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United States

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This chapter provides an overview of US antitrust law, with emphasis on those portions that affect international trade and global competition. In a few instances, aspects of US law that do not directly affect international trade are summarized because the US approach is significantly different from the approach of other countries to comparable problems.

Goals of US Competition Policy

Economic and Noneconomic Goals

The goals of US antitrust law are multiple and vary somewhat from statute to statute. The Sherman Antitrust Act of 1890, the oldest US federal antitrust law, was a child of the industrial revolution. The giant industrial trusts of that era, in addition to their many productive contributions, engaged in a course of conduct to stamp out and swallow up their competitors and exploit their suppliers and customers. The Sherman Act was passed to regulate these trusts. Its legislative history is replete with concerns about the unfair use of power and disparities in wealth and power. Farmers, small proprietors, consumers, and those who sim-

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ply suffered "inequality of condition, of wealth and opportunity" were all identified as victims. Economists generally opposed the bill.

In 1914 Congress passed the Clayton Act. Born of the Progressive Era, this legislation was enacted during the term of President Woodrow Wilson as a part of his "new freedom" initiative, which promised "the little man" a better opportunity to succeed. One of the law's best-known proponents was Louis Brandeis, later an associate justice of the Supreme Court, who fought to protect opportunities for small business. The Clayton Act introduced a merger law in section 7, and in section 3 a law against tie-in sales (where one product is used to force the sale of another) and exclusive dealing and requirements contracts between buyers and sellers that may lessen competition. "Lessen competition" did not then have particular reference to consumer harm. The law was designed to unclog the channels of competition so that small firms would not be fenced out of business opportunities by larger and powerful competitors.

In 1936, in the wake of the Great Depression and especially in view of the hardship small businesses were suffering in the shadow of large and powerful firms, Congress passed the Robinson-Patman Anti-Price Discrimination Act. This act was an extensive amendment of section 2 of the Clayton Act.

The events of World War II gave rise to the next important amendment to the antitrust laws. Americans observed how the concentration of industries in Germany had played into the hands of fascism. In the 1940s, responding to a call from President Franklin D. Roosevelt to protect "the liberty of democracy," Congress established the Temporary National Economic Committee to study the causes and effects of economic concentration and to offer solutions to the widely accepted "problem" of economic concentration. The TNEC hearings and monographs, as well as parallel discussions and debate, led to the Celler-Kefauver Merger Act, an amendment to section 7 of the Clayton Act, in 1950, which strengthened the merger law. The purpose of the amendment was to check the increasing concentration of assets into fewer and fewer hands. The law aimed to preserve a society of small, independent, decentralized businesses in order to keep economic power dispersed and thereby keep political power diffused.

For scores of years, through the 1960s, neither Congress nor Supreme Court majorities acknowledged the tension between protecting small firms' freedom to participate in open markets, on the one hand, and protecting the interest of consumers in low prices, on the other. But in the mid-1970s the Supreme Court began to speak more frequently of the economic grounding of antitrust and began to apply a limiting principle to antitrust precedents so that conduct that served consumers was not unlawful. When the tension between the interests of small firms and those of consumers finally did surface, the courts and government agencies framed it as one between protecting inefficient small competitors and protecting consumer welfare. In the 1980s, under the Reagan administration, federal enforcement agencies resolved this dilemma in favor of protecting consumer welfare, by which phrase some enforcers meant promoting allocative efficiency—that is, efficiency of the total economy—while others meant, more literally, consumer interests. Enforcement officials in the Reagan administration resolved to use the antitrust laws only to challenge inefficient transactions. Beyond outright cartels, however, it was hard to find such transactions, and enforcement activity dwindled.

The Reagan administration's enforcement officials, whose ideology is popularly referred to as that of the Chicago School, were strong advocates of their new paradigm for antitrust, and many judges, especially newly appointed ones, were sympathetic to the relatively noninterventionist antitrust law that the paradigm implied. Other judges were also concerned with the rather bloated body of antitrust law that was the legacy of the 1960s, and all were aware of the Supreme Court's signals in the late 1970s heralding economic "soundness" as a basis for resolving antitrust issues. These influences converged to give great prominence to economic efficiency as a goal of antitrust law in contemporary antitrust jurisprudence.

By the end of the 1980s, some antitrust watchers believed that the Chicago School had won, not only in its quest to make allocative efficiency the sole goal of US antitrust law but also in its effort to confine the category for permissible intervention to output-limiting transactions, and to begin analysis of a problem by assuming that markets work well, that business acts efficiently, and that government intervention is clumsy. It is now clear, however, that the Chicago School, although very influential, has not prevailed.

First, as to goals, certain surviving antitrust rules are clearly not based on allocative efficiency. These include the per se rule against resale price maintenance agreements (discussed below), the modified per se rule against tie-ins by firms with market power, and the rule against naked competitor boycotts. These rules imply the right to be free from coercion and bullying and the right to participate in unclogged markets. Even the per se rule against cartels was driven not so much by allocative concerns as by a concern for fairness in distribution and by the political-economy interest in assuring that markets, not people, control the terms of trade. Even the law against market power-increasing mergers was driven by a desire to maintain the diversity thought necessary to preserve the interplay that underlies competition, and the pluralism that anchors democracy. That many of these rules, as refined, are consistent with allocative efficiency goals does not imply that allocative efficiency explains their adoption.

Second, US antitrust jurisprudence of the 1990s shows no signs of adopting into law an assumption that markets work well and virtually always pressure firms to operate efficiently—or the motto that one should "trust markets, not government." The Supreme Court rejected just this approach in the case of *Kodak v. Image Technical Services, Inc.* (504 U.S. 451, 1992).

Third, the question of how to use (or withhold) antitrust enforcement to achieve efficiency remains open. Targeting inefficient transactions may be one way to gain efficiency, but it is no longer accepted that all other enforcement conduces to inefficiency. Another way to keep markets efficient and firms robust may be to keep markets free of artificial blockages (see the *Aspen* and *AT&T* cases discussed below and complainants' allegations in the cases against Kodak and Microsoft). These issues are still being explored by enforcement agencies and the courts.

Influence of Industrial Policy

We confine industrial policy in this discussion to government policy that promotes national champions or otherwise facilitates the successful participation of US firms in international or world markets. Competition is one industrial policy. Indeed, US efforts to maintain competition through antitrust enforcement have no doubt greatly facilitated the growth of robust US firms and their successful participation in world markets, whereas lax antitrust enforcement seems to have had the converse effect.

Has industrial policy been an influence on the development of antitrust law? It may be an influence in two senses: industrial policy interests might be taken into account in considering what is anticompetitive, and "competitiveness" might be asserted as a trump over antitrust. Industrial policy interests have influenced antitrust in both ways, but most significantly the former. In the 1970s the United States reexamined its antitrust analysis against the background of an overgrown body of antitrust law, a declining economic growth of the nation, a recession, and the rise of efficient foreign competitors. Antitrust policy was revamped in the late 1970s and the 1980s, with new sympathy for freedom of action of even large firms, removing what some called the handicap of US antitrust.

As for industrial policy as a trump, policymakers may decide that it is worth bearing some anticompetitive loss in order to gain international or transnational competitiveness. Some legislative initiatives along these lines have failed (e.g., a merger proposal by Secretary of Commerce Malcolm Baldrige during the Bush administration), but others have passed. Sematech, the research and development consortium of US semiconductor chip makers, received both government funding and an antitrust exemption. Other legislation has been more modest. Two statutes simply lessen the available remedies against certain transactions, namely, research and development joint ventures and production joint ventures that are notified to the government, described below. Finally, a 1982 statute removes from the scope of the law US activity that harms only markets abroad.

Influence of Trade Policy

Trade policy has been linked with antitrust policy since the birth of US antitrust law. In 1890 many Republicans who supported the McKinley Tariff Act to protect US business from low-priced imports also supported the Sherman Act as the price of protection. If foreign goods were to be kept out of the United States, the nation had to be assured of a competitive national market.

In a very different sense, trade policy had a dramatic influence on antitrust in the 1970s. Because tariffs in the United States had by then been reduced to relatively low levels and there were few other trade restraints, foreign firms had easy access to US markets. Newly efficient firms from countries such as Germany and Japan, having finally recovered from the devastation of World War II, offered intense competition to US firms, some of which had grown lax with success. Antitrust became a scapegoat. Firms that were less than efficient tended to blame their failures on constraints imposed by US antitrust laws, and they often suggested that foreign firms were free of similar constraints.

In the early 1990s antitrust was again linked with trade policy. The US trade deficit with Japan had soared, and US businesses decried what they saw as the closure of Japanese markets by private as well as government restraints. The United States and Japan were then engaged in the Structural Impediments Initiative (SII). Then-US Assistant Attorney General James Rill joined then-US Trade Representative Carla Hills in suggesting antitrust policy as well as trade policy as a tool to pry open cartelized foreign markets (an initiative discussed in the section on extraterritoriality below).[1] Although this initiative has provoked cries of impermissible extraterritoriality, it has also raised to the level of international discussion the problem of private blockage of market access and the extent to which antitrust law can and should be used to police the openness of markets.

