Antitrust Law: Competition Matters

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Overview

- Multi-Firm Conduct
  - Relevant Statutes and Elements of an Offense
  - No-Poaching and Wage-Fixing
  - Pricing Algorithms and Price Scraping
- Purchasing from Abroad
  - Reach of U.S. Antitrust Laws to Import Conduct
  - Protection for Purchasers of Imported Goods
- Merger Enforcement
  - Relevant Statutes and Enforcers
  - Recent Court Battles
- Questions

Multi-Firm Conduct

Relevant Statutes

- Sherman Act. Section 1 of the Act (15 U.S.C. § 1) states: **"every contract, combination … or conspiracy**, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

- Colorado Antitrust. The Act (C.R.S. 6-4-104) includes a state law analogue to Section 1 of the Sherman Act.

- FTC Act. The Act (15 U.S.C. § 45) can be violated by "invitations to collude" when the invitations, if accepted, would constitute *per se* Section 1 violations.

Elements of an Offense

- Section 1 of the Sherman Act prohibits
  - **agreements** between competitors
  - that **unreasonably restrain trade**, and
  - **effect interstate** or **foreign commerce**

Elements of an Offense

- Elements of an Offense: Agreement
  - Agreements are "meetings of the mind" that unreasonably restrain trade.
  - Agreements include written or oral agreements, tacit understandings, and "gentlemen's agreements."
  - Agreements can only arise between two or more independent entities, not between parent and subsidiary or commonly-owned companies.

Elements of an Offense

- Elements of an Offense: Proof of Agreement
  - Agreements must be entered into knowingly.
  - Direct evidence: written or oral. [No need to infer]
  - Circumstantial evidence: inferences
    - Example: A meeting among competitors at a trade show:
      - Why were competitors meeting?
      - Who said what to whom?
      - Notes taken? What do the notes state?
      - What did the companies do after communication?
      - Who had authority at the meeting to bind the companies?

Elements of an Offense

- Elements of an Offense: Unreasonable Restraint of Trade
  - *Per Se* Treatment
    - Agreements that always or almost always restrict competition and decrease output
    - Presumed unreasonable
    - No ability of defendant to present efficiencies or business justifications
  - The Rule of Reason
    - Applies to all agreements not subject to *per se* treatment
    - Involves burden shifting and ability of defendant to offer procompetitive justifications
    - Balances anticompetitive effects against procompetitive benefits

Elements of an Offense

- Elements of an Offense: Unreasonable Restraint of Trade
  - Agreements viewed as *per se* illegal (i.e. always illegal) traditionally include “naked” agreements among competitors to:
    - Fix prices
    - Rig bids
    - Allocate markets (by customers, territories, products or services)
    - Boycott competitors, suppliers or customers
  - As of late, two other types of agreements have drawn close scrutiny:
    - Naked wage-fixing and no-poaching agreements (*per se* violations)
    - Use of algorithmic pricing software that allows companies to change prices based on competitors’ prices

Elements of an Offense

- Elements of an Offense: Unreasonable Restraint of Trade
  - “Naked” means the agreement’s purpose is to engage in unlawful anticompetitive behavior that is untied to any legitimate purpose.
  - Agreements reasonably necessary to a legitimate collaboration between competitors like a joint venture or merger are not considered “naked” agreements.

Elements of an Offense

- Elements of an Offense: Effect on Interstate Commerce
  - Antitrust conduct applies to trade/commerce “among the several states” (and within the District of Columbia)
  - Low threshold to satisfy this element
  - Generally stated, antitrust conduct need only tangentially affect interstate commerce

Enforcement

- The DOJ Antitrust Division has exclusive jurisdiction over criminal antitrust cases and violations of the Sherman Act.
- The DOJ can also pursue civil remedies for violations of the Sherman Act and Clayton Act.
- The FTC has exclusive jurisdiction over violations of Section 5 of the FTC Act.
- State attorneys general enforce state antitrust laws.
- Private litigants, individuals and companies, can also recover damages for antitrust violations.

Enforcement Remedies

- Violations of the Sherman Act can result in drastic penalties for companies, including:
  - Fines up to the greater of $100 million per violation or twice the defendant's gross gain or the victim's gross loss
  - Government oversight restricting commercial activities
  - The DOJ may also seek injunctions and civil penalties

Enforcement Remedies

- Violations of the Sherman Act can result in drastic penalties for individuals, including:
  - Imprisonment for up to ten years
  - Fines up to the greater of $1 million per violation or twice the defendant’s gross gain or the victim’s gross loss

Enforcement Remedies

- Violations of the FTC Act can result in penalties for individuals and companies, including:
  - Preliminary and permanent injunctions
  - Disgorgement of unjust enrichment
  - Restitution for injury suffered by consumers

Enforcement Remedies

- Violations of the Colorado Antitrust Act (C.R.S. 6-4-101 et. seq.) can result in penalties and damages for individuals and companies.

