Managing Competition Cases: Cartels & Agreements

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Relevant Statutes

- Sherman Act Section 1
- Anti-Monopoly Law Chapter II

Sherman Act

- Sec. 1. 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, …

AML

- Art. 13 prohibits monopoly agreements among competing undertakings, including
  - Price setting
  - Output/sales limits
  - Sales/purchases allocation
  - New technology/equipment/products limits
  - Group boycotts
- Art. 14 prohibits resale price fixing and other monopoly agreements between undertakings and counterparties to a transaction
- Art. 15 provides exemptions to Arts. 13, 14 for agreements reached for specified purposes that "will not materially limit competition in the relevant market and…can enable consumers to share the benefits…"

Agreements

- Distinguishing agreements from unilateral conduct
- Identifying agreements among competitors
- Identifying vertical agreements

Agreements v. Unilateral Conduct

- Sherman Act Section 1 only applies to concerted action – not unilateral conduct
- Agreement must be between two or more independent entities
  - Intra-enterprise conspiracies
- Agreement may be reached under pressure

Agreements v. Unilateral Conduct cont'd

- No written agreement/verbal communication needed to find an agreement
  - "evidence that tends to exclude the possibility of independent action…direct or circumstantial evidence that reasonably tends to prove…a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984).
  - "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).
  - Consider if (1) "any rational motive" to join a conspiracy and (2) conduct "consistent with…independent interest." *Matsushita*, 475 U.S. at 587.

Horizontal Agreements

- Among competitors as competitors
- More than conscious parallel action
  - In self-interest only if others act similarly; contrary to self-interest if act alone
  - Legitimate business reasons to act independently
  - Motive to conspire
  - Lawsuits alleging an antitrust conspiracy must state facts suggesting that the conspiracy is "plausible," not merely "conceivable." *Bell Atlantic v. Twombly,* 550 U.S. 544 (2007)
- Actions by trade associations

Vertical Agreements

- Among undertakings at different levels of an industry
- More needed to prove agreement than termination of wholesaler/dealer by manufacturer in response to complaints by other wholesalers/dealers
- Hub & spokes, to benefit the hub and/or spokes
  - *U.S. v. General Motors Corp.*, 384 U.S. 127 (1966)
  - *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000)

Treatment of Cartels v. Other Agreements

- Neither Sherman Act nor AML distinguishes between cartels and other agreements
- Sherman Act provides that all violations are criminal offenses
- Distinction in U.S. established by Supreme Court decisions since 1911
  - Section 1 prohibits only *unreasonable* restraints of trade
  - Unreasonable =

    raises market prices

    lowers total market output/quality/choice

    creates/maintains/increases market power
  - Only cartels subject to criminal sanctions

Treatment of Cartels v. Other Agreements cont'd

- Some types of agreements presumed to be unreasonable, based on judicial experience
  - Price fixing, bid rigging by competitors
  - Market allocations by competitors
- Conduct *per se* illegal "only after considerable experience" with that type of conduct
- Other conduct considered case-by-case, under standard of reasonableness: rule of reason analysis
  - Whether conduct's anticompetitive effect substantially outweighs procompetitive effect that reasonably requires conduct to be achieved
  - No consideration of social or other factors
  - Joint ventures

Joint Ventures

- DOJ/FTC Antitrust Guidelines for Collaborations among Competitors
- Joint venture agreements among competitors are often pro-competitive
  - New products or services created
  - More efficient utilization of resources
  - Significant cost savings
  - Joint ventures are presumptively reviewed under the rule of reason
  - The "pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006)
- Competitive concerns may arise if the JV
  - Creates or enhances the market power of the participants
  - Imposes competitive restraints on the parties beyond the scope of the JV

Treatment of Horizontal v. Vertical Agreements

- Competitive impact of horizontal v. vertical agreements
  - Interbrand v. intrabrand competition
- Established by judicial precedents

Treatment of Vertical Agreements

- Unilateral v. coordinated action in vertical contexts
  - Refusals to deal
  - Discriminatory pricing
- Market power in vertical contexts
- Analysis of vertical price v. non-price agreements
  - Restrictions on sales/purchases
- Dual distribution arrangements
  - Wholesale-retail price squeezes
    - *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. ___ (2009)

Rule of Reason in U.S. v. Exemptions

- U.S. rule of reason considers impact on competition
- Exemptions reflect concerns about non-competition factors and may ignore negative impact on competition

Impact on Competition

- Proof of actual anticompetitive effect
  - Reduction of output
  - Less price competition
- Market analysis
  - Relevant market
  - Market power = ability to raise/lower prices beyond that possible with competition
    - Market share
    - Market entry barriers
  - Impact of conduct on market power, competition, not on individual competitors
    - Intent may indicate likely impact

Impact on Competition cont'd

- Proof of procompetitive effects
  - Efficiencies
  - Avoidance of free-riding
  - Increasing output/quality/choices
  - Introducing new products/services
  - Conduct reasonably necessary to achieve procompetitive effects, or procompetitive effects outweigh anticompetitive effects
- Factors unrelated to competitive effect are irrelevant
  - "Under the Sherman Act the criterion to be used in judging the validity of a restraint is its impact on competition." *NCAA v. Board of Regents*, 468 U.S. 85, 104 (1984)

Exemptions

- U.S. exemptions
  - Statutory
  - Judicial
  - Application
- AML Art. 15
  - Application
  - Burden of proof
  - U.S. counterparts

U.S. Exemptions

- Statutory
  - Regulated sectors
    - Agriculture, communications, transportation, energy, financial markets, healthcare, insurance, sports, organized labor
  - Types of conduct
    - R&D, production joint ventures, standards setting organizations, export trading companies, medical training, higher education financial aid
- Judicial
  - Constitutional
    - State action doctrine v. dormant commerce clause
    - *Noerr-Pennington* doctrine
  - Implied from regulations of sectors
    - Filed rate/*Keogh* doctrine

U.S. Exemptions cont'd

- Narrowly construed
- Trend toward exemptions
  - Only from *per se* rule and treble damages
    - Conduct may be found unreasonable and subject to single damages
  - That are specific and narrow

AML Art. 15

- Applies to all agreements uniformly, including cartels?
- Burden of proof
  - Anti-monopoly enforcement authority shows existence of agreement for prohibited purpose
  - Undertaking must show agreement has
    - Proper purpose
    - "will not materially limit competition in the relevant market and…can enable consumers to share the benefits…"
  - U.S. authorities must show anti-competitive effect except in case of cartels

AML Art. 15 cont'd

- U.S. rule of reason includes consideration of
  - Upgrading technology, R&D of new products
  - Improving quality, efficiency
    - Establishing standards and specializations considered from perspective of efficiency
    - Size of undertakings irrelevant

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Thank you

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