

U.S. Anti-Cartel Enforcement

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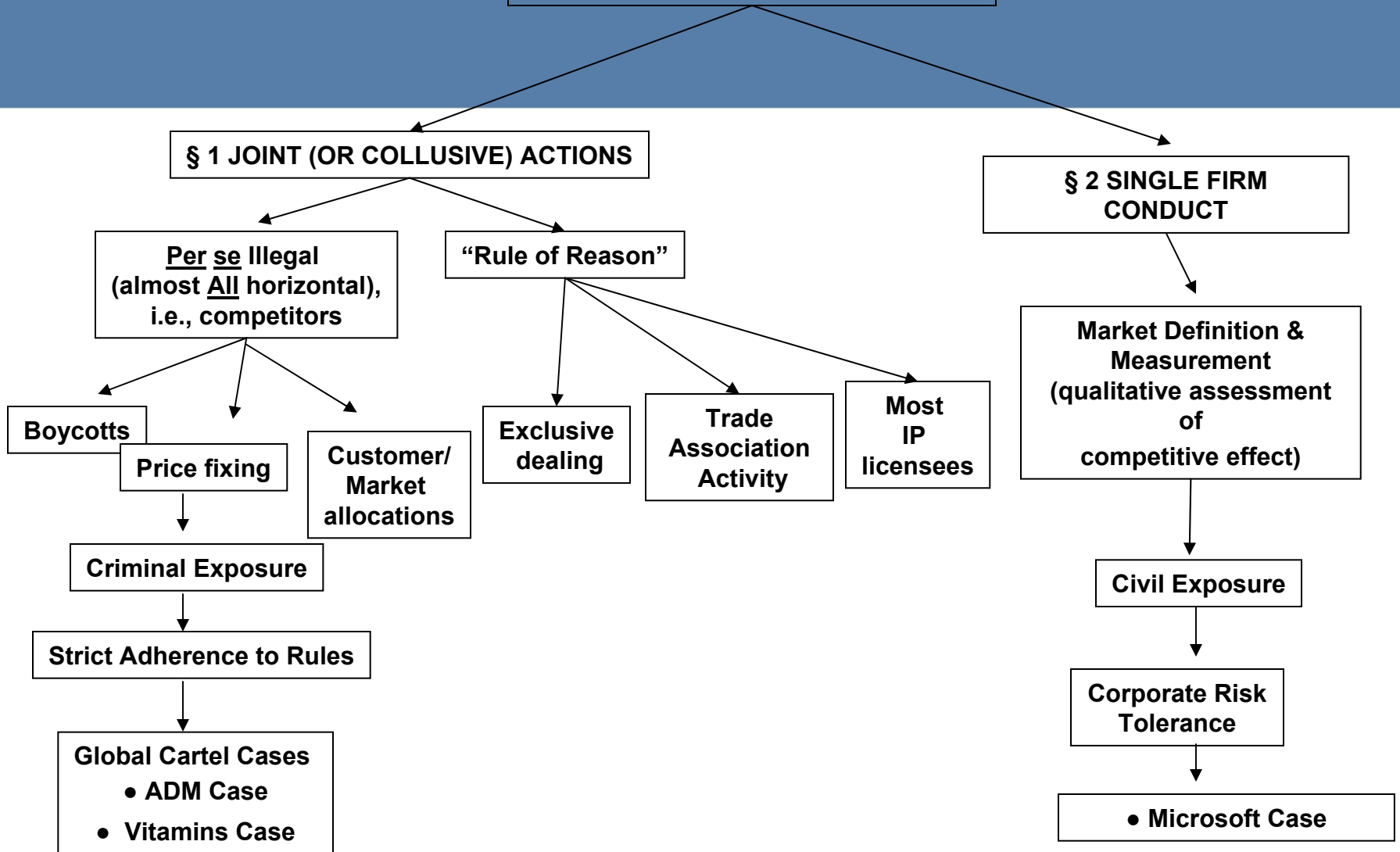
Why care about U.S. Antitrust?