Trade policy influences day-to-day antitrust analysis in a more technical way. Tariffs and voluntary import restraints are barriers. If, because of trade restraints, merging domestic producers would be able to raise prices without triggering a flow of foreign imports that would defeat the price rise, the merger would be more likely to be found anticompetitive. But

1. A related problem for both antitrust and trade policy is raised in the context of low-priced imports made possible by monopoly profits in the closed foreign markets. A devastated US industry may seek protection against such imports.

if a production joint venture in the United States is the vehicle for a foreign producer to jump over a voluntary export restraint (VER) barrier, the joint venture may be procompetitive. Thus, the presence or absence of trade restraints is a background fact influencing competitive analysis.

Federal and State Antitrust Statutes

Federal Statutes

The substance of US federal antitrust enforcement derives from the four statutes described above: the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Celler-Kefauver Merger Act. Although they are the primary source of US competition policy, these statutes (with the exception of the Robinson-Patman Act) are relatively concise and lacking in detail. In reality, most antitrust policy in the United States originates in court interpretation of the broad language of the statutes.

The Sherman Act

The Sherman Act consists of two brief operative paragraphs. In section 1, contracts, combinations, and conspiracies "in restraint of trade" are declared illegal. The phrase "restraint of trade" has been interpreted to cover such hard-core violations as price fixing and market division, and also practices that are less harmful from a competitive point of view, such as exclusive-dealing contracts and joint ventures, when they are anticompetitive. The section covers both horizontal arrangements (agreements between competitors) and vertical arrangements (agreements between a producer and its suppliers or distributors). Violation requires more than one participant, for there must be a contract, combination, or conspiracy.

Section 2 of the Sherman Act makes it a violation to monopolize, attempt to monopolize, or combine or conspire with others to monopolize trade. A single firm may violate this provision. It is noteworthy that the section prohibits "monopolizing" and not the status of holding a monopoly position. Thus, some behavioral component is normally regarded as necessary before the provision is violated.

The Clayton Act

Provisions of the Clayton Act prohibit a variety of business practices whose effect may be to substantially lessen competition or tend to create a monopoly. Among the practices covered are price discrimination (section 2 of the act), tie-in sales and exclusive-dealing contracts (section 3), mergers and joint ventures (section 7), and interlocking directorates (section 8).

The Robinson-Patman Act

This statute covers in great detail discrimination in price and the provision of services. It covers not only discriminatory pricing but also the knowing receipt of a discriminatory discount.

The Celler-Kefauver Act

This legislation declares illegal those mergers or joint ventures (horizontal, vertical, and conglomerate) whose effect may be substantially to lessen competition or to tend to create a monopoly.

State Statutes

State antitrust laws, similar in most respects to federal antitrust laws, exist in most of the 50 states. These statutes are normally interpreted in a fashion consistent with federal court interpretation of the Sherman and Clayton Acts.

State statutes are enforced primarily against local restraints of trade, that is, practices that have an effect exclusively or primarily within a single state. There are important exceptions, however. A state may challenge in court any transaction that has a significant effect on commerce within its borders, even if the transaction is of national or even international dimension.

Enforcement

There are four centers of antitrust enforcement: two federal agencies with largely concurrent jurisdiction (the Antitrust Division of the Department of Justice, and the Federal Trade Commission), state enforcement, and private enforcement by companies or individuals injured in their business or property by practices that violate the antitrust laws.

The Antitrust Division of the Department of Justice

The Antitrust Division is responsible for enforcing the Sherman and Clayton Acts. Although authorized to do so, the division has not brought a proceeding under the Robinson-Patman Act for almost half a century.

Violations of sections 1 and 2 of the Sherman Act can be challenged in civil proceedings seeking an order to cease the practice, or in criminal proceedings, where conviction is punishable by imprisonment for up to three years and fines in amounts up to $350,000 for individuals and up to $10 million for corporations for each offense, or, if greater, double the amount gained from the violation or lost by the victim. Beginning in the mid-1970s, the Antitrust Division put new emphasis on criminal prosecutions and routinely seeks imprisonment for serious antitrust offenses such as price-fixing.

The Federal Trade Commission

The Federal Trade Commission (FTC) is an independent regulatory agency, established in 1914 by the Federal Trade Commission Act, which declares unlawful "unfair methods of competition."[2] The provision has been interpreted to give the FTC concurrent jurisdiction with the Department of Justice to enforce the Sherman and Clayton Acts.[3] The FTC has no criminal jurisdiction. The two agencies have certain overlapping jurisdiction and responsibilities, most notably with regard to mergers. They have developed a liaison system to avoid duplication of effort and unnecessary interference with businesses.

Private Enforcement

Individuals and corporations injured by violations of the antitrust laws may sue on their own behalf to enjoin behavior that causes them antitrust harm. If successful, they are entitled to three times the amount of their damages plus court costs and attorneys' fees. In the 1970s and early 1980s, an average of almost 1,500 private actions were brought each year by customers, competitors, or other private parties. Partly because of procedural restrictions on access to the courts, private actions have declined in recent years, but they still totaled more than 500 in 1992. Moreover, groups of complainants similarly situated can join forces in a class-action suit seeking damages on their joint behalf.

Successful antitrust actions can involve huge costs and damages. General Electric and other companies paid more than $350 million in the early 1960s to litigate and settle price-fixing cases. Treble damages of more than $1 billion were more recently awarded to a pipeline company against a group of railroads (*ETSI Pipeline Project v. Burlington Northern, Inc.,* No. B-84-979, E.D. Tex. 1989).

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2. It has been suggested at times that the act be interpreted to cover transactions that violate the spirit if not the letter of the Sherman and Clayton Acts, making the act an independent source of restrictions. In practice, that notion has not significantly modified antitrust coverage.

3. The statute also empowers the FTC to enforce a variety of other statutes, including those concerned with fair packaging and labeling, consumer credit, and deceptive advertising.

State Enforcement

State enforcement officials may bring antitrust cases for injunctive relief or for damages to the state itself and on behalf of individuals residing in the state. These officials may seek treble damages, costs, and attorneys' fees in addition to injunctive relief.

State antitrust enforcement has increased sharply in recent years, particularly in the 1980s when it was widely thought that federal antitrust enforcement was inadequate.[4]

Selected Competition Issues That Affect Global Markets

Measurement of Market Power

Except in areas of per se prohibition, the consequences of conduct or transactions vary depending on the market power of the firm or firms engaged in the transaction. For example, a merger or joint venture is more likely to lessen competition and therefore be held illegal if the parties to the transaction account for 40 percent of the market than if they account for 10 percent.

The first step in measuring market power in the United States is to define the relevant market. The US approach to market definition, particularly with emphasis on future competitive responses if prevailing prices are raised, is somewhat different from market power measurement in other parts of the world.

General Concepts in Case Law and Guidelines

In defining the relevant market under US law, the central question is whether a firm or group of firms can raise their price by a significant amount without losing so much business to substitutes (which may be other products available in the same geographic area or the same product produced in other geographic areas) that the price rise would be unprofitable. A product market includes all products or services for which there is reasonable interchangeability in consumption or production. A geographic market is defined by identifying the area within which purchasers can practicably turn for an alternative source of supply. If

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4. Under certain circumstances, even foreign governments may sue in US courts to recover damages for injuries to those governments. See *Pfizer, Inc. v. Government of India,* 434 US 308 (1978). The principle entitling foreign government buyers to treble damages was modified by amendment to section 4 of the Clayton Act of 29 December 1982, P.L. 97-393.

a firm or firms that raised their price would lose a significant amount of business to other products or to the same product produced in other geographic areas, those other products are within the product market, and those alternative sources of supply are within the geographic market.

The leading US case on the subject is *United States v. E. I. du Pont de Nemours & Co.* (351 US 377, 1956), in which Du Pont was charged with monopolizing commerce in cellophane. If the court determined that cellophane was a separate relevant product market, Du Pont, with almost 75 percent of sales, might have been found guilty of monopolizing behavior. If, however, all flexible packaging material (including wax paper, aluminum foil, polyethylene, and other materials) were considered part of the market, Du Pont's share was only 20 percent, and Du Pont was not even a candidate for monopolization. The US Supreme Court concluded that there was cross-elasticity of demand between cellophane and other flexible packaging materials, so that if Du Pont raised the price of cellophane significantly, many customers would switch to other flexible packaging materials; therefore the product market was not cellophane but all flexible packaging materials.[5]

A measurement of market power should not end with an examination of presently available substitutes. One should inquire whether the firm or firms in question, if they raised the price, would face competition from producers that could easily shift their facilities to make the relevant product ("supply substitution"), products currently sold outside the geographic market that could be diverted into it ("geographic diversion"), or new entry in the form of expanded capacity or totally new production. Even a firm with 100 percent of an existing market would lack market power if, upon raising its price slightly, it would be swamped by an avalanche of diverted production or prompt new entry.

