



How Manufacturing Leaders Can Spot and Resolve Antitrust Issues

The Manufacturing Law Group

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Of Note

We note that in this presentation we are only providing general information; the information contained in this presentation does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, please contact us directly.

Jennifer M. Driscoll, CIPP-US/CIPP/E

Started career in New York as a general commercial litigator at an Am Law 20 firm

Moved to Washington, DC to focus on antitrust and government investigations

Worked with preeminent antitrust attorney Don Klawiter for 17 years

Recognized by The Legal 500 for expertise in cross-border criminal antitrust investigations and mergers

Auto parts manufacturers and senior executives in the Antitrust Division's investigation of Japanese auto parts market

Japanese medical device manufacturer and its EU subsidiaries in False Claims Act investigation

Major telecom company to form teaming agreement and obtain clearance from Antitrust Division to build underground wireless service for Washington Metropolitan Area Transit Authority (WMATA)

Merger analysis and Hart-Scott-Rodino filing for Belgian industry group acquiring stake in French-owned chemical manufacturer

Presents on antitrust, Foreign Corrupt Practice Act, and data privacy issues

ABA Sections of Antitrust and International Law

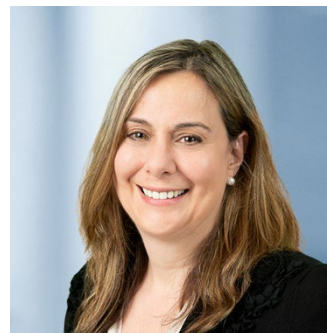
Japan and Taiwan Fair Trade Commissions (antitrust agencies)

Japan External Trade Organization (JETRO)

Japan and Taiwan auto industry associations

Japanese Federation of Bar Associations and Osaka Bar Association

Penn Carey Law Antitrust Symposium



Key Takeaways

The Federal Trade Commission (FTC) and Department of Justice (DOJ) enforce federal U.S. antitrust laws.

- DOJ prosecutes misconduct that occurs in other countries if the product enters the U.S. “stream of commerce”

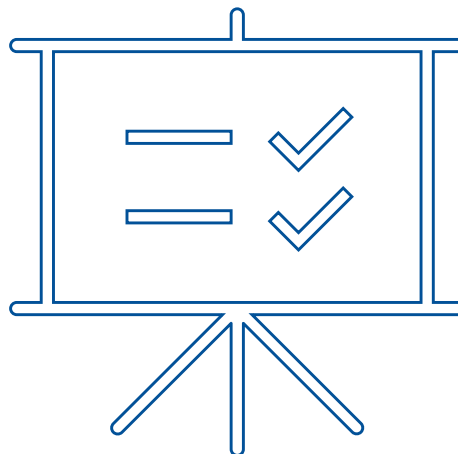
Almost every country has antitrust laws—and many have become aggressive about enforcing them.

- European Commission
- Japan Fair Trade Commission
- Brazil/CADE
- U.K./Competition Markets Authority

Antitrust law protects competition and consumers, not competitors.

Antitrust laws do not punish growth and success.

Think of antitrust laws as guardrails—not roadblocks.



Sherman Act Section One: Joint Conduct

“Every contract, combination ... or conspiracy, in restraint of trade or commerce ... is declared to be illegal.”

Agreements with competitors are per se or hard-core antitrust law violations.

- Price-fixing
- Bid rigging
- Market or customer allocation
- Eliminating discounts

Sherman Act Section One: Joint Conduct

Antitrust law does not prevent competitors from responding to market conditions provided the decisions are made independently and not the result of collusion.

Guardrails

- Frequent and up-to-date compliance training
- Compliance audits
- Clear line of reporting
- DOJ is on record that detecting misconduct does not mean compliance training failed
- DOJ gives credit for self-reporting

How to Structure Competitor Collaborations

The FTC and DOJ recognize that there are legitimate competitor collaborations.

- Joint ventures
- Trade associations
- Academic consortia
- Certification bodies

With joint ventures, the parties should continue to compete against each other through independent business operations.

How to Structure Competitor Collaborations

The parties should also establish firewalls to prevent the exchange of competitively sensitive information (CSI).

- Joint venture employees should operate independently; they should not have access to their partner's CSI
- Control access to portals and sites with passwords, access codes, or other means of authentication

How to Structure Competitor Collaborations

Guardrails.

- Competitor collaborations should be narrowly tailored and of limited scope
- Document procompetitive justifications for working together and measures taken to prevent antitrust misconduct

Sherman Act Section Two: Unilateral Conduct

It is unlawful to “monopolize or attempt to monopolize” a market.

Market share is a threshold issue.

- 70% or greater market share considered a monopolist
- 50% or less market share unlikely to qualify as a monopolist
- 50% - 70% is a gray area

Sherman Act Section Two: Unilateral Conduct

But market share is not the only issue.
There must be exclusionary conduct that injures competition.

- A company prices a product below cost until competitors go out of business and then the Company dramatically raises the price
- A buyer cannot purchase Product A unless it also purchases Product B—even if the buyer doesn't want Product B
- A manufacturer with a large market share tells a supplier that it cannot sell essential inputs to other manufacturers

Sherman Act Section Two: Unilateral Conduct

A company is not required to help or deal with competitors.

Antitrust laws facilitate innovation and aggressive competition because it benefits consumers.

Rule of Reason

Plaintiff must first show there are anticompetitive effects.

- Higher prices
- Fewer products/offerings
- Inferior quality/service

Then defendant must show non-pretextual procompetitive justifications.

- Lower prices
- Greater efficiency
- Better quality/service
- Innovation/new products in the market

The burden shifts back plaintiff to prove the anticompetitive effects outweigh the procompetitive justifications.

Guardrails.

- Compliance training and clear policies
- Document procompetitive justifications contemporaneously
- Seek an FTC advisory opinion or DOJ business review letter

Clayton Act Section Three: Exclusive Dealing Arrangements

It is unlawful “to make a sale or contract for sale of goods ... [with] the understanding that ... the purchaser thereof shall not use or deal in the goods ... of a competitor” if the contract will substantially lessen competition or tend to create a monopoly.

Clayton Act Section Three: Exclusive Dealing Arrangements

Non-price vertical restraints.

- Exclusive dealing agreement: A manufacturer prevents a dealer from selling competitors' products.
 - Restrictions on intrabrand competition promote interbrand competition.
- Requirements contract: A buyer must purchase all inputs from a single supplier.
 - Potential benefits are reduced transaction costs, the stable source of supply, and enhanced ability to forecast.
 - Requirements contracts pose greater antitrust risks to suppliers with higher market shares.

Clayton Act Section Three: Exclusive Dealing Arrangements

Guardrails.

- Recognize that the market share threshold for a Section Three violation is market power.
- The agreement should be short-term and easy to terminate by the party subject to the restraint.
 - Duration of one or two years.
 - Clearly state who can terminate the agreement and the termination process.
- Look at the “practical effects on competition.”
 - Exclusive dealing arrangements may have no impact if market share is low.
 - Terminating the agreement should not foreclose alternative channels.

Exclusive Dealing Arrangements and The Rule of Reason

The rule of reason test that weighs anticompetitive effects and procompetitive justifications applies to exclusive dealing arrangements.

The effects of market foreclosure are more pronounced if the exclusive dealing arrangement

- Limits competitors' access to inputs
- Reduces competition at the supplier level
- Raises competitors' costs

Because the agreements are between parties at different levels of the supply chain, many exclusive dealing arrangements are legal

- Patent licensing
- Coke versus Pepsi
- Territorial and customer restrictions *imposed by supplier*
- A retailer's refusal to sell products or carry a specific product line



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