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What is United States Anti-Trust Law?

United States Antitrust Law

Although the term "antitrust law" may sound complex, it's simply a way of referring to the body of law that prohibits anti-competitive behavior (a monopoly) or unfair business practices. The purpose of these laws it to promote competition and protect consumers.

The Law

There are three core federal antitrust laws. In 1890, Congress passed the first antitrust law, the Sherman Act. In 1914, Congress passed two additional antitrust laws, the Federal Trade Commission Act (creating the FTC), and the Clayton Act.

The Sherman Act

The Sherman Act forms the foundation for most federal antitrust law. The Act outlaws "every contract, combination . . . or conspiracy in restraint of trade,"[1] and any monopolization, attempted monopolization, or conspiracy or combination to monopolize.[2] The United States Supreme Court has held that the Sherman Act does not prohibit every restraint of trade; instead it

[1] 15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

[2] 15 U.S.C. § 2. Monopolizing trade a felony; penalty
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

only prohibits those that are *unreasonable*.[3] The most frequent violations of the Act are price fixing and bid rigging, both of which are usually prosecuted as criminal violations.[4]

The Federal Trade Commission Act

The Federal Trade Commission Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." The Act also created the Federal Trade Commission to police violations of the Act. The Act carries no criminal penalties.

The Clayton Act

The Clayton Act prohibits mergers or acquisitions that are likely to lessen competition, and other business practices that are likely to lessen competition. The Clayton Act is a civil statute, meaning there are no criminal penalties under the Act.

Criminal Penalties

If an individual or business violates the Sherman Act they may be prosecuted in federal court. The Department of Justice alone is empowered to bring criminal prosecutions under the Act.

The criminal penalties for violations under the Act can be up to $100 million for a corporation and $1 million for an individual, as well as a maximum of ten years in prison.[5] Additionally, under federal law the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.[6]

In order to be convicted under the Sherman Act, the government has to satisfy certain elements. For there to be a violation of Section 1, there are three elements the government must prove:

(1) An agreement

(2) which unreasonably restrains competition, and

(3) which affects interstate commerce.

A Section 2 violation under the Sherman Act has two elements:

(1) The possession of monopoly power in the relevant market, and

(2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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[3] *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911).
[4] U.S. Attorney Antitrust Resource Manual, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title7/title7.htm.
[5] 15 U.S.C. §§ 1 and 2.
[6] 18 U.S.C. § 3571(c) and (d).

As with most federal crimes, the elements are very vague. Such vagueness allows U.S. Attorneys (prosecutors) to liberally charge for violations of the statute. For example, under Section 1 there doesn't necessarily have to be a verbal agreement, the agreement could be inferred from the parties' conduct.

An example of a charge of Section 1 of the Sherman Act was in the case *U.S. v. Ajinomoto Co., Inc. et al*. There a number of individuals and corporations based out of Japan were charged with agreeing to fix and maintain prices and to coordinate prices increases for the sale of lysine in the United States. They were also charged with agreeing to allocate the volumes of sales of lysine among the corporate conspirators.

Another case was recently brought in federal court in San Francisco against the former Chairmen and Chief Executive Officer of the Taiwanese company Chunghwa Picture Tubes Ltd. for his participation in global conspiracies to fix prices of two types of cathode ray tubes (the color display tubes used in computer monitors and those used in television sets).

In one last example, Bridgestone, a Tokyo-headquartered manufacturer of marine hose and other industrial products, was charged under the Sherman Act for conspiring to rig bids, fix prices and allocate market shares of marine hose in the U.S. and elsewhere.

There has been a drastic increase in the number of individuals the U.S. Government is charging under the Sherman Act and an increase in the sentences that are being imposed. In 2004, the U.S. Sentencing Guidelines were revised and penalties for antitrust violations increased. In 2010, 78 defendants were sentenced to prison under the Sherman Act for a total of 26,046 total days to be served.[7] While in 2000, only 38 individuals were charged under the act and only served a total of 5,584 days in jail.[8]

It should also be noted that whenever possible, the Department of Justice will prosecute and seek extradition of fugitive antitrust defendants. Historically, the Department of Justice could not even threaten extradition in criminal antitrust cases since the U.S. and Canada were the only jurisdictions that considered price-fixing to be a crime.[9] However, since 2010, the Department of Justice Antitrust Division has been successful in its efforts to have foreign nationals extradited to the United States for prosecution for antitrust violations.[10] This change in extradition has come because more jurisdictions are criminalizing price-fixing.

