

The Complete Compliance and Ethics Manual 2023

Federal Antitrust Law Risks

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Overview

The United States relies on a number of different statutes to protect competition and, in so doing, ensure that consumers have access to a variety of goods and services offered at competitive prices. This brief overview discusses four of the statutes most likely to pose compliance risks for companies that sell, purchase, or resell goods or services for consumption by US consumers: Sections 1 and 2 of the Sherman Antitrust Act,^[4] Section 5 of the Federal Trade Commission (FTC) Act,^[5] and the Robinson-Patman Act.^[6] Except for Section 5 of the FTC Act, each of these statutes may be enforced in private actions in which consumers, competitors, or distributors seek treble damages. For all statutes, the government may bring a civil suit for injunctive relief. The government may also seek to impose criminal liability on the company and the individuals involved under Section 1 of the Sherman Act for certain kinds of illegal conduct, such as bid rigging or price fixing.

In 2021, the Department of Justice (DOJ) charged 29 executives and 14 companies with criminal antitrust conduct. Since 2012, the DOJ has obtained more than \$8 billion in criminal fines. The average prison sentence in criminal antitrust cases between 2020 and 2021 was 15 months.^[7] Given the threat of treble damages and attorneys' fees, private lawsuits regularly settle for amounts in the hundreds of millions of dollars. Defending an antitrust action, whether brought by the government or a private plaintiff, and regardless of the outcome, is itself a costly and lengthy exercise that consumes significant and scarce company resources, such as the attention of senior management and sales managers.

What follows is an introduction to these statutes, the kinds of conduct they prohibit, and some suggestions for minimizing the risks they pose. A list of more in-depth reference materials is included at the end of this article.

Identification of Section 1 Risks

Section 1 of the Sherman Act^[8] prohibits concerted conduct that has the effect of unreasonably restraining competition. The prohibited conduct includes both arrangements among actual or potential competitors, which are called horizontal restraints, and arrangements among firms at different levels of the supply chain, such as a distributor and a manufacturer, which are called vertical restraints. Typical horizontal restraints include price fixing, bid rigging, territorial and customer allocation agreements, and concerted refusals to deal. Typical vertical restraints include interbrand restraints that result in exclusionary effects (conduct including tying and exclusive dealing) and intrabrand restraints that demonstrably harm competition (conduct such as resale price maintenance and exclusive distributorships). To promote antitrust compliance, it is important to understand not only the types of restraints that may violate Section 1 but also the standards used to measure whether such restraints "unreasonably" restrict competition.

Section 1 Claims

1. Standard for Liability. Section 1 imposes liability on persons (including corporations and associations) who

make or engage in any “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.”^[9] The elements that a plaintiff must establish to prove a violation of Section 1 may be summarized as follows:

- **Contract, Combination, or Conspiracy among Two or More Separate Entities.** Section 1 applies only to concerted action, meaning that it does not cover unilateral conduct by a single party. Moreover, as long as the parties to the action have demonstrated a commitment to creating or engaging in an unreasonable restraint of trade, their motivations for doing so are irrelevant. An agreement under Section 1 only requires a showing of general intent.

Proof of a contract, combination, or conspiracy can take many forms. An express agreement, such as a formal written contract, is usually the clearest evidence of concerted action. However, this element can also be established based on an implied agreement, which could arise in the absence of written or oral communications. Circumstantial evidence that tends to exclude the possibility of independent action by the parties can establish the existence of an agreement. Circumstantial evidence would include evidence that the defendant acted contrary to its own interest by, for example, cutting output.

- **Effect on Interstate or Foreign Commerce.** Section 1 applies only where the challenged activity involves “trade or commerce” and where the activity affects interstate commerce. In general, only those activities motivated by charitable rather than commercial objectives are immune from Section 1 liability. This holds true without regard to the overall purpose of an organization, be it a corporation or a nonprofit.

An activity will usually be found to affect interstate commerce if it has some effect on the commercial movement of products and services across state borders. Courts have defined the concept of interstate commerce very broadly and, as a result, have held that a wide range of activities affect interstate commerce.

Section 1 only applies to conduct that arose in foreign nations if two jurisdictional requirements are met. First, the conduct must have a direct, substantial, and reasonably foreseeable effect on domestic US commerce or import trade, or on the export commerce of a person engaged in such commerce in the US. Second, the effect on US domestic or foreign commerce must give rise to a Sherman Act violation. Both inquiries—whether the conduct has a direct effect on interstate commerce and whether the effect gives rise to plaintiff’s injury—require a showing that the respective causal link was reasonably foreseeable.