  – Criminal Penalties

    - Companies – Up to $1 million per violation
    - Individuals – Up to $100,000 per violation
    - Individuals – Between 1-3 years in prison

No-Poaching and Wage-Fixing

- Heightened DOJ and FTC Focus
- Wage-Fixing Agreements
- No-Poaching Agreements
- Managing Risk

Heightened DOJ and FTC Focus

- No-poaching and wage fixing agreements are *per se* illegal.

- The DOJ and FTC jointly issued Antitrust Guidance for Human Resources Professionals in October of 2016.

  – You can access this guidance at: https://www.justice.gov/atr/file/903511/download

Heightened DOJ and FTC Focus

- DOJ has modified enforcement approach to condemn misconduct as criminal (as opposed to civil).
- DOJ and FTC have reiterated that labor markets constitute valid antitrust markets. These markets, like those for goods and services, must respect competitive norms.
- Companies that compete to hire or retain employees are competitors in the employment marketplace.

Wage-Fixing Agreements

- What are wage-fixing agreements?
  - Agreements between employers (buyers of employment services)
  - To set compensation
  - For a class of employees (sellers of employment services)

Wage-Fixing Agreements

- What are wage-fixing agreements?
  - Compensation
    - Can be hourly wages, salaries, or benefits
    - Includes agreements as to specific wage amounts, ranges, or methods of calculation
  - Class of labor
    - Can be any group or individual employees
    - Cases frequently include managerial, professional, or technical employees
  - Employers need not be direct competitors in the sale of products or services
    - Employers sourcing from the same labor pool are direct competitors

Wage-Fixing Agreements – Illustrative Matters

- U.S. v. Utah Soc'y of Healthcare Human Res. Admin. (1994)
  - Administrators in hospitals exchanged current and prospective, non-public nurse wage information to restrain wages.
- Todd v. Exxon (2001)
  - Exxon and 13 other oil companies shared salary information regarding managerial and technical employees through a third party consultant and used that information to set wages and salaries.
- U.S. v. Arizona Hospital & Healthcare Ass'n (2007)
  - Arizona hospitals agreed to uniform bill rate schedules for nurses.
- Johnson v. Arizona Hospital and Healthcare Ass'n (2007)
  - Arizona hospitals and medical centers were accused of fixing per diem and traveling nurses' wages.
- Beltran v. InterExchange, Inc. (filed in Colorado district court)
  - Organizations sponsoring au pairs alleged to have fixed wages.

No-Poaching Agreements

- What are no-poaching agreements?
  - Agreements between employers (buyers of employment services)
  - Not to hire
  - A class of employees (sellers of services)
  - Commonly referred to as “non-solicitation” agreements

No-Poaching Agreements

- What are no-poaching agreements?
  - Hire
    - Includes agreements not to solicit, interview, or actually hire employees
  - Class of labor
    - Can be any group or individual employees
    - Cases frequently include managerial, professional, or technical employees
  - Employers need not be direct competitors in the sale of products or services
    - Employers sourcing from the same labor pool are direct competitors

No-Poaching Agreements – Illustrative Matters

- U.S. v. Adobe Systems, Inc. (2010)
  - DOJ sued Adobe, Apple, Google, Intel, Intuit and Pixar alleging an illegal "gentlemen's agreement" not to cold call one another's technical employees.
- In re HighTech Employee Antitrust Litigation (2011)
  - Civil class actions against Adobe, Apple, Google, Intel, Intuit, Pixar and LucasFilm alleging bilateral agreements were in fact a single over-arching horizontal conspiracy.
  - Over $400,000,000 in settlements.
- U.S. v. Knorr-Bremse AG, case # 1:18-cv-00747 (D.D.C. 2018)
  - DOJ settled civil complaint against rail equipment suppliers (Knorr-Bremse and Wabtec) for allegedly agreeing not to compete for each other's personnel, including PMs and engineers.