What standard must be satisfied to establish that potential production constrains market power (and therefore is in the relevant market)? During the 1980s, US enforcement agencies and some courts became very lenient in examining whether future hypothetical shifts in purchasing or supply patterns constituted checks on market power. Often the courts were satisfied with a finding that substitute production *could* appear (i.e., that there were no insurmountable barriers to entry) rather than whether it actually *would* appear in the market.[6] Rejecting this lenient approach, the 1992 Merger Guidelines (US Department of Justice and

5. There is a notorious and much-criticized logical flaw in the application of the test used in this case. It is possible that DuPont was already charging a higher than competitive price for cellophane, and for that reason substitute competition was effective in preventing further price increases (Pitofsky 1990 summarizes criticism of the doctrine).

6. See, for example, *United States v. Waste Management, Inc.,* 743 F.2d 976 (2nd Cir., 1984) and *United States v. Syufy Enterprises,* 903 F.2d 659 (9th Cir., 1990).

Federal Trade Commission 1992) provide that substitute competition or new entry will only be taken into account where such entry *would* be "timely, likely and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern." It remains to be seen whether US courts will also adjust their approach to the question of substitute competition or new entry constraining the exercise of market power.

Global Competition: Effect on Relevant Market Analysis

A few products (jet engines, some financial services) compete in a market that is essentially global. Alternative sources of supply worldwide may check anticompetitive behavior and ensure that no market power exists. The list of such products is short, but it may grow as competition changes from national to global.

More frequently, global competition considerations relating to measurement of market power revolve around the question of imports. The established view in the United States is that imports are counted in the market and are relevant for purposes of measuring market power. The argument put forward by some—that international trade is fragile, easily disrupted, and unpredictable and therefore should not be counted in measuring domestic market power—has been rejected. As a result, market power in the United States is directly affected by the level of imports.

If imports would promptly increase upon a price rise, this potential pressure on prices may be taken into account as well. The pressure from imports and potential imports may prevent market power from arising, but such a conclusion cannot be assumed; it depends on specific facts, including the reliability of the flow of imports. Since importers may be actual competitors of domestic firms, many transactions (mergers, joint ventures, distribution contracts) entered into between non-US firms that export to the United States and US firms will be regarded as horizontal transactions. In general, arrangements that lessen horizontal competition are treated more stringently under US antitrust law than those that lessen competition between firms that are not presently or only potentially direct rivals.

Cartel Policy

Both in law and in enforcement, the United States has an exceptionally strict anticartel policy. Naked agreements between competitors to fix or affect price or divide markets are illegal.

Scope of Policy

Agreements are regarded as price-fixing if they set or have the effect of setting either maximum or minimum prices (*Arizona v. Maricopa County*

Medical Society, 457 US 332, 1982) or related terms of sale such as discounts, rebates, transportation charges, and credit terms (*Catalano, Inc. v. Target Sales, Inc.*, 446 US 643, 1980). A market division agreement divides markets geographically or by product (*Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 1990). Finally, agreements to allocate or rotate bids are a form of price fixing.

Reflecting a general antagonism to cartel behavior, US law provides that price fixing and market allocation between rivals are illegal per se. In these cases, it is no defense that the participants lack market power, are motivated by a benign business purpose, or have good business reasons for their conduct. Experience reveals that such conduct almost always results in adverse competitive effects and is almost never justified by business reasons sufficiently persuasive to counteract those effects.[7]

The Issue of "Agreement"

Since direct price-fixing is almost impossible to justify, the central issue under US law is whether price setting occurred unilaterally (which is legal) or by agreement. The necessary agreement can be express or implied and is often inferred from circumstantial evidence. Parallel pricing is not in itself sufficient to prove the existence of an agreement, but parallel pricing together with other evidence (often referred to as "plus factors") can establish an agreement. Plus factors might include evidence of meetings among competitors (particularly if clandestine), exceptionally high profits, or lock-step pricing over a long period of time and in the face of varying economic conditions. If defendants' conduct or behavior would not have made business sense if done unilaterally, an inference of collaboration might be drawn, and conversely if a hypothesis (e.g., that defendants conspired to fix a low price) does not make business sense, an inference that no agreement existed might be indicated. US law has not yet grappled with the problem that what makes business sense might be a function of culture. For example, it is said that Japanese firms might employ strategies to increase their market shares even at the expense of profit maximization.

Characterization Questions

There occasionally is a preliminary question concerning whether competitively ambiguous behavior constitutes price-fixing. Particularly where the effect on price is indirect, and where the arrangement challenged as price-fixing can be defended on the grounds that it produces efficiencies, the court will take a "quick look" to determine whether the severe per se

7. The cases establishing the per se rule are old but still valid: *United States v. Socony-Vacuum Oil Co.*, 310 US 150 (1940); *United States v. Trenton Potteries Co.*, 273 US 372 (1927).

rule should apply. This characterization phase is an abbreviated procedure in which the courts examine market power, purpose, effect, and business justification—the very issues that would be excluded by a per se approach. (The leading case illustrating the characterization approach is *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 US 1, 1979).

Exceptions

Although antitrust condemnation of cartel behavior is sweeping and covers almost all industries, there are a few exceptions, primarily based on express legislative provisions. These are discussed below.

"Dominant Firm" Policy

Antitrust limits on business behavior designed to achieve monopoly power and on the behavior of companies that possess monopoly power have been a central feature of US antitrust policy from the beginning. In the first half of the 20th century, the courts adopted exceptionally restrictive rules. The history of enforcement and interpretation in recent decades reflects a general easing of those restrictions, to the point where US policy with respect to dominant firms is now more lenient than policy in the European Union and most European countries.

Monopoly Power

There is no precise market-share threshold necessary to support a claim that a firm possesses monopoly power under section 2 of the Sherman Act. A famous dictum from the *Alcoa* case states that 90 percent of a market is enough to constitute a monopoly, 60 or 64 percent is doubtful, and 33 percent is insufficient (see *United States v. Aluminum Co. of America,* 148 F.2d 416, 424, 2d Cir., 1945). In fact, the issue of what level of market share qualifies does not lend itself to easy formulas. A firm with monopoly power may be content to charge extremely high prices and exercise its market power and a distinctive good by reaping high profits on less than a 50 percent market share. However, a firm with 90 percent of the market may not have market power if it is earning only ordinary profits and would lose a substantial portion of its business if it raised its price even a small amount. Despite these complexities, it has been observed that the leading US cases upholding monopolization claims involved defendants that controlled from 70 to 100 percent of the market.[8]

8. *Broadway Delivery Corp. v. United Parcel Service of America, Inc.,* 651 F.2d 122 (2d Cir.), *cert. denied,* 454 US 968 (1981); *Hiland Dairy Inc. v. Kroger Co.,* 402 F.2d 968, 974, n.6 (8th Cir., 1968).

Monopolizing Behavior

As noted earlier, in the United States the mere possession of a monopoly does not violate the antitrust laws; unacceptable conduct to achieve or maintain such a monopoly seems to be required for violation. In some early cases the conduct component was much attenuated. For example, in the *Alcoa* case cited above, the defendant, holding a dominant position in the production of aluminum ingot, was found to have violated section 2 because it had doubled and redoubled its capacity in anticipation of demand.[9] The court appeared to hold that "deliberate" conduct that has an exclusionary effect is illegal even if motivated by legitimate business concerns. The court's attitude on the question was complicated by the fact that it carved out as an exception conduct that constituted nothing more than superior skill, foresight, and industry (*United States v. Aluminum Co. of America,* 148 F.2d 430, 2nd Cir., 1945). The *Alcoa* case and others decided during this period thus reduced the conduct element of a section 2 violation to a bare minimum.[10]

The most common example of monopolizing behavior is the acquisition of a direct rival by a dominant firm in a high-barrier market (see, e.g., *United States v. Southern Pacific Co.,* 259 US 214, 1922). Other instances might involve predatory pricing (pricing below cost under certain conditions with expectation of recoupment), long-term lease arrangements with penalty clauses if the customer switches to a challenger of the monopolist, and refusals to deal for no business purpose other than to achieve or maintain a monopoly position.[11]

In the past several decades, US courts have become far more solicitous of protecting a monopolist's ability to compete in order to defend its position or even achieve greater market share, particularly where that monopoly position was legally acquired.[12] As a result, government and private challenges to monopoly behavior have repeatedly been unsuccessful. A single glaring exception, however, is the federal govern-

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9. The court's decision was no doubt influenced by the fact that, in the early years of its operation, Alcoa had clearly engaged in anticompetitive conduct such as participating in an international cartel and entering into exclusionary contracts that prevented potential competitors from acquiring power sites in areas adjacent to raw material deposits. Because of technicalities, this earlier anticompetitive behavior was not before the court.

10. Although more serious anticompetitive conduct was involved, courts appeared to embrace the test that called only for deliberate exclusion, regardless of business justification, in *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295 (D. Mass., 1953), *aff'd per curium,* 347 US 521, 1954; and *United States v. Grinnell Corp.,* 384 US 563, 1966.

11. See *Otter Tail Power Co. v. United States,* 410 US 366 (1973) and *Lorain Journal Co. v. United States,* 342 US 143 (1951).