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[7] U.S. Government Criminal Enforcement Fine and Jail Charts 2000 - 2010, http://www.justice.gov/atr/public/criminal/264101.html.
[8] U.S. Government Criminal Enforcement Fine and Jail Charts 2000 - 2010, http://www.justice.gov/atr/public/criminal/264101.html.
[9] John M. Majoras, United States Succeeds in Extraditing Foreign National Indict for Antitrust Violations, April 9, 2010, http://www.martindale.com/antitrust-trade-regulation-law/article_Jones-Day_975518.htm.
[10] John M. Majoras, United States Succeeds in Extraditing Foreign National Indict for Antitrust Violations, April 9, 2010, http://www.martindale.com/antitrust-trade-regulation-law/article_Jones-Day_975518.htm.

Immigration Consequences

Many times the immigration consequences for an antitrust conviction are more severe than the criminal punishment. The Department of Justice has a policy that treats violations of the Sherman Act as "crimes involving moral turpitude," subjecting foreign executives to exclusion or deportation from the U.S. This policy is the called the "Memorandum of Understanding" (also known as "MoU") that is between the Antitrust Division of the Department of Justice and the Immigration and Customs Enforcement Division of the Department of Homeland Security. MoU specifically says it "[C]onsiders criminal violation of the Sherman Act . . . to be crimes involving moral turpitude, which may subject an alien to exclusion or deportation from the United States."

Of interest is that most antitrust convictions are obtained against **non-U.S. executives** – and every one of these convictions but one has been by plea agreement rather than trial.[11] The reason these non-U.S. executives plead guilty is not because of the strength of the Government's case, but rather the threat of a U.S. travel ban.[12] The 15-year minimum ban on travel to the United as a result of the MoU can be devastating to the careers of many foreign executives.[13] This gives the Department of Justice leverage in securing guilty pleas. The MoU is included in nearly every plea agreement whereby the government will grant an exemption from travel restrictions to foreign executives in exchange for a guilty plea.

The pressure to plead guilty due to immigration consequences is depriving these non-U.S. executives of their right to a trial. Even in cases where the government lacks evidence they are still obtaining pleas of guilty from these executives. Since the majority of their cases end in a guilty plea, most U.S. Attorneys in the anti-trust division lack trial experience. In most cases, instead of pleading guilty these defendants should retain experienced trial attorneys to take their case to trial to obtain a not guilty verdict.

Leniency Program

According to the Department of Justice, its Antitrust Division's Leniency Program is its most important investigative tool for detecting antitrust violations. If an individual or corporation reports the antitrust violation and cooperates with the investigation they can avoid criminal conviction, fines, and prison sentences if all the requirements of the program are met.

To be eligible for the leniency program, the individual or corporation must

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[11] Kara Scannell, US Accused of Unfair Antitrust Tactic, Financial Times, Sept. 20. 2011, http://www.ft.com/cms/s/0/1d923292-e0b9-11e0-947a-00144feabdc0.html#axzz1Zvn9E3J8.
[12] Eric Grannon, DOJ Leverages Immigration Laws, Counsel's Advisory, Washington Legal Foundation, Vol. 18 No. 3 (2010).
[13] Eric Grannon, DOJ Leverages Immigration Laws, Counsel's Advisory, Washington Legal Foundation, Vol. 18 No. 3 (2010).

(1) have taken prompt and effective action to terminate its participation in the anticompetitive activity being reported upon discovery of the activity; and

(2) did not coerce any other party to participate in the anticompetitive activity being reported and was not the leader in, or the originator of, the activity.[14]

The applicant bears the burden of proving he or she is eligible to receive leniency. The applicant must also agree to provide **full**, **continuing** and **complete** cooperation with the Antitrust Division in connection with the anticompetitive activity being reported. This includes providing a full exposition of all facts known to the applicant relating to the anticompetitive activity, and providing all documents, information and other materials relating to the conduct.

If the applicant meets the requirements of the program, the Antitrust Division agrees to not bring any criminal prosecution against the applicant for any act or offense committed prior to the date of the agreement in connection with the anticompetitive behavior being reported.

The problem with the leniency program is that even if the applicant is eligible for the program and agrees to cooperate, the Antitrust Division only has to agree "conditionally" to accept the applicant into the leniency program. This means the division may revoke the leniency at any time (even after the applicant has already given the Antitrust Division incriminating statements and documents). Also, the leniency only relates to the antitrust conduct being reported, thus the applicant could still be charged for unrelated antitrust violations.

[14] For more information see http://www.usdoj.gov/atr/public/criminal/leniency.htm.