No-Poaching Agreements – Franchises

- Franchise agreements prohibiting “poaching” of employees by one franchisee of another franchisee’s personnel
- Government and private plaintiff activity
  - Fast food restaurants
    - July 2018 – seven restaurant chains agree with 10 states and D.C. to remove “no-poach” terms from franchise agreements
    - August 2018 – eight restaurant chains agree with State of Washington to remove “no-poach” terms
  - Bautista v. Carl Karcher Enters., LLC (2017)
    - Class action against Carl’s Jr. burger franchise alleged agreements not to hire other franchisees’ supervisors

Managing risk – When Can Employee Hiring and Wage Activity Be Lawful

- Agreement tied to a legitimate <u>primary</u> purpose
  - Ancillary to a legitimate employer collaboration (i.e., joint venture, merger, acquisition)
  - Ancillary to a legitimate vertical arrangement (i.e., independent contractor agreement)
  - Wage information exchanges that do not set wages (i.e., legitimate benchmarking)
    - Independent third party aggregator;
    - Where the data is more than three months old; and
    - The data has been sufficiently aggregated.
      - *See* https://www.justice.gov/atr/statements-antitrust-enforcement-policy-health-care (Section 6)

Managing Risk – Compliance Policies and Corporate Vigilance

- Create an Antitrust Compliance Policy
  - Training
  - Written policy with certificate of compliance
  - Ensure all employees certify compliance annually
- If red flags appear, investigate the substance of the conduct (e.g., information exchanges) and seek antitrust counsel

No-Poaching & Wage-Fixing – Takeaways

- Employers <u>need not compete</u> in the provision of goods and services to be competitors for employees
- Wage-fixing pertains to <u>any part</u> of employee compensation
- Legitimate relationships between employers can justify certain types of agreements and information exchanges
- Communications among employers or through third party conduits about hiring or compensation are red flags
- Implement an Antitrust Compliance Policy and ensure training provided to HR and others with hiring/pay authority
- Employer/employee non-compete agreements are <u>not</u> no-poach agreements. [Some states have laws applicable to non-competes, e.g., Illinois]

Pricing Algorithms and Price Scraping

- Technology-Aided Pricing
  - A pricing algorithm instructs a computer to set the price of an item for sale, and can be developed to rely on competitors' prices and demographic or other information about the customer.
    - Algorithms are described as a series of if-then statements designed by humans that tell a computer what to do.
- Pricing Algorithm Advantages
  - Speed
  - Complexity

Pricing Algorithms and Price Scraping

- Interdependence vs. Collusion
  - Collusion (or an agreement among competitors), in the legal sense, differs from mere interdependent behavior among firms in a horizontal relationship.
  - Under U.S. law there is a critical legal difference between concerted behavior among competitors aimed at influencing prices and unilateral decision-making in light of observed market conditions.
  - The DOJ and FTC adopt the view that the legal standard for finding unlawful collusion remains the same in the context of pricing algorithms.

Pricing Algorithms and Price Scraping

- Single Firm Use of Algorithms
  - Implementation of pricing policies by a single firm is unilateral conduct (whether it factors in the prices of competitors or not) and is not actionable under Section 1 of the Sherman Act without evidence establishing an agreement with another firm over the purpose or effect of a pricing algorithm.
  - “Setting prices together is illegal, while observing the market and making independent decisions is not.”
    - Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Remarks from the Concurrences Antitrust in the Financial Sector Conference: Should We Fear Things That Go Beep in the Night? (May 23, 2017)[hereinafter Ohlhausen Remarks].

Pricing Algorithms and Price Scraping

- Use of Pricing Algorithms By Multiple Firms
  - Computer-determined pricing may be susceptible to coordination among competitors, just as human-determined pricing can be.
    - Note by U.S., Algorithms and Collusion, Directorate For Financial and Enterprise Affairs Competition Committee, OECD (May 26, 2017), https://one.oecd.org/document/DAF/COMP/WD(2017)41/en/pdf.
  - Algorithms can be programmed to produce some sort of signal to the market, a signal that only the other market participants, similarly armed with algorithms of their own, will be able to detect.
    - *See* Ohlhausen Remarks.

Pricing Algorithms and Price Scraping

- Scenarios presenting algorithmic pricing concerns:
  - An agreement among competitors to use a common computer system to establish or implement an illegal pricing agreement.
    - *See* U.S. v. Airline Tariff Publishing Co., 836 F. Supp. 9 (D.D.C. 1993).
  - An agreement among competitors to use pricing algorithms that enhance their joint profits by setting higher prices than either firm would have charged using only its own rules or algorithm.
    - *See* U.S. v. Topkins, No. CR 15-00201 (N.D. Cal. 2015); https://www.justice.gov/atr/case/us-v-david-topkins. *See also* U.S. v. Aston et. al. CR 15-00419 (N.D. Cal. 2015); https://www.justice.gov/atr/case/us-v-daniel-william-aston-and-trod-limited.