12. *Olympia Equipment Leasing Co. v. Western Union Telegraph,* 797 F.2d 37, 375-76 (7th Cir., 1986), *cert. denied,* 480 US 934 (1987); *Telex Corp. v. IBM,* 510 F.2d 894 (10th Cir., 1975), *cert. dismissed,* 423 US 802 (1975).

ment's challenge to the monopoly position and practices of the American Telephone & Telegraph Company (AT&T), but that is explained on the grounds that the defendant possessed vertically integrated monopolies (in long-distance and local service) and the court found that the Justice Department made a prima facie case that the company protected its monopolies through highly anticompetitive exclusionary conduct (*United States v. AT&T,* 524 F.Supp. 1331, D.D.C., 1981) (later settled by consent decree, which was vacated by the Telecommunications Act).

There remains a basic lack of clarity in US law on how to distinguish between economically exclusionary or predatory conduct, which is illegal, and exercise of superior skill, foresight, and industry, which is legal. Part of the problem rests with the reliance on such words as "exclusionary" because so much desirable competitive conduct exemplifying "superior skill" has an exclusionary effect. One of the Supreme Court's most recent effort at clarification was *Aspen Skiing Co. v. Aspen Highland Skiing Corp.,* 472 US 585 (1985), where the owner of three ski slopes abruptly discontinued the offer to consumers of a joint four-mountain ticket with a fourth, smaller ski slope and made it impossible for the smaller ski slope owner to buy up tickets to offer a package deal. Although the court recognized that a monopolist has no generalized duty to cooperate with competitors, it found Aspen Ski's behavior illegal, apparently on the ground that the discontinuance was injurious to its competitor and was entirely lacking in business justification, depriving consumers of an option they desired and disabling the smaller competitor from serving that demand. That formulation is probably a fair, though ambiguous, statement of current law. See also the *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451 (1992) holding that Kodak's cut off of independent repair suppliers can be a violation of section 2 where it is an exercise of market power to exploit its machine customers.

Merger Policy

Mergers are reviewed primarily under section 7 of the Clayton Act, which declares illegal those mergers that may substantially lessen competition or tend to create a monopoly. US antitrust policy with respect to mergers has varied widely. In the 1960s the United States had by far the most stringent antitrust merger policy in the world, striking down mergers among small firms in unconcentrated markets. It was not unusual for the government to challenge successfully mergers among direct competitors holding no more than 5 or 6 percent of the market,[13] and in one case a merger between customer and supplier was successfully challenged where

13. *United States v. Pabst Brewing Co.,* 384 US 546, 550 (1966); *United States v. Von's Grocery Co.,* 384 US 270, 281 (1966).

the acquired company accounted for between 1 and 2 percent of the market (*Brown Shoe Co. v. United States,* 370 US 294, 347–48, 1962). By the mid-1980s, the United States had moved to an extremely lenient merger policy. No challenges to nonhorizontal mergers occurred, and billion-dollar mergers were regularly allowed to be completed without government challenge, even when they involved direct competitors.[14] Current federal enforcement is more visible. It extends to horizontal, potential horizontal, and vetical mergers.

Philosophy of Merger Enforcement

The twin themes of US merger enforcement involve concerns that the merger will allow the combined firm, acting unilaterally, to raise prices, or that the merger will result in the reduction of the number of firms in a high-barrier, concentrated market, which in turn will facilitate explicit or implicit coordination of action to extract higher prices and earn greater profits at the expense of consumers.[15] Also, merger enforcement may preserve innovation competition in highly concentrated markets. Beyond these specific concerns about the possible anticompetitive effects of mergers, there is a generalized view in the United States that, in noncompetitive markets, incentives to achieve efficiency, innovate, and drive down prices will diminish.

Merger Rules

The initial step in analyzing the legality of a merger is to define the relevant market (see "Measurement of Market Power" above). Within that market, current fashion in the United States is to measure market shares and industry concentration by the Herfindahl-Hirschman index (HHI), calculated by summing the squares of the market shares of each firm in the market. For example, in a market with ten equally sized firms the HHI is 1,000 (10^2, or 100, for each of the ten firms); in a market with five equally sized firms the HHI is 2,000 (400 for each of the five firms).

With modest differences in emphasis, the current guidelines and earlier versions (reflecting judicial decisions as well) are consistent in describing different enforcement attitudes depending upon concentration after the merger. If a postmerger HHI for a horizontal merger were 1,000, the guidelines would treat it as an unconcentrated market, and the government would be extremely unlikely to sue; if the HHI exceeded 1,800, the guidelines would treat that market as concentrated,

14. For a summary of data on the question see Fox and Pitofsky (1992, 319, 325-27).

15. The US Department of Justice and the Federal Trade Commission restated these themes of merger policy in the 1992 Horizontal Merger Guidelines (US Department of Justice and Federal Trade Commission 1992, section 0.1 at 4-5).

and the government would be far more likely to challenge it. Markets with HHIs between 1,000 and 1,800 are characterized as moderately concentrated, and the government and the courts will examine a wide variety of factors to determine whether market power has increased, justifying enforcement. Even where collusive or collaborative behavior is not a matter of concern, a single firm might be able unilaterally to achieve anticompetitive effects. The guidelines assume that such a result will occur when the combined market share of the merging firms is at least 35 percent.

When the enforcement agencies and the courts look beyond market share and concentration to "other factors," the most important by far involves conditions of entry. When entry is sufficiently easy, US courts have occasionally held that the merger is not a serious problem regardless of market share (*United States v. Waste Management, Inc.,* 743 F.2d 976, 2d Cir., 1984). Other factors that have been examined include homogeneity of the product (cartels are easier to establish and maintain when homogeneous products are involved), availability of key information concerning transactions and individual competitors that make cartel behavior feasible, and a history of collusion in the market.

The most controversial "other factor" is the presence or absence of efficiencies. Claims of efficiency can be considered as a relevant factor in the enforcement agencies' exercise of prosecutorial discretion (US Department of Justice and Federal Trade Commission 1997 amendment, section 4), but according to Supreme Court precedent in the 1960s, efficiencies are not relevant as an offset or a defense when a transaction is examined in court (see *FTC v. Procter & Gamble Co.,* 386 US 568, 1967). Even in the context of prosecutorial discretion, the government's posture toward efficiency claims has sometimes been skeptical. The burden of persuasion and proof is on the party asserting the efficiency, and it probably is essential to demonstrate that the claimed efficiencies occur in a market setting that ensures that the savings from the efficiencies will be passed along to consumers (Pitofsky 1992 summarizes current law). Many lower courts are beginning to take efficiency claims into account, but the US Supreme Court has not had an opportunity to reconsider its position.

To clarify their own position, the government agencies amended their 1992 merger guidelines in 1997, stating that they will not challenge mergers with substantiated efficiencies unlikely to be produced absent the merger if these efficiencies are sufficiently great to counteract any consumer harm, and that the greater the probable adverse effect of the merger the greater must be the efficiencies to nullify the effect.

Finally, US law takes into account the economic condition of the acquired company. Even where a merger is otherwise illegal, a company (or one of its divisions) that is failing may be sold to any purchaser. A "failing firm" is defined very narrowly. The firm must have "resources so depleted and prospects for rehabilitation" so remote "that it faces the grave probability of a business failure" (*United States v. General Dynamics Corp.,* 415 US 486, 507, 1974, quoting *International Shoe v. FTC,* 280 US 291, 302, 1930), and there must be no other prospective purchaser available that poses a less-severe danger to competition (*Citizen Publishing Co. v. United States,* 394 US 131, 136, 138, 1969). The 1992 Horizontal Merger Guidelines adopt similarly stringent language and in addition provide that the defense is available only if the allegedly failing firm would not be able to reorganize successfully through bankruptcy proceedings, and only if, absent a merger, the assets of the failing firm would exit from the market (US Department of Justice and Federal Trade Commission 1992, section 5.1). In effect, firms must be virtually insolvent before the defense is permitted. If the *industry* is in economic distress (for example, it has chronic overcapacity) but the firm in question is not failing, no defense is available under US law. Of course such factors would be taken into account as a matter of prosecutorial discretion.

Joint Venture Policy

Characterizing and Distinguishing Mergers, Cartels, and Joint Ventures

Joint ventures are a preferred device by which US and non-US firms combine resources to compete in a particular product or geographic market. Joint ventures may include any cooperative arrangement among firms. Normally they are undertaken to share talents and pool risks, in order to undertake a job that neither partner could do as well alone.

Joint ventures may be loose contractual arrangements, or they may be corporate joint ventures. The joint venture partners may form a new corporation in which they hold shares, and they might jointly control the new corporation. Since corporate joint ventures are normally subject to section 7 of the Clayton Act, the principal merger law, as well as to the Sherman Act, characterization questions at the borderline between merger and joint venture are relatively unimportant. In this respect, US law differs from law in the European Union, under which a joint venture must be classified as either concentrative (merger-like) or cooperative, and much turns on the characterization (although an amendment to the European Merger Regulation may alleviate the problem).

