Antitrust, Monopoly and Restraint of Trade

Antitrust and Monopoly

- Generally, the law encourages innovation and competition among businesses to develop and sell more appealing products to consumers
- The law regulates conduct that leads to or tends to produce monopoly power or conduct that is a restraint of trade

Market Power

- Definition: power of company to control market for its product
- The law does allow for market monopolies when patent issued
  - patent owner temporarily protected from competition in the market to manufacture and sell patented product or service

Goals of Antitrust Law

- Market power per se is not “bad”
- What is bad or illegal
  - how market power is acquired
  - what firms do once they have that power
- Antitrust laws regulate the market power of companies to promote competition
- Freedom of contract is allowed except when a contract is contrary to public policy, like price fixing and restraint of trade

Origins of Antitrust Law

- In the late 1800s, companies like Standard Oil (Rockefeller) formed “trusts” which began to control entire market
- Congress enacted “anti-trust” legislation as common law insufficient
  - Interstate Commerce Act of 1887
  - Sherman Act of 1890
  - Clayton Act
  - Federal Trade Commission Act
    - prevent and correct unfair trade practices

Sherman Act

- Applies only to conduct that has significant impact on *interstate* commerce
  - Thus, courts presumably have jurisdiction only if the commerce is interstate
- Regulates “local” activity if affects interstate commerce
- Enforced by Department of Justice

Sherman Act (2)

- Section 1
  - Requires two or more persons, as one person cannot contract, agree, combine or conspire alone
- Section 2
  - Applies to individuals and groups
  - Monopolization or attempts to monopolize
  - Predatory pricing
    - attempt drive competitor(s) from market by selling product at prices substantially below normal production costs

Monopolization

- Sherman Act requires two elements
  - Possession of monopoly power
  - Willful acquisition and maintenance of power
- US Supreme Court has defined monopolization as "power to control prices or exclude competition"
- "Market-Share" test (rule of thumb)
  - if firm has 70% or more of relevant market, it is regarded as having monopoly power
    - includes both Product and Geographical Markets

Anticompetitive Behavior

- Must be "willful acquisition of power"
- Intent monopolize difficult to prove
  - inferred from evidence that firm had monopoly power and engaged in anticompetitive behavior
    - Firm's actions scrutinized to determine whether intended to exclude competitors and garner monopoly power and had "dangerous" probability of success

Predatory Pricing

- Sale of products below cost
  - problematic for government attorneys because consumers benefit from low prices, giving them greater freedom of choice
  - e.g., Microsoft's free *Internet Explorer*
- Condemned because it ultimately leads to monopoly by driving competitors out of business

Restraint of Trade

- Definition
  - Any agreement between firms that has effect of reducing competition in marketplace

Clayton Act

- In contrast to Sherman Act's broad proscriptions, Clayton Act deals with very specific practices
  - Price Discrimination
    - sellers charge different buyers different prices for same goods
  - Exclusionary Practices
    - exclusive-dealing or "tie-in" sales agreements
  - Corporate Mergers
    - forbidden if substantially lessen competition

Federal Trade Commission Act

- FTC Act a “catchall”
- FTC’s sole substantive area
  - “unfair methods of competition”
  - “deceptive acts or practices” affecting commerce

Private Actions

- Under Clayton Act, private party can sue for treble damages plus attorney’s fees
- Under Sherman Act, Plaintiff must show:
  - Defendant’s antitrust violations directly or indirectly caused injury; and
  - Defendant’s actions affected protected interests of Plaintiff

Antitrust Laws in Global Context

- Foreign “persons” may sue US companies for antitrust violations in US courts, even if the violations occur outside of US
- These violations occur in export, trade or commerce with foreign nations

Exemptions to Antitrust Laws

- Most statutory exemptions apply to:
  - Labor
  - Agricultural associations and fisheries
  - Insurance
  - Foreign trade
  - Professional baseball
  - Cooperative research and production
  - Joint efforts by businesspersons to obtain legislative or executive action

Antitrust and Restraint of Trade

- Federal antitrust legislation is directed at anticompetitive agreements between rival firms, involving, e.g., price fixing, restriction of output and division of markets

Rule of Reason

- Per se violations of Sherman Section 1
  - those agreements deemed blatant and substantially anticompetitive
- Courts consider the "rule of reason" and the "soft" per se rule in determining whether a specific agreement is a restraint of trade under Section 1

Horizontal Restraints

- Agreements among Sellers (or Buyers) that restrain competition between firms same market
  - include Price Fixing
- Horizontal Market Divisions
  - Agreements to control prices by dividing the market so each firm has a geographic monopoly
- Trade Associations
  - A concentrated industry is controlled by one or a few firms with large percentage of sales

Group Boycotts

- Agreement between two or more firms to refuse to do business with a particular firm or person
- Purpose may be to enforce anticompetitive agreements or lock out competitors

Joint Venture

- Courts consider whether a JV violates Sherman Act and whether its purpose is permissible
  - JV's market share is important factor

Vertical Restraints

- Per se anticompetitive agreements
  - imposed by Sellers upon Buyers (or vice versa)
  - that may include affiliates in entire supply chain of production
- Territorial or Customer Restrictions
- Resale Price Maintenance (“fair trade”) Agreements

Refusals to Deal

- Generally, firms have freedom to contract, which allows them to refuse to deal with certain other firms
- Refusals to deal violate antitrust laws when
  - firm refusing to deal has, or is likely to acquire, monopoly power, and
  - refusal is likely to have an anticompetitive effect on particular market

Price Discrimination

- Seller charges different Buyers different prices for same goods
- *Per se* violation when it injures competition
  - What about “negligible” differences such as labeling or branding that result in customer preferences?
  - What about time and cost considerations?

Exclusionary Practices

- Exclusive-dealing Contracts
  - Seller forbids Buyer from purchasing products from Seller's competitors
- Tying Arrangements
  - Seller conditions sale of product on Buyer's agreeing to purchase another product produced or distributed by Seller

Mergers

- Horizontal Mergers
  - between firms that compete with each other in same market
- Vertical Mergers
  - company at one stage of production acquires company at a higher or lower stage of production
- Crucial consideration
  - market concentration (share) after the merger

Conglomerate Mergers

- Mergers between unrelated firms
- Three types
  - Market-Extension Merger
  - Product-Extension Merger
  - Diversification Merger