Pricing Algorithms and Price Scraping

- Scenarios presenting algorithmic pricing concerns continued:
  - – Competing firms each entered into separate agreements with a single firm (for instance a platform) to use a particular pricing algorithm, and the evidence showed they did so with the common understanding that all of the other competitors would use the identical algorithm. This is sometimes called a "hub-and-spoke" conspiracy.
    - *See Meyer v. Kalanick*, No. 1:15-cv-09796-JSR (S.D.N.Y.).

Pricing Algorithms and Price Scraping

- Reducing Antitrust Risks Related to Pricing Algorithms:
  - Update the company's antitrust compliance program.
  - Document the company's legitimate business rationale for adopting a pricing algorithm.
  - Instruct employees that the use of algorithms and features of those algorithms constitute competitively sensitive information.
  - Consider the risks when the company is outsourcing pricing to a third party vendor that is also pricing for rivals.
  - Seek counsel about the treatment of pricing algorithms in non-U.S. jurisdictions where the company conducts business.

Purchasing from Abroad

Purchasing Imported Products

- Reach of U.S. Antitrust Laws to Import Conduct

- U.S. Antitrust Laws – Protection for Purchasers of Imported Goods

U.S. Antitrust Laws – Reach

- Competition laws differ across borders
- Some countries impose regulations that mandate competitors in those countries to coordinate on product exports (e.g., prices, output)
- While those export practices, if practiced in the U.S., would violate our antitrust laws, criminal and civil exposure might not arise in the U.S.
- Reach of U.S. antitrust laws is bounded
- Principles of international comity
- FTAIA (limits reach of U.S. antitrust laws as it relates to antitrust violations occurring overseas)

U.S. Antitrust Laws – Protection for Purchasers of Imported Goods

- Criminal and civil exposure can arise for importers of goods into the U.S. when
  - "Agreement" occurs in whole or part in the U.S. <u>or</u>
  - Collective foreign practices are not "mandated" by gov't regulation or statute (comity principles do not apply) <u>&</u>
  - foreign conduct has a direct, substantial & reasonably foreseeable effect on U.S. import commerce
- Criminal investigations into conduct can aid purchasers by
  - Creating disincentives for further unlawful activity
  - Alerting purchasers of potential right of action

U.S. Antitrust Laws – Protection for Purchasers of Imported Goods

- Direct purchasers of goods who have suffered damages because of violations of U.S. federal antitrust laws can seek recovery

- Injured parties (individuals or companies) can recover up to three times actual damages, plus all costs of suit and attorneys' fees
  - Actions by "private attorneys general" a policy goal of the federal antitrust laws

U.S. Antitrust Laws – Protection for Purchasers of Imported Goods

- U.S. states also provide for protection of purchasers through consumer protection and state antitrust laws.
- In Colorado, direct (but not indirect) purchasers of goods, injured by violations of the state's antitrust law, can seek civil recovery.
- Private persons or firms may sue for damages under the Colorado antitrust law and may recover up to three times actual damages suffered, plus all costs of litigation and attorneys' fees.

U.S. Antitrust Laws – Protection for Purchasers of Imported Goods

- In re Vitamin C Antitrust Litigation (E.D.N.Y.)
  - Class action alleging Sherman Act Section 1 price fixing
  - Group of Chinese exporters of vitamin C alleged to have colluded on vitamin C prices through pricing and output
  - Chinese government proffered that exporters' sales practices mandated by government action
  - District court did not accord comity (i.e., did not apply act of state doctrine) to Chinese gov't proffer
  - At trial, jury found two exporters fixed prices and awarded class $147 million in damages (after trebling)

U.S. Antitrust Laws – Protection for Purchasers of Imported Goods

- In re Vitamin C Antitrust Litigation (Appeals)
  - Second Circuit overturned district court verdict
    - Deference to be afforded sworn proffers regarding construction and effect of foreign government laws
    - Under Chinese construction of its own law, exporters couldn't simultaneously comply with U.S./ Chinese law
  - Supreme Court remanded to Second Circuit
    - Absolute deference to sworn proffers not proper
    - Respectful consideration afforded but federal court to decide comity questions

U.S. Antitrust Laws – Protection for Purchasers of Imported Goods

Takeaways

- Tracking of gov't investigations can alert purchasers of antitrust wrongdoing by suppliers.