- Violating U.S. antitrust law is a *CRIME*
 - Individuals - up to 10 years in jail, plus up to USD\$1M fine
 - Corporations - fines up to USD\$100M or twice the gains
 - Injunction to force violators to stop
- Civil litigation
 - Massive treble-damages lawsuits
 - Lasts years
 - Additional scrutiny by antitrust authorities (e.g., for mergers)
- U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC)
 - State authorities
 - Private parties
- Jurisdiction over anticompetitive conduct outside the U.S.

U.S. Antitrust Law

- The Premise: Consumers get better products at lower prices if suppliers compete vigorously
- Conspiracy – U.S. Sherman Act § 1
 - Forbids “agreements” in restraint of trade
 - Criminal penalties and civil litigation
- Abuse of Monopoly – U.S. Sherman Act § 2
 - Forbids monopolizing or attempting to monopolize (exclusionary conduct)
 - Civil litigation
- Price Discrimination – U.S. Robinson-Patman Act
 - Identical sales at different prices to similarly situated customers
- Mergers & Acquisitions – U.S. Clayton Act § 7, Hart-Scott-Rodino Act
 - Threat to “substantially lessen competition”
 - Mandatory pre-closing filing and review process

SHERMAN ACT



Illegal Agreements with Competitors

- Agreements that are *per se* illegal:
 - What price to sell or buy at
 - How much to make, sell or buy
 - Whom to sell to or buy from
 - Who will win a bid
 - Whether or not to do business with someone

Extreme Penalties

- **Epson Imaging Devices** - (2009) - USD\$26M
- **Asiana Airlines** - Air Cargo (2009) - USD\$50M
- **Hitachi Displays** – LCD Panels (2009) - USD\$31M
- **LAN - Aerolinhas Brasileiras** – Air Cargo (2009) - USD\$109M
- **EI AL** - Air Cargo (2009) - USD\$15.7M
- **LG Display** - LCD panels (2008) - USD\$400M
- **Sharp** – LCD panels (2008) - USD\$120M
- **Chunghwa Picture Tubes** – LCD panels (2008) - USD\$120M
- **Cathay Pacific** - Air Cargo (2008) - USD\$60M
- **Martinair** - Air Cargo (2008) - USD\$42M
- **SAS** - Air Cargo (2008) - USD\$52M
- **Air France-KLM** – Air Cargo (2008) - USD\$350M
- **Japan Airlines** - Air Cargo (2008) - USD\$110M
- **Qantas** - Air Cargo (2008) - USD\$50M
- **British Airways** – Air Cargo (2007) - USD\$300M
- **Korean Air Lines** – Air Cargo (2007) - USD\$300M
- **Samsung** - DRAM (2006) - USD\$300M
- **Hynix** - DRAM (2006) - USD\$185M
- **DuPont Dow** - Chloroprene (2005) - USD\$84M
- **Mitsubishi** - Graphite Electrodes (2001) - USD\$134M
- **Hoffman-La Roche** - Vitamins (1999) - USD\$500M
- **BASF** - Vitamins (1999) - USD\$225M
- **SGL Carbon** – Graphite Electrodes (1999) - USD\$135M

Criminal Investigations vs. Civil Litigation Discovery

- **Criminal investigation**
 - Search warrants; wire taps; undercover operations
 - Grand jury testimony
 - Growing international law enforcement coordination

- **Civil litigation discovery - Very costly**
 - Written Interrogatories and Requests for Admissions
 - Depositions
 - Production of written documents and “electronically stored information”
 - E-discovery of e-mail, presentations, sales and production data
 - May include personal records (e.g., planners, diaries, datebooks)

Proof of “Agreement” Between Competitors

- “A wink and a nod” are enough to establish an agreement.
- An agreement may be oral or written, formal or informal.
- An agreement may be proven per circumstantial evidence.
- An agreement can be inferred from parallel conduct plus factors that make collusion more likely.
 - Trade association activities
- An agreement need not be implemented - the offence is in act of agreement itself.
- Intent is not necessary to establish an agreement.
- Simply discussing competitively sensitive topics could create an “opportunity to conspire.”

