses, tying arrangements, predatory pricing, and refusals to provide rivals with essential inputs.

The Clayton Act

Section 7 of the Clayton Act prohibits mergers and acquisitions that may "substantially ... lessen competition" or "tend to create a monopoly." Merger law distinguishes between "horizontal" mergers involving competitors and "vertical" mergers involving firms in the same supply chain. Horizontal mergers can raise two primary types of concerns. First, horizontal mergers may facilitate tacit or express collusion by increasing market concentration. Second, horizontal mergers may allow a firm unilaterally to increase its prices or decrease the quality of its products by eliminating competition between close substitutes, regardless of whether overall changes in market concentration are problematic. In its 1963 decision in *United States v. Philadelphia National Bank*, the Supreme Court recognized a presumption of illegality for horizontal mergers that result in a firm controlling "an undue percentage share of the relevant market" while significantly increasing market concentration. The Department of Justice (DOJ) and Federal Trade Commission (FTC) have attempted to give greater specificity to this "structural presumption" in merger guidelines, which utilize a measure of market concentration called the Herfindahl-Hirschman Index (HHI). The HHI is calculated by squaring the market share of each firm in the relevant market and summing the results. Thus, a market consisting of four firms with market shares of 30%, 30%, 30%, and 10% would have an HHI of 2,800 ($30^2 + 30^2 + 30^2 + 10^2$). The 2023 Merger Guidelines provide that the structural presumption is triggered by mergers that would result in an HHI exceeding 1,800 and an HHI increase of more than 100.

The structural presumption can be rebutted—for example, with evidence that market shares do not reflect a merger's likely competitive effects, that the entry of other firms will discipline any pricing power, or that the merger will produce efficiencies that offset any anticompetitive effects. Upon rebuttal of a *prima facie* case, the burden of producing further evidence of anticompetitive harm shifts back to the plaintiff and merges with the burden of persuasion.

The antitrust agencies challenge vertical mergers less frequently than horizontal mergers because vertical mergers do not eliminate direct competitors. Vertical integration may also generate efficiencies—for example, by allowing a firm to access inputs at cost instead of paying a markup, which may result in cost savings and lower consumer prices. The main concern with vertical mergers is that an integrated firm with control of an important source of inputs or a key distribution channel may have the ability and incentive to harm competition by raising its rivals' costs or refusing to do business with rivals altogether (a phenomenon called "foreclosure"). Vertical mergers may also harm competition by giving the merged firm access to rivals' competitively sensitive information. The legal standards governing vertical mergers are not firmly settled, but analysis of vertical mergers generally entails an assessment of the likelihood of these types of harm.

The FTC Act

Section 5 of the FTC Act prohibits "unfair methods of competition." The Supreme Court has construed this phrase to encompass any conduct that violates the Sherman Act, in addition to certain other practices that violate the "spirit" of the Sherman Act.

The Hart-Scott-Rodino Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) requires the parties to mergers that exceed certain size thresholds to report their transactions to the DOJ and FTC and abide by specified waiting periods before closing. While the agencies have authority to challenge consummated mergers, the HSR Act allows the DOJ and FTC to review (and potentially challenge) mergers before they are completed, avoiding the complications of attempting to unwind a consummated transaction.

The Robinson-Patman Act

The Robinson-Patman Act (RPA) prohibits price discrimination in the sale of commodities where the effect of such discrimination may be anticompetitive. The RPA applies to both "primary line" discrimination (which may affect competition between rival sellers) and "secondary line" discrimination (which may affect competition between rival buyers). The statute has generated controversy within the antitrust bar, with many commentators advocating its repeal or reform. Much of the controversy surrounding the RPA involves the welfare goals discussed above; unlike most other areas of antitrust, the case law governing secondary line RPA claims does not require plaintiffs to establish market-wide harms such as higher consumer prices, reduced output, or diminished innovation. Instead, the Supreme Court has held that competitive harm can be inferred in secondary line RPA cases based on injuries to disfavored buyers. For several decades, government enforcement of the RPA was close to nonexistent. In 2024 and 2025, however, the FTC brought its first RPA cases since the Clinton Administration, signaling a possible revival of the statute.

Enforcement

The DOJ and FTC are the federal agencies tasked with enforcing the antitrust laws. The agencies share concurrent authority to enforce the Clayton Act. The DOJ enforces the Sherman Act "directly" and the FTC enforces the Sherman Act "indirectly" insofar as Section 5 of the FTC Act incorporates the Sherman Act's prohibitions. The Sherman Act and Clayton Act are also enforced by private plaintiffs and state attorneys general.

Current Issues (2025)

Theoretical Foundations and Antitrust Reform

Beginning in the 1970s, antitrust underwent a shift from the interventionism that characterized competition policy during the 1950s and 1960s. Two theoretical moves underpinned this change. First, as discussed, courts endorsed the proposition that antitrust is principally concerned with the welfare benefits that result from competitive markets. Other goals, such as the protection of small businesses and the elimination of concentrated power, receded in importance. Second, enforcers and courts were heavily influenced by a set of views known as the Chicago School of antitrust analysis, which held that markets tend to self-correct and that many of the practices that antitrust condemned at the time had benign or procompetitive explanations. Based on these principles, courts pared back several of the more restrictive elements of antitrust law over the ensuing decades, while enforcers targeted a narrower range of conduct and transactions. This shift to a more permissive antitrust regime has attracted criticism. "Neo-Brandeisians," inspired by the late Supreme Court Justice Louis Brandeis, have called for the abandonment of the consumer welfare standard, urging a return to a broader range of goals that animated previous eras of antitrust enforcement. Others operating in what has been called a "Post-Chicago" school have advocated more vigorous enforcement within the post-1970s welfarist framework, challenging the theoretical basis for many of the Chicago School's claims about market functioning.

Monopolization Cases Against Big Tech

At the time of this writing, the DOJ and FTC are litigating monopolization cases against four large platform companies: Amazon, Apple, Google, and Meta. In separate cases, federal district courts have found that Google unlawfully monopolized certain markets related to online search and digital advertising technology. The remedies phase of the search case is underway, while remedies proceedings in the ad tech case are expected later in 2025. The FTC is also litigating monopolization claims against Meta and Amazon, while the DOJ has filed a suit alleging that Apple has monopolized certain smartphone markets.

The FTC Act and Competition Rulemaking

The FTC typically enforces the FTC Act through case-by-case adjudication. In April 2024, however, the FTC issued a rule prohibiting most employers from entering into or enforcing non-compete agreements with workers, raising unsettled issues regarding the agency's authority to issue rules defining certain practices as "unfair methods of competition" (UMC). In lawsuits challenging the non-compete rule, lower federal courts have split on the FTC's authority to issue UMC rules. One court has universally vacated the rule, precluding the FTC from enforcing it. The FTC has appealed that decision.

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