When loose forms of cooperative arrangements are involved, characterization questions at the borderline between cartels and joint ventures are, however, very important. Cartels, in US usage, are agreements among competitors designed to fix price or divide markets in order to override the market (see "Cartel Policy" above.) Cartels are illegal per se and a criminal violation. Joint ventures are subject to the rule of reason and, currently, are treated hospitably. Cartelists might seek to conceal a cartel under the rubric of a joint venture, as has been done in such notorious international cartel cases as *Timken Roller Bearing v. United States,* 341 US 593 (1951) and *United States v. Imperial Chem. Indus., Ltd.,* 100 F.Supp. 504 (S.D.N.Y., 1987). Often, whether a collaboration is a joint venture or a cartel presents a difficult question of fact (see *United States v. Columbia Pictures Indus., Inc.,* 507 F.Supp. 412, S.D.N.Y., 1980, *affirmed without opinion,* 2d Cir., 1981).

General Analysis

Joint venture analysis may be divided into three parts: essence, ancillary restraints, and, in rare cases, the duty to admit competitors.

The *essence* question is whether the formation of the joint venture is likely to produce or increase market power. To perform this analysis it is necessary to define the market. Often there is more than one relevant market in the case of a joint venture; for example, the market in which the joint venture operates and the market within which the parents operate or stand in a buyer-supplier relationship. Anticompetitive problems usually arise, if at all, from one of the following two situations.

First, the parents may be competitors outside the joint venture market, and the fear is that the joint venture will bring them closer together and provide a forum for collaboration; thus their collaboration might spill over to lessen competition in an adjacent market. This concern arises in the case of export associations composed of the few firms in a concentrated US market. The spillover concern was also expressed in connection with the General Motors-Toyota joint venture to make and sell a small car, which was permitted to proceed subject to consent decree restrictions (*In General Motors Corp.,* 103 FTC 374, 1984) (decree later vacated). Anticompetitive effects would not be expected to arise unless the market is concentrated and entry not easy, for otherwise the forces of competition would make the spillover collaboration unprofitable.

Second, the parents may be potential competitors: for example, a US parent may be a dominant firm in the US market, and a foreign firm may be in the same line of business in its home market and one of a few potential entrants into the United States. The two might enter into a joint venture, for example in a specialty market in the United States. The joint venture might co-opt the foreign firm, which might then lose its incentive to become a competitor of its partner. This concern, too, was raised in the General Motors-Toyota joint venture: a hypothesis was that Toyota would lose its incentive to establish its own production facilities in the United States. The consent decree addressed this problem by limiting the joint venture's output to approximately 5 percent of the US small car market.

"Strategic alliance" is a label given to certain joint ventures, particularly where the collaboration gives each partner advantages in penetrating the market of the other or gives the partners synergistic advantages in technology. The label itself tells very little. The anticipated strategic benefit may be anticompetitive exclusionary advantages, or it may be procompetitive means of market entry. Each case must be analyzed on its facts.

A joint venture may be likely to create market power but also likely to result in efficiencies or technological progress. We know of no US court that has explicitly confronted this tension, although the General Motors-Toyota joint venture was potentially such a case. From dictum in contemporary cases under section 2 of the Sherman Act, we believe it is likely that courts will treat hospitably joint ventures that promise to create significant efficiencies or technological progress not likely to be achieved otherwise, even if the joint venture might create some market power in the short run.

Ancillary restraints may limit the competition of the joint venturers against one another or between the joint venture and its parents, and they may set the terms by which the fruits of the joint venture are exploited. Where a joint venture is procompetitive and ancillary restraints are important to make it work, covenants are normally upheld. On the other hand, covenants not to compete, entered into in connection with the joint venture, may be a way to protect the partners from one another's competition and may be far broader than necessary to make the joint venture work (*Yamaha Motor Co. v. FTC*, 657 F.2d 971, 8th Cir., 1981).

There is very little contemporary law on the rights of joint venture partners to *share the technological fruits* of their joint venture. They may, for example, wish to divide the fruits so that one partner has the exclusive right to use a product or technology in a given field or in its home country, and the other the exclusive right in a different field or its home country. They also may wish to agree not to sublicense their new technology. A first question is whether any of the above provisions are illegal per se. Under contemporary principles, they are not likely to be so treated where the covenant was an important part of the bargain that produced the joint venture and is reasonably related to achieving its goals. As a result, if the technology produced does not prove to be highly desirable and unique, the parties are not likely to face antitrust concerns. If, however, the joint venture is successful and the technology confers market power, the problems are of a different dimension and the outcome cannot be predicted.

It is less likely that a court would require the joint venture to give competitors access to the technology, in recognition of the fact that the joint venture parents have taken risks and invested efforts to produce the technology. But the collaborative aspect of the joint venture would make its refusal to deal more vulnerable than a refusal to deal by a single actor.

Before the mid-1970s it was generally thought that dominant joint ventures might have *duties of inclusion*; that is, they might be obliged to accept all competitors who wished to take part in the enterprise (or make available the advantages of membership) and who were willing to share its costs (see *Associated Press v. United States,* 326 US 1, 1945). Under contemporary law and thinking, the duty of inclusion is very narrow. It is recognized that, if collaboration is important to competitiveness, several competing groups are far better than one.

There remains a rare instance in which dominant joint ventures would have a duty of inclusion, namely, when the joint venture is or owns an essential facility that cannot feasibly be duplicated, and access to it is necessary in order to compete. Even then, if the "facility" consists of technology created by the foresight of the joint venturers, a court may well deny a right of access. This, too, is a cutting-edge problem on which the law is not clear.

Predation

Definitions

Under US law predation is a strategy to disable competitors by first using low prices, strategic exclusions, or other means designed to impose costs on the competitors, and then raising prices after achieving monopoly or oligopoly. It is a strategy that would not make sense if the market were expected to be as competitive after the period of predation as before it began. Thus we say that a firm "invests" in predation—it takes a loss today in the expectation of a future payback in the form of higher than competitive profits that more than repay the loss.

Most commonly, predation is price predation, but it can also be product-change predation, as when IBM slowed the speed of a unit that it manufactured just so peripheral compatible manufacturers' equipment would fail. In *Transamerica Computer Co. v. IBM,* 481 F. Supp. 965, 1007-08 (N.D. Cal. 1979), *aff'd,* 698 F.2d 1377 (9th Cir.), *cert. denied,* 464 U.S. 955 (1983), the court held that IBM had no monopoly power and dismissed the case.

Price predation is a complex issue because low prices are good for consumers, and the law should not discourage sustained low pricing. Price predation cases normally arise, where they do arise, in the context of section 2 of the Sherman Act, where the defendant (at least allegedly) either has monopoly power or is likely to obtain it as a result of its pricing strategy. A number of courts have required, to reach a finding of predation, that the defendant was charging a price below cost (e.g., below marginal cost, with average variable cost as a proxy).[16] In addition, some courts inquire into the defendant's intent to destroy competitors and

16. US precedent is summarized and policy considerations are examined in *Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227 (1st Cir., 1983).

whether it had a reasonable chance to do so, and, thereafter, whether it had a reasonable chance to recoup the losses by charging higher than competitive prices. In some courts it is sufficient that the defendant's prices were below average total cost, and some fewer courts accept pricing above average total cost with clear proof of anticompetitive intent. Some courts have not required proof of probable recoupment, but a recent Supreme Court opinion declares probable recoupment a necessary element of the case (*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 1993).

Comparison with Trade Policy

Trade law protects US industry against dumping, which is sustained low pricing (pricing at "less than fair value") of imports into the United States that causes material harm to a domestic industry. "Less than fair value" may mean less than the price at which the goods are sold in the home country, less than their price in a third country, or less than some constructed value (i.e., a value computed by estimating costs). Procedures for the finding of "less than fair value" are not rigorous.

Accordingly, it has been argued that trade law may keep out of the United States goods sold at sustainably low prices even in cases in which the importers have no possibility of winning market power in the United States, and thus no possibility of raising prices above competitive levels later. See Lipstein's chapter in this volume for a discussion of the tensions between and proposals for convergence of antitrust and antidumping policy.

Price Discrimination

Definition and Enforcement

The Robinson-Patman Act prohibits price discrimination where its effect may be substantially to lessen competition or to injure, destroy, or prevent competition with a competitor or customer. "Primary line" discrimination harms a competitor of the firm engaging in price discrimination and may threaten to lessen competitiors on this level at which the defendant and its competition compete. Secondary line discrimination may harm competition on the line of the disfavored customer.

For at least the last 20 years, enforcement authorities have been acutely aware of the tension between the Robinson-Patman Act and the policy of the Sherman Act. The Robinson-Patman Act has the potential to chill price cutting. Accordingly, the act has been little enforced at the federal level; its enforcement has largely been by way of private treble-damage actions.