Permissible Agreements

- Agreements between corporate affiliates are legal, even if they are competitors.
 - “A corporation cannot conspire with itself.”
- Legitimate Joint Ventures
 - Benefit customers: R&D, new products, more production, cheaper production
 - No joint market power: together <35% share
 - No joint control of prices and output

Relationship with Competitors: Guidelines

- Corporate directors/officers/employees/agents **are not to enter into any agreement** with a competitor about "off-limit" topics:
 - ❑ Price (or anything affecting price) and other selling terms
 - ❑ Bids
 - ❑ Allocation of customers/territories/products
 - ❑ Boycotts
 - ❑ Future plans/strategies (e.g., R&D)
 - ❑ Distribution practices
 - ❑ Dealings with customers/suppliers
 - ❑ Anything else affecting competition (e.g., production capacity/purchase of supplies)
 - ❑ Market-place reactions to public policy

- If other participants persist in problematic conversation, make a "noisy withdrawal."

Relationship with Competitors: Guidelines

- Memorialize reasons and content of any meeting/discussion with competitors.
 - There is no such thing as an "off the record" discussion.
- Corporation to make all pricing and other competition-related decisions independently of competitors and other third parties.
 - Basis for defense
 - Document reasons for decisions
- Corporation should have antitrust compliance guidelines and a compliance officer.

Specific Issues: Competitive Intelligence

- Corporation can obtain market intelligence about a competitor from:
 - Customer/supplier
 - Experts/consultants
 - Publicly available information

- **BUT...**
 - **DO NOT** attempt to obtain competitive information from competitors;
 - **DO NOT** use customers/suppliers as conduit to exchange information/reach agreements with competitors; and
 - **DO NOT** enter into, facilitate or become unwitting party to unlawful agreement involving or affecting other customers/supplier

- **And document the source of the information.**

Specific Issues: Mergers/Joint Ventures

- Corporation can discuss potential acquisitions/sales/ joint ventures with competitors.

- **BUT:**
 - **DO** limit discussions to evaluating merits of transaction.
 - **DO NOT** use as pretext to exchange competitively sensitive information.
 - **DO** establish procedures to control what type of information is exchanged and who can access it.

- **AND** involve legal counsel.

Specific Issues: Competitor as Customer/Supplier

- Corporation can enter into *bona fide* customer/supplier arrangements with competitors.
- **BUT:**
 - ❑ **DO** restrict discussions to those legitimate arrangements; and
 - ❑ **DO NOT** use relationship as vehicle to engage in otherwise unlawful discussions/arrangements.

Specific Issues: Participation in Trade Associations

- Noerr-Pennington doctrine - corporations can participate in trade associations
 - Corporations have a right to political speech
 - Can coordinate for public policy advocacy

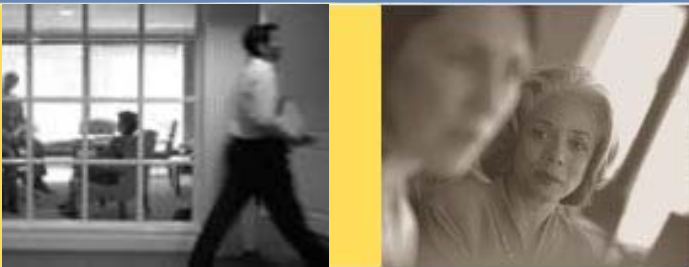
- **BUT:**
 - Be careful that meetings or even normal social interchanges do not lead to potentially illegal conduct
 - Avoid “off-limit” topics.

Specific Issues: Participation in Trade Associations

- Potential issues include:
 - Data exchange and market analysis
 - Membership restrictions
 - Standard setting
- Involve legal counsel
 - Require compliance with topic restrictions (e.g., avoid “off-limit” subjects)
 - Prepare agenda (stated objectives), and do not deviate
 - Prepare minutes or memorandum (stated outcomes)

Obrigado.

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