- Vitamin C highlights purchasers must be vigilant in monitoring the dynamics affecting prices and the purported bases for sellers' pricing behavior.

- Public policy seeks to have private parties enforce the U.S. antitrust laws but those laws are not unbounded.

Merger Enforcement

Relevant Federal Statutes and Enforcers

- Clayton Act §§ 7 and 7A (15 U.S.C. §§ 18, 18a)
  - Section 7: "No person…shall acquire, directly or indirectly, the whole or any part of the stock… or any of the assets of another person… where any line of commerce…in any section of the country, the effect…may be substantially to lessen competition…"
  - Section 7A: Premerger notification and waiting period (referred to as the Hart-Scott-Rodino Act or HSR Act)
- The DOJ and FTC have concurrent jurisdiction
  - Mergers above a certain threshold must be reported in advance to the DOJ and FTC under the HSR Act unless exempt
  - Non-reportable deals may be challenged
  - Reported deals may be challenged post-consummation

Recent Court Battles

- AT&T's $85.4 billion acquisition of Time Warner
  - In October 2016, AT&T finalized a deal that would combine AT&T's large wireless and satellite subscriber base with the television and film content owned by Time Warner, including CNN, TBS, HBO and Warner Bros.
  - The DOJ challenged the merger in court in November 2017 alleging that AT&T's ownership of Time Warner's Turner Broadcasting unit would allow AT&T to extract higher fees from television distributors for its sports and live news content, ultimately driving up consumer costs.

Recent Court Battles

- AT&T's $85.4 billion acquisition of Time Warner
  - The case is notable because antitrust scrutiny most often focuses on horizontal transactions involving a combination of competitors, which may result in anti-competitive effects.
  - The proposed acquisition of Time Warner by AT&T does not involve horizontal competition but rather is a vertical merger, involving an upstream supplier and downstream distributor.

Recent Court Battles

- AT&T's $85.4 billion acquisition of Time Warner
  - It is rare for antitrust authorities to challenge a vertical merger in court.
  - Since the 1970s to resolve antitrust concerns raised by enforcers, parties proposing vertical mergers have either abandoned them or agreed to settlement.
  - AT&T and Time Warner committed to stay the course and defend their proposed vertical merger in court.

Recent Court Battles

- AT&T's $85.4 billion acquisition of Time Warner
  - After a nearly six-week bench trial, Judge Leon of the U.S. District Court for the District of Columbia rejected the DOJ's request to block the deal in a sprawling 170-plus-page opinion on June 12, 2018, finding the government had not adequately shown the combination is likely to hurt competition and drive up costs for television consumers.
  - The transaction closed on June 14, 2018.
  - The DOJ announced that it would be appealing to the D.C. Circuit in July of 2018.

Recent Court Battles

- AT&T's $85.4 billion acquisition of Time Warner
  - Takeaways:
    - The appeal could be seen as a government warning to the media industry.
    - The case is worth continuing to watch because the appellate court could develop a standard regarding the government's initial burden in vertical merger cases going forward.
    - The government may still try and break up the company later if it sees that the market has been negatively impacted.

Recent Court Battles

- U.S. v. Parker-Hannifin Corp.
  - On September 26, 2017, the DOJ filed a complaint in the U.S. District Court of Delaware to partially unwind Parker-Hannifin Corporation's $4.3 billion acquisition of CLARCOR Inc.
  - The complaint stated that the consummated merger combined the only two domestic companies making qualified aviation ground fuel filtration systems used by the military and airlines.
  - The challenge is unusual because it occurred seven months after the DOJ allowed the HSR waiting period to expire.

Recent Court Battles

- U.S. v. Parker-Hannifin Corp.
  - Federal agencies do not formally approve proposed transactions.
  - Subsequent challenges of consummated mergers in which the parties have gone through the HSR process is rare.
  - The DOJ has signaled that Parker-Hannifin failed to adequately alert the agencies about the overlapping product issue during the HSR waiting period.

Recent Court Battles

- U.S. v. Parker-Hannifin Corp.
  - Takeaways:
    - U.S. enforcers will review consummated transactions that raise competitive concerns- even where such transactions are reported. The agencies have continuing authority under Section 7 of the Clayton Act.
    - Parties to a merger should conduct a meaningful competitive assessment of the proposed transaction as early as possible, particularly if the transaction involves direct competitors in overlapping products, and carefully consider the reaction of key stakeholders, including customers and other third parties.

Questions?