In 1993 the Supreme Court handed down a decision in a Robinson-Patman primary line case (*Brooke Group Ltd. v. Brown & Williamson*

Tobacco Corp., 509 U.S. 209, 1993). The case involved a price war in unbranded cigarettes. Brown & Williamson, the company in the oligopolistic branded-cigarette market with the most to lose from the incursions of generic cigarettes, waged the low-price war with the intent to destroy Liggett, the innovator in generic cigarettes. Brown & Williamson charged prices below its average variable cost. The Supreme Court held that the jury verdict for Liggett could not stand because Liggett had not proved the defendant's probability of recoupment. The Supreme Court seemingly brought primary line Robinson-Patman cases into line with price predation cases under section 2 of the Sherman Act, except that under the latter the low pricing must be en route to monopoly, whereas under the Robinson-Patman Act it may be en route to solidifying market power among oligopolists.

Comparison with Trade Law

Trade law against international price discrimination (see above) remains much more far-reaching than the Robinson-Patman Act's restrictions on domestic price discrimination. For example, a recoupment scenario is not a necessary element in finding a trade law violation. Moreover, pricing below cost is not a requirement of the trade law violation; typically, a respondent prices below average total cost but not average variable cost.

Vertical Agreements

Contractual arrangements whereby manufacturers influence the marketing behavior of distributors can affect—indeed, sometimes control—the ability of foreign manufacturers to obtain access to markets in the United States. For that reason, vertical arrangements are examined at some length in this section. In addition, other countries, particularly Japan and Germany, are struggling now with some of the same issues that have attracted the attention of US enforcement authorities and courts in recent years.

Resale Price Maintenance

Agreements to fix maximum or minimum resale prices (resale price maintenance, or RPM) are illegal per se (*Dr. Miles Medical Co. v. John D. Park & Sons,* 220 US 373, 1911). In the last decade, however, there has been judicial erosion of this rule by narrowing the definition of "agreement," narrowing the definition of "price-fixing agreement," and increas-ing the plaintiff's burden in proving that an agreement exists. Proof of a manufacturer's cutoff of a discounter in response to a full-price dealer's complaints is not sufficient to take the case to a jury, either with regard to proof of agreement or with regard to proof that an agreement, if one exists, sets a resale price (*Business Electronics Corp. v. Sharp Electronics Corp.,* 485 US 717, 1988). To prove that an agreement exists, the plaintiff's evidence must tend to exclude the possibility that the manufacturer was acting independently from the nonterminated distributors. To prove RPM, the plaintiff must show that the agreement fixed a price or a price level.

The back-door erosion of the per se rule parallels the minimalist position, widely publicized in the 1980s, that almost all vertical restraints are good for competition. According to that position, vertical restraints are likely to prevent free riding on the investments and services of full-price distributors, and interbrand competition will police the market to make sure that producers respond to buyers and do not exploit them.

The erosion noted above has particular regard to minimum vertical price fixing. Maximum vertical price fixing—putting a lid on prices—and minimum price-fixing may be quite different. Maximum vertical price-fixing may be a way to compete. The per se rule against maximum vertical price-fixing rule has been eroded by standing rules (who can sue) and antitrust injury concepts (what kind of harm is compensable). Thus, the Supreme Court has held that a competitor hurt by nonpredatory low pricing brought about by maximum price fixing has not suffered antitrust injury and cannot complain (*Atlantic Richfield Co. v. USA Petroleum Co.,* 495 US 328, 1990). At the time of this writing, a case pending before the Supreme Court challenges the per se rule against maximum vertical price fixing (*Kahn v. State Oil Co.,* 93 F.3d 1358 [7th Cir. 1996], cert. granted).

Division of Customers and Territories

Since the *Sylvania* case (*Continental T.V. v. GTE Sylvania,* 433 US 36, 1977), vertical divisions of customers and territories are judged by a rule of reason. This treatment recognizes that intrabrand customer and territorial divisions can improve a manufacturer's efficiency, either by preventing free riding or simply by clarifying lines of responsibility and thus accountability, and that intrabrand efficiency can improve interbrand competition. Vertical customer and territorial allocations are illegal only if they create or increase market power. This would be possible if, for example, the market is concentrated and not easy to enter and the same vertical restraints are adopted by all of the leading firms, thus easing their coordination. A minority of courts take a different approach and would find such restraints illegal if they seriously lessen intrabrand competition and the intrabrand restraints are not offset by benefits to interbrand competition.

The *Sylvania* rule is very different from the rule in the European Union, which prohibits tight territorial restraints at member state borders, regardless of the intensity of interbrand competition (see Fox, this volume). The European rule is designed both to enhance free movement and market integration and to promote competition. Border restraints are viewed as a distortion of competition, and the requirement that borders be kept open is seen as a dynamic enhancement to competition. (The Europeans are less persuaded than the Americans that free movement, intrabrand, undermines efficiency; they are also less persuaded that there is a serious free rider problem.)

Tie-ins, Exclusive Dealing, and Reciprocity

Congress enacted section 3 of the Clayton Act to protect small and medium-sized businesses from being squeezed out of markets and business opportunities by their powerful and better situated bigger competitors. In the 1950s and 1960s the spirit of this section of the Clayton Act crept into the handling of Sherman Act section 1 cases, and both statutes were interpreted to prohibit what were viewed as unfair foreclosures: blockages of substantial segments of markets for reasons other than competitive merit (see, e.g., *Standard Oil Co. of California v. United States,* 337 US 293, 1949). Although sometimes consumer harm might appear, this was not a necessary element of the case. Unjustified blockage, or "fencing out," was implicitly assumed to harm consumers, because by definition consumers were deprived of an option they would or might otherwise choose (*Northern Pac. R.R. Co. v. United States,* 356 U.S. 1, 1958).

In the early 1980s, foreclosure law was rarely accepted as the basis of a violation. Enforcers urged applicaton of the price theory paradigm: no vertical restraint is illegal unless the plaintiff can prove that it creates or enhances market power, raising price and limiting output. The law against reciprocity—agreements to deal with a customer on condition that the customer deal with the seller—has all but disappeared. Exclusive-dealing, exclusive-purchasing, and requirements contracts are recognized to have strong efficiency properties and have usually been found legal by the courts. They are illegal under a rule of reason if they can be proved to increase the coordinative behavior of competitors in an oligopoly, or if they raise barriers to entry and thus enhance unilateral price-raising power.

The tie-in law, however, was too well developed to yield to the price theory model. Tie-ins are subject to a modified per se rule: a firm with market power in the market for one product cannot legally use that power to force its customer to accept another separate product in cases where a not-insubstantial amount of commerce in the tied product is affected (*Jefferson Parish Hospital No. 2 v. Hyde,* 466 US 2, 1984). Even then, the tie can be defended if there is a plausible business justification; for example, that product A will not perform well if the supplier cannot control the quality of product B (*Mozart Co. v. Mercedes-Benz of North America,* 833 F.2d 1242, 9th Cir., 1987). The law is justified today largely on grounds of coercion of the consumer, but in fact it appears to be one of the last vestige of the once-robust market access rules that arose from the sense that foreclosures were unfair.

Unlike much contemporary US law, law in the European Union does not force the distinction between what is anticompetitive and what is "merely" unfair. Unjustified exclusionary practices may amount to abuse of dominance (and a firm with 40 percent of a market may be deemed dominant). Exclusive dealing and tying by large firms not uncommonly run afoul of this law (see Fox, this volume).

Exceptions to General Antitrust Policy

The United States has a number of derogations from general antitrust policy, although perhaps fewer than most other countries. Most of the derogations are justified on grounds that market failure is so great that competition cannot be counted on to bring about the economic benefits that markets provide, or that noneconomic goals are paramount.

Labor policy is informed by both justifications. The labor exemption, contained in section 6 of the Clayton Act, provides that the labor of a human being is not an article of commerce. It is interpreted to allow workers to combine, for example, for collective bargaining, which could involve employee wage fixing. A nonstatutory exemption provided by case law allows employers to combine to negotiate with labor unions and allows agreement on terms of labor.

A number of industries are regulated by statute and by administrative agencies, and some of these statutes provide limited antitrust exemptions—for example, in the electric power industry and the insurance industry. Through a series of Supreme Court opinions it is now well settled that the exemptions are narrowly construed, and that application of antitrust law is normally consistent with regulatory regimes; competition should prevail wherever it can work. In the absence of express exemption, it is possible to have an implied exemption, but only if and to the extent that the regulatory system so displaces competition that the two cannot operate side by side.

At least two exemptions do not fit either of the above categories of justification: those for professional baseball and for export cartels. The baseball exemption arose by historical accident: an exemption was judicially decreed for the "performance" or "exhibition" of the game when the commerce clause of the US Constitution was narrowly construed and the performance was held not to be in interstate commerce.

A less-important but similar provision exempts from the antitrust laws associations or joint ventures organized for the sole purpose of engaging in export trade (see the Webb-Pomerene Act 1918, *Stat*. 40, 516, as amended, *US Code Appendix* 1987, Vol. 15, sections 61-65). The export cartel exemption was enacted only in 1982 (technically, the Sherman Act was cut back so as not to cover export cartels), as part of an effort to promote exports by removing the so-called antitrust handicap.

