

An In-House Counsel's Guide to Navigating the Waters of Antitrust Law

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Introduction to Antitrust Law

Brief Introduction to Antitrust Law from a world-renowned expert:



The Goal of the Antitrust Laws

- Protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operated efficiently, keep prices down and keep quality up

The Principal Antitrust Laws

- Core federal antitrust statutes:
 - Sherman Act (1890):
 - ✓ Prohibits contracts, combinations and conspiracies that unreasonably restrain trade like price-fixing, bid-rigging, market allocation
 - ✓ Prohibits monopolization, attempts to monopolize and conspiracies to monopolize
 - ✓ Criminal Penalties and civil actions
 - Clayton Act (1914):
 - ✓ Prohibits certain tying and exclusive dealing contracts
 - ✓ Prohibits price discrimination, services or allowances (Robinson-Patman Act amendments)
 - ✓ Provides civil penalties for violations

The Enforcers

- U.S. Department of Justice (Antitrust Division)
 - ✓ Criminal Authority and Civil Claims
 - ✓ Concurrent jurisdiction with the FTC (*e.g.*, mergers)
- FTC
 - ✓ Focus on preventing and remedying consumer harm
 - ✓ Administrative Proceedings
- State Attorneys General
 - ✓ *Parens patriae* gives states standing to sue on behalf of their natural citizens
 - ✓ Can also bring suits in name of state or to enforce state's own antitrust laws
- Civil Plaintiffs
 - Source of most antitrust suits; direct and indirect purchasers
 - Cannot sue under FTC Act or to stop a merger

Importance of Compliance with the Antitrust Laws

- Any violation of the antitrust laws can substantially impact an organization and its individual employees, potentially resulting in:
 - Treble damages
 - Joint and Several Liability with no right of contribution
 - Injunctions
 - Fines
 - Prison terms (for individuals)
- Even if an organization ultimately prevails, an antitrust suit or investigation can be extremely costly
- Effective antitrust compliance policy could lead to a reduction in criminal sanctions

Importance of Compliance with the Antitrust Laws

Criminal Penalties

- For Individuals:
 - Up to 10 years in prison per offense
 - Up to \$1 million in fines per offense
- For Organizations
 - Fines up to \$100 million per offense
 - ✓ Generally measured by the "volume of commerce" (based on sales per year of product(s) at issue)
 - Application of Alternative Minimum Fine Statute can push maximum fine above \$100 million
 - ✓ Potential reduction in penalty if company has effective antitrust compliance program in place
 - Injunction/Decrees

Cartel Whistleblowers

Amnesty Program & ACPERA

- Requirements
 - First to report conduct to the DOJ
 - Must not be "ringleader"
 - Full cooperation
- Benefits
 - No criminal prosecution for company and its employees
 - Civil liability limited to single damages for amnesty applicant's own sales
 - ✓ Must also cooperate with civil plaintiffs

Importance of Compliance with the Antitrust Laws

Sherman Act Violations Yielding Corporate Fines over \$100 Million

Defendant (FY)	Product	Fine (\$ Millions)	Geographic Scope	Country
Citicorp. (2017)	Foreign Currency Exchange	\$925	International	U.S.
Barclays, PLC	Foreign Currency Exchange	\$550	International	U.S.
JP Morgan Chase & Co.	Foreign Currency Exchange	\$550	International	U.S.
AU Optronics Corporation of Taiwan (2012)	Liquid Crystal Display (LD) Panels	\$500	International	Taiwan
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	\$500	International	Switzerland
Yazaki Corporation (2012)	Automobile Parts	\$470	International	Japan
Bridgestone Corporation (2014)	Anti-vibration rubber products for automobiles	\$425	International	Japan
LG Display Co., Ltd LG Display America (2009)	Liquid Crystal Display (LCD) Panels	\$400	International	Korea
Royal Bank of Scotland	Foreign Currency Exchange	\$395	International	Scotland (United Kingdom)
Société Air France and Koninklijke Luchtvaart Maatschappij, N.V. (2008)	Air Transportation (Cargo)	\$350	International	France (Société Air France) The Netherlands (KLM)
Korean Air Lines Co., Ltd. (2007)	Air Transportation (Cargo & Passenger)	\$300	International	Korea
British Airways PLC (2007)	Air Transportation (Cargo & Passenger)	\$300	International	UK
Samsung Electronics Company, Ltd. Samsung Semiconductor, Inc. (2006)	DRAM	\$300	International	Korea
BASF AG (1999)	Vitamins	\$225	International	Germany
CHI MEI Optoelectronics Corporation (2010)	Liquid Crystal Display (LCD) Panels	\$220	International	Taiwan
Taro Pharmaceuticals U.S.A., Inc.	Generics	\$205.70	Domestic	U.S.
Teva Pharmaceuticals USA, Inc. (2023)	Generics	\$225	Domestic	U.S.
Pilgrim's Pride Corporation (2021)	Broiler Chicken Products	\$107.9	Domestic	U.S.
Starkist Co. (2019)	Packaged Seafood	\$100	Domestic	U.S.
Bumble Bee Foods, LLC (2017)	Packaged Seafood	\$25	Domestic	U.S.