Trade and Investment Policy

Trade and investment policy in the United States is developed and implemented in a wide array of governmental units, including cabinet departments (Commerce, State, Defense, Treasury, and Justice, among others), regulatory agencies (the International Trade Commission, the Environmental Protection Agency, and the Federal Trade Commission, among others), the Council of Economic Advisers, the National Security Adviser, and the US Trade Representative. Description of the responsibilities of each of these governmental units in the trade and investment area is beyond the scope of this chapter.

One recent development deserves comment, however. In early 1993 the Clinton administration created the National Economic Council (NEC) to coordinate the administration's international trade and domestic economic policy. Aside from providing the president with economic advice, the NEC was designed as a vehicle to avoid policy conflicts that have burdened previous administrations and to coordinate economic policy much as the National Security Council coordinates foreign policy.

In the past, US competition policy was implemented in a manner largely independent of the goals and programs of other trade and investment policies. For example, monopolies such as the telephone system were dismembered regardless of the impact on trade issues, and mergers were permitted or challenged without reference to noncompetition trade objectives.

National Security Considerations

Until recently, national security considerations were not formally examined in connection with enforcement of competition policy. Occasionally, the Defense Department or the Commerce Department would comment upon the national security implications of proposed enforcement actions or remedies—for example, in connection with investigations of monopoly behavior by AT&T or by US oil companies—but such instances were relatively rare. In 1988 Congress passed the Exon-Florio amendment, which authorized the president to investigate and eventually block or suspend any acquisition or other foreign investment where US national security is threatened (the term "national security" was not defined; *US Code App*. 1988, Vol. 50, section 2170). The president's exercise of discretion in approving or blocking a foreign investment is not reviewable.[17] In 1992 Congress amended Exon-Florio so as to create a presumption against allowing foreign government-controlled entities to make acquisitions in the US defense industry.[18]

Because the Exon-Florio amendment does not provide a clear definition of national security, the statute has the potential for extremely broad application. To date, however, the Exon-Florio amendment has been an insignificant factor in merger enforcement. Of 805 notifications of proposed foreign acquisitions from 1988 to 1995, only 15 have been subject to full investigations, and only 1 has been blocked. That may understate slightly the influence of the statute, since three other transactions subjected to full investigation were withdrawn and one was restructured.

The single transaction that was blocked provides little guidance about the future of US merger policy. A company owned by China's Ministry of Aerospace Industry sought to acquire MAMCO, a Seattle-based manufacturer of metal commercial aircraft components, including tail and wing assemblies and other smaller parts. Boeing was MAMCO's principal customer, and MAMCO had no contracts involving classified products. Nevertheless, then-President George Bush, relying on "credible confidential information," blocked the transaction (Tolchin and Tolchin 1992, 57). Some have speculated that the decision was more a reaction to China's violent crackdown on prodemocracy demonstrators at Tiananmen Square in 1989 than one based on any national security information or technology possessed by MAMCO. In any event, other transactions that appear to have had a more direct impact on national security were either not investigated or cleared. These included the acquisition by a Japanese firm of up to a 25 percent interest in Titanium Metals Corp. of America, which provided 50 percent of the titanium purchased by the Department of Defense, and the proposed acquisition by Nikkon Corporation of Japan of Perkins-Elmer Corporation, the last major US manufacturer of silicon chip-etching machines, which involve key defense applications (Tolchin and Tolchin 1992, 64-65).

To date, enforcement of Exon-Florio has been an insignificant factor in the development of competition policy. To the extent that the statute has been enforced (or not enforced), the US government has given very ambiguous signals as to the type of transactions that would be subject to its provisions.

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17. The legislation directs the president to block or divest a foreign investment if there is credible evidence that leads the president to believe that the foreign interest exercising control might take action that threatens to impair the national security, provided that national security is not adequately protected by other statutory schemes (50 USC App. section 2170[e]).

18. P.L. No. 102-484, *Stat*. 1992, 106:2463. For extensive discussions of Exon-Florio, see Graham and Krugman (1995).

Comparative Treatment of Foreign and Domestic Transactions under US Law

As a general matter, the United States has not taken into account the nationality of parties to a transaction in examining its legality. However, a modest departure from the general proposition that nationality is not a factor may have occurred in the enactment of the National Cooperative Production Act of 1993 (P.L. 103-42, section 3[a], *Stat*. 107:117, *US Code* 15, section 4301, 10 June 1993). The statute provides that lawsuits against joint ventures for research, development, and/or production will be treated under a rule of reason, and in the case of ventures notified to the government, damages will be limited to single rather than treble damages. These benefits are available, however, only if "the principal facilities for such production are located in the United States or its territories," and any foreign person controlling the joint venture is from "a country whose law accords antitrust treatment no less favorable to United States persons than to such countries' domestic persons with respect to participation in joint ventures for production. . . ."

The practical effect of the statute is minor, because there has not been a challenge to a production joint venture (lacking coordinated sales as well) under US antitrust law since the federal law was enacted in 1890—that is, the 1993 statute limits legal challenges in an area where legal challenges are virtually unknown. Moreover, production joint ventures are clearly entitled to rule of reason analysis. Also, the reciprocity provision is framed in such a way that it will be difficult to find a foreign country that does not accord equal treatment.

Extraterritorial Reach of US Antitrust Laws

The Sherman Act prohibits restraints that affect commerce. The word "commerce" expressly includes that between and among the states of the United States and with foreign nations.

The United States has adopted the effects doctrine, derived from the *Alcoa* case, under which the Sherman Act applies even to foreign actors acting abroad when they intend to and do affect US commerce. The doctrine is sometimes restated to hold that the Sherman Act applies when the acts, although performed abroad, have a direct, substantial, and reasonably foreseeable impact on US commerce. The effects doctrine is based on the notion that if a regulating nation or its citizens are hurt directly, the nation has a stake in regulating the conduct and ought to be able to do so.

In view of trading partners' claims of US jurisdictional overreaching, some—but not all—US courts tempered the effects doctrine with balancing tests, the best known of which was declared by the Court of

Appeals for the Ninth Circuit in the case of *Timberlane Lumber Co. v. Bank of America,* 549 F.2d 597 (9th Cir., 1976). Under *Timberlane,* after considering whether the conduct has an effect or intended effect on US commerce and whether the effect is sufficiently large to present a cognizable injury to plaintiffs and therefore an antitrust violation, the court must consider seven factors: purpose, effect, foreseeability, nationality, location, comparative significance of effects in the United States and elsewhere, and degree of conflict with foreign law and policy. The court is enjoined not to exercise jurisdiction if the "interests of, and links to, the United States . . . [are not] sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority" (*Timberlane Lumber Co. v. Bank of America,* 549 F.2d 613–14, 9th Cir., 1976).

In 1982 Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA; 15 USC, sections 6a, 45, 1982). The FTAIA limits the Sherman Act and the Federal Trade Commission Act. By its terms, the limitation does not apply to conduct involving import trade or commerce. As to conduct involving all other (i.e., nonimport) US trade or commerce with foreign nations, the Sherman and FTC Acts are declared inapplicable unless the conduct has a "direct, substantial and reasonably foreseeable effect" on US commerce or on the export trade of a person engaged in such trade or commerce in the United States.

The principal effect of the FTAIA is to remove from the scope of the US antitrust laws US firms' actions in foreign commerce where the only persons hurt are foreign competitors or foreign consumers. Thus, as far as the US antitrust laws are concerned, US firms may form export cartels as long as the cartel activity does not spill over into price rises in the United States and does not otherwise harm US competition.

A companion statute, the Export Trading Company Act of 1982 (15 USC sections 4011-21, 1982), provides a procedure whereby persons wishing to engage in export activity may receive a certificate of review from the secretary of commerce. To qualify, the applicant must satisfy the attorney general and the secretary of commerce that the export activity will neither lessen competition within the United States nor substantially restrain the export trade of a competitor of the applicant. A certificate, when granted, protects the holder against both criminal and civil actions brought by the government and limits an injured private party's recovery to single damages for all conduct described in the certificate.

The Antitrust Division of the Department of Justice issued Enforcement Guidelines for International Operations in 1977 and revised guidelines in 1988; in 1995 the division, jointly with the Federal Trade Commission, promulgated new guidelines that replaced the 1988 document. The 1988 guidelines stated, in footnote 159, that the Justice Department was "concerned only with adverse effects on competition that would harm US consumers by reducing output or raising prices." Moreover, in a case example (case 4), the department gave guidance that it would not challenge a merger despite a substantial anticompetitive effect in the United States where both merging firms are foreign and all of their assets relevant to the antitrust concern are located outside of the United States, on grounds that it would be difficult to obtain effective relief.

The guidance value of the guidelines was eroded in 1990 when the FTC challenged an acquisition by a French producer of rabies vaccine, Institut Merieux, of a Canadian producer of polio vaccine, Connaught BioSciences. The case was settled upon the filing of a consent order that required Merieux to lease the rabies vaccine business of Connaught to an FTC-approved lessee (an order expanded only belatedly, at Canada's insistence, to require also approval by Canadian authorities). So important was the US market to the merging companies that they accepted the order without contesting jurisdiction.