Importance of Compliance with the Antitrust Laws

Civil Exposure

- Liability for Treble Damages Based on ALL Co-Conspirators Sales
 - Joint and several liability
 - No pass-through defense
 - *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)
- Costs of Litigation
 - Attorneys' fees
 - Experts' fees
 - General costs of litigation

Potential Antitrust Concerns: Knowing The Red Flags

- **Information Exchanges with Competitors**
 - Information exchanges with competitors regarding pretty much anything confidential and proprietary:
 - present or future prices, pricing policies, bids, costs,
 - capacity
 - terms or conditions of sale
 - discounts, identity of customers
 - allocation of customers
 - product quotas and R&D plans
- ▶ **Note that antitrust "agreements" need not be written:**

They may be inferred from any conduct - *e.g.*, a "knowing wink or nod," a casual remark, email exchanges or "off-the-record" discussions -- that results in or reflects a mutual understanding

Types of Illegal “Horizontal” Arrangements with Competitors

- Price Fixing
 - Agreements among competitors to fix prices of goods or services, including any aspect of the terms or conditions of sale or purchase
E.g., agreements to fix prices on certain products (see Colegio de Optometras, 2007)
- Bid-Rigging
 - Agreements among competitors to reduce competition
 - *E.g., agreements that prevent competitors from offering competing bids (see Kansas City School Transportation, 1993)*
 - *E.g., agreements to rig bids with respect to chicken sold to common customers (see Broilers, 2020)*
- Output Suppression
 - E.g., agreements to restrict supply of chicken produced to affect supply and demand factors (see Broilers, Pork, 2016)*

Types of Illegal “Horizontal” Arrangements with Competitors

- Market Division or Customer Allocation
 - Agreements among competitors to allocate customers, suppliers or markets
E.g., agreements that certain competitors will only sell to particular customers or in certain geographic regions (see FMC Corporation and Asahi Chemical Industry Co., Ltd., 2002)
- Group Boycotts
 - Agreements among competitors to refuse to deal
E.g., agreements not to sell products to certain customers (see Minnesota Rural Health Cooperative, 2010)

Types of Illegal “Vertical” Arrangements with Customers

- Tying
 - Requiring a buyer who wants a particular product or service also to purchase a second product or service
 - ✓ *E.g.*, requiring purchase of monitoring services along with medicine where manufacturer is only producer of medicine but many companies provide monitoring services (*see Sun Company, Inc., 1992*)
 - ✓ Ninth Circuit approved of Qualcomm's "no license, no chip" policy (*FTC v. Qualcomm 9th Cir. 2020*)
- Exclusive Dealing
 - Prohibiting a supplier or customer from dealing with others
 - E.g.*, exclusive contracts that tie up lower-cost supply, forcing competitors to seek higher-priced sources (*see Mylan Laboratories, Inc. and others, 2000*)

Best Practices for Antitrust Compliance

- Corporate antitrust policy
 - Specific in terms of risk faced by company- your line of business
 - Training, culture of compliance, monitoring, confidential reporting, discipline
- Industry associations and Meetings
 - Industry meetings perform many useful and legitimate functions
 - If a subject that involves potential antitrust issues is raised at an industry meeting, and there was no prior legal approval to discuss the matter, it is best to:
 - ✓ Immediately object
 - ✓ If necessary, leave the room or hang up the telephone
 - ✓ Report the incident to the general counsel's office or outside counsel immediately
 - It's OK to talk to industry contacts, just not about confidential information

Opt Out Litigation:

When your Company is a Victim of an Antitrust Conspiracy

Antitrust Class Actions

Civil Class Actions

- Actions brought by private individuals/businesses on behalf of a "class" of individuals/businesses with common claims/damages model
- Lawyer driven
- No risk to individual class members
- If class lawyers achieve settlement or successful result at trial, recovery (after costs and attorneys' fees) is distributed to class members
- Judge must certify class and approve all settlements

Price-fixing cases generally involve multiple class actions

Does Your Organization Have an Individual Opt Out Claim?

- Significant antitrust claims are often overlooked or needlessly ignored
 - Recoveries in individual actions almost always ***significantly exceed*** what party would have received as a member of the class
 - Individual or group opt-out antitrust recoveries can exceed total class recovery
 - A company's claim does not need to be very large to justify bringing an independent action
 - ***Flexibility*** in claims
 - Choose own counsel focused on your claim
 - Choose which conspirators to sue
 - Decide when/if to settle claims
 - Ability to treat different suppliers differently

Recovery Case Studies

Case	Tech Data's Recovery	Recovery for the Entire Class
LCD	\$201,000,000	\$473,000,000
CRT	\$77,000,000	\$210,000,000

Case	Avnet's Recovery	Recovery for the Entire Class
Capacitors	\$267,000,000	\$600,000,000

Common Hesitancies to Opt Out

- Gathering support from management or business units
- Perceived fear of damaging existing relationships
 - Retaliation Protection
- Impact on business of collecting data and documents
- Impact on key employees/C-suite in sitting for depositions

Civil Exposure

- **LCD Case Study:**

Tech Data recovered \$50 million from Chi Mei Optoelectronics even though Tech Data did not purchase a single dollar's worth of product from the defendant

- **Capacitors Case Study:**

Avnet recovered \$267 million from Nippon Chemicon even though Avnet purchased approximately \$5m of product from the defendant

What Can You Do to Stay Informed?

- Keep an eye out for class action notices and forward them along to experienced antitrust counsel
- Pay attention current events/news reports and seek further color from antitrust counsel
- Listen to your employees- they know when pricing seems off

Questions

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