In 1992 the 1988 guidelines were eroded once again. US businesses complained that they were unfairly fenced out of foreign markets, especially the Japanese market. The United States and Japan were then engaged in the Structural Impediments Initiative (SII) to break down artificial barriers to trade. To advance the objectives of the SII and unclog channels for US exporters, US Assistant Attorney General James Rill announced that, in a proper case in which comity concerns were satisfied, the Antitrust Division would consider challenging a foreign import cartel that excluded US exporters; he would consider lawsuits against US subsidiaries of the foreign cartelists, in the United States under US law, if the import cartel was also illegal in the excluding country and the excluding country declined to enforce its own law. On announcing this initiative, Attorney General William Barr and Assistant Attorney General Rill withdrew footnote 159 of the 1988 guidelines. Consistently, the 1995 international guidelines envisage lawsuits in certain cases where foreign firms' private restraints on their own territory directly and foreseeably exclude US exports.

In 1993 the US Supreme Court had its first opportunity in more than a quarter century to clarify the law on extraterritoriality and comity with regard to antitrust. Nineteen states and numerous private plaintiffs had brought Sherman Act section 1 cases against domestic insurers and domestic and foreign reinsurers of general commercial liability. The plaintiffs alleged that the insurance companies had cut back commercial insurance coverage through illegal collaborations and conspiracies that allegedly rendered occurrence ("long-tail") and pollution coverage unavailable or nearly unavailable in the plaintiff states.

The defendant foreign reinsurers, which operated on the London market under the aegis of London market regulation, moved to dismiss the case against them. The district court granted the motion on grounds of comity. It found that a "significant" conflict with English law and policy would result from application of US antitrust law to the UK reinsurers' conduct and operations in the United Kingdom and that the interference and harm caused by the conflict was not outweighed by other factors, such as the effect and foreseeability of effect of the defendants' conduct in the United States. The court stated that the purpose of the foreign defendants' collaboration to deny certain coverages was to reduce exposure to certain risks and thus control losses—"a legitimate business purpose." The Court of Appeals for the Ninth Circuit reweighed the factors that figured in the comity balance and reversed the decision.

The Supreme Court, in a 5-4 decision, held that comity did not justify dismissal (*Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 1993). The Court first found that subject matter jurisdiction existed. Plaintiffs had alleged that the foreign conduct "was meant to produce and did in fact produce some substantial effect in the United States." Writing for the majority, Justice David Souter said, "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States" (*Id.* at 796). The Court then rejected the claim that conflict with foreign law existed and that the conflict counseled dismissal. The Court determined that conflict did not exist because the British defendants *could* have complied with the law of both nations at the same time. The four dissenting justices, in an opinion by Justice Antonin Scalia, would have treated the question as one of intended reach of the US law and would have held that the US law did not apply to what they saw as essentially a London market transaction. This case settles very little regarding the confused law of extraterritoriality and comity. (For a proposed framework for resolution see Fox 1993, 1995, and 1997.)

Bilateral and Multilateral Treaties and the OECD Recommendation

The United States is party to four bilateral agreements on cooperation in antitrust enforcement. Moreover, as a member of the Organization for Economic Cooperation and Development (OECD), the United States works within the framework of that organization.

The first US bilateral cooperation agreement was signed with Germany in 1976. The agreement provides that the antitrust authorities of the two countries will cooperate with and render assistance to one another. The parties agree that each will provide to the other "significant information" that comes to its attention involving restrictive business practices that have a substantial effect on the trade of the other. Upon request, each party agrees to obtain for the other advice, assistance, and information regarding such referred restrictive business practices (subject to a right to decline on grounds such as confidentiality and public policy). The parties agree upon request to consult regarding possible coordination of concurrent antitrust investigations or proceedings. They agree that neither shall interfere with an antitrust investigation or proceeding of the other, to the extent compatible with domestic law and policy. Moreover, where application of the laws of one party "will be likely to affect the important interests of the other party," the former agrees to notify the latter and to consult and coordinate "to the extent appropriate" (4 CCH Trade Reg. Rep. ¶ 13,501). The agreement was designed to reflect and build upon the already close ties between the West German Federal Cartel Office and the US enforcement agencies (see Glynn 1991).

Bilateral cooperation agreements were also signed with Australia in 1982 and with Canada in 1984. A superseding agreement with Canada was signed in 1995. The 1982 and 1984 agreements rose out of several cases involving international transactions and stemmed from a desire to ease the tensions that had developed from extraterritorial application of US law.

The Australian agreement provides that, when a US agency decides to undertake an antitrust investigation that may have implications for Australian interests, it must notify the government of Australia of the investigation; Australia, for its part, "may" notify the United States when it has adopted a policy that may have antitrust implications for the United States. After notification, either party must consult upon request of the other, and both must "seek earnestly to avoid a possible conflict between their respective laws, policies and national interests," giving "due regard to each other's sovereignty and to considerations of comity." The United States agrees to consider Australia's interest in exports before bringing or continuing litigation. When a private suit that has been the subject of notification and consultations is pending in a US court, the government of Australia may request that the government of the United States participate in the litigation, whereupon the latter must report to the court on the substance and outcome of the consultations (4 CCH Trade Reg. Rep. ¶ 13,502).

The 1984 Canadian agreement was similar to the Australian agreement, but it was more detailed and the obligations it imposed were reciprocal (4 CCH Trade Reg. Rep. ¶ 13,503). The 1995 Canadian agreement adds "positive country" obligations such as those undertaken in the US-EC agreement described below (4 CCH Trade Reg. Rep. ¶ 13,503).

The OECD recommendation forms the major framework for notifications and sharing of information between and among most industrialized countries of the world. The last revision was adopted in 1986. Compliance with the recommendation is voluntary. The recommendation recites that when a member country intends to take action that may affect the important interests of another member country, it should notify the latter in sufficient time to hear and take into account the views of the affected country. An appendix contains guiding principles and procedures for notifications, exchanges of information, consultations, and conciliations (OECD document printed in Hawk 1990; Glynn 1991).

A more innovative form of cooperation agreement was crafted in 1991 by the United States and the European Community. This is the Executive Agreement with the European Community of September 1991 (printed at 61 BNA Antitrust & Trade Reg. Rep. 382, 26 September 1991). Although held void on a technical ground by the European Court of Justice, the agreement was officially validated upon approval by the Council of Ministers in 1995. The concept of the agreement can be traced to speeches by Sir Leon Brittan, then EC Commissioner for competition, who expressed concern about the multitude of jurisdictions regulating the same merger and suggested consultations to allocate jurisdiction.

The US-EC agreement covers much more than mergers. Its purpose is "to promote cooperation and coordination and lessen the possibility or impact of differences" in the parties' application of their competition laws. It provides that when antitrust enforcement by one party, including remedies, may affect important interests of the other party, notification shall be given far enough in advance to take the other party's views into account. The agreement also calls for consultations. It requires exchange of information and meetings at least twice a year for this purpose and to discuss policy changes. Most significantly, it provides for "positive comity"—helping one another in enforcement efforts. If anticompetitive activities carried out in the territory of one party adversely affect the other, the latter may request the former to initiate discovery and other enforcement actions, and the former must sympathetically consider the request. The agreement provides a framework for coordinating enforcement activities when both parties have an interest in pursuing the same conduct or transaction.

The agreement also provides for "negative comity" (i.e., restraint) where one party's enforcement may adversely affect the important interests of the other. The parties agree to seek "an appropriate accommodation of the competing interests" and, in doing so, to take into account all relevant factors. The listed factors are similar to those in the *Timberlane* case, discussed above. (The agreement is printed at 61 BNA Antitrust & Trade Reg. Rep. 382, 26 September 1991.)

The Antitrust Division of the Justice Department is devoting continuing efforts to coordinating enforcement activities with the antitrust authorities of other nations. To facilitate this effort, the division sought and obtained enactment of the International Antitrust Enforcement Assistance Act (IAEAA) of 1994 (*US Code App.* 15, sections 6201-12). Pursuant to the IAEAA, the US antitrust authorities are empowered to share evidence (other than pre-merger filings) regarding antitrust violations with the antitrust authorities of foreign nations that enter into antitrust mutual assistance agreements with the United States. Upon request by foreign authorities who have entered such agreements, the US authorities may, if they choose, investigate possible violations of foreign antitrust laws. Australia has entered into a mutual assistance agreement with the United States (printed at 4 CCH Trade Reg. Rep. 13,502A).

The IAEAA and the US-EC agreement focus on positive comity—helping one another to enforce the law against cross-border transgressions. They reflect the reality that competition and competitive offenses have reached a global dimension, and they reflect the challenge of the law to meet this economic reality.

Conclusion

Thus US antitrust law has moved from a law designed to limit power, preserve diversity, and open markets, to a law guided by the goals of robust business and consumer interests. While antitrust law has become quite separate from trade law and other disciplines, the pulls of the world economy are once again bringing specialists in antitrust, trade, and industrial policy into dialogue.

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