- **Unreasonable Restraint of Trade.** Section 1 only prohibits restraints found to be “unreasonable.” In general, such restraints tend to raise price; reduce output; diminish quality; reduce innovation; or otherwise create, maintain, enhance, or preserve market power. To determine whether an agreement unreasonably restrains competition, courts traditionally have applied one of two analytical frameworks: per se liability and the rule of reason.
 - *Per Se Liability.* Certain types of activities are conclusively presumed to restrain competition unreasonably, such as horizontal price fixing, bid rigging, and market allocation agreements among competitors. The presumption of per se liability removes the need for an examination of the activity’s purpose, the nature and extent of competitive effects, or potential business justifications. The courts are careful to limit the application of per se liability to agreements that plainly and obviously have anticompetitive effects and lack any redeeming value, as the mere existence of such agreements is sufficient to establish an unreasonable restraint of trade.
 - *Rule of Reason.* Most agreements and other concerted activities, whether horizontal or vertical, are analyzed under the rule of reason, the ultimate purpose of which is to determine whether a restraint

promotes competition or suppresses it. The amount of evidence needed to show that a business practice violates the rule of reason varies with the nature of the restraint analyzed. In some cases, courts may simply look to quantitative or structural factors in making this determination, such as the percentage of a market that a restraint forecloses from a competitor. In others, they may conduct a more comprehensive or more limited inquiry into the restraint. Generally speaking, two major forms of the rule of reason are applied by courts:

- *Full-Blown Rule of Reason.* This inquiry typically calls for a comprehensive analysis of various economic factors relevant to determining whether the restraint is likely to result in enhanced market power. Even where a restraint is found to be likely to cause substantial anticompetitive harm, courts will usually take into consideration whether it is likely to produce offsetting procompetitive benefits such as increased output, operating efficiencies, or product improvements and innovation. If so, harms and benefits of the conduct will be “balanced” to determine its net effect on competition. While the process of balancing harms and benefits may appear unpredictable, if the ultimate effect of a restraint is to increase price, reduce output, decrease quality, or reduce innovation, it violates Section 1.
- *Quick Look Rule of Reason.* For conduct that is obviously likely to result in consumer harm but is not illegal per se due to possible procompetitive benefits, courts will apply a “quick look” analysis in determining whether the conduct violates Section 1. Under this truncated analysis, a court will consider whether the conduct is so inherently suspect that consumers will likely be harmed. Even so, a defendant may show that the restraint admits of plausible procompetitive benefits in an attempt to avoid liability under this rule.

2. Examples of Section 1 Liability. As noted previously, there are a variety of practices that fall within the scope of Section 1. A few examples of the more commonly litigated practices are illustrated next.

- **Horizontal Restraints—Per Se Violations**

- **Agreement Affecting Price:** Competing wholesalers conspire to standardize credit terms offered to a purchaser. In terms of its anticompetitive effect, this conduct is just as harmful to consumers as an explicit agreement to jointly raise prices and constitutes a per se violation.
- **Agreement Affecting Output:** Producers of plumbing fixtures agree to cease production of a line of lower-priced fixtures. In terms of its anticompetitive effect, limiting output is at least as harmful to consumers as an agreement to fix prices and constitutes a per se violation.
- **Price Fixing among Buyers:** Egg distributors conspire to fix and depress the prices at which eggs are purchased from egg producers, which constitutes a per se violation.
- **Bid Rigging:** Individuals conspire to rig bids at foreclosure auctions by refraining from bidding against one another and deciding who would win certain auctions. This conduct is per se illegal.
- **Agreement Allocating Sales Territories:** Two providers of bar review services that previously competed in the same state execute a market allocation agreement and covenant not to compete with each other in the same geographic markets. Market division agreements are also per se illegal.
- **Price Fixing among Sellers:** Realtor associations combine their multiple listing service (MLS) databases into a single database and fix a single MLS fee for all subscribers without providing any legitimate efficiency-related justification for doing so.

- **Market Intervention by Sellers:** Oil companies agreed to divide up the spot market for gasoline and purchase spot-market gasoline at market prices whenever available. This stabilized pricing for gasoline and allowed oil companies to charge more at the retail level. This interference with the free play of market forces constitutes a per se violation.
 - **Group Boycott:** Attorney members of the bar association agree to stop representing indigent criminal defendants unless the District of Columbia increases their compensation. This restraint on price and output is per se illegal.
 - **“No Poach” Agreement:** Employers at two large technology companies agree to not cold call each other’s software engineers about prospective employment opportunities as well as limit the number of engineers each hires from the other’s company. A healthcare company was indicted on criminal charges for similar per se illegal conduct in 2021.
- **Horizontal Restraints—Rule of Reason**
 - **Arrangement Incidentally Affecting Price:** Holders of copyrights to musical compositions agree on a fee for a blanket license to all their compositions. Although this is an agreement on price, it is subject to the rule of reason because the agreement is necessary to create a new and more efficient product, namely, the blanket license.
 - **Concerted Refusal to Deal:** A wholesale purchasing cooperative, comprising various office supply retailers that collectively have market power within a specific geography, decides to exclude a retailer from the cooperative and refuse to sell to the retailer at the wholesale level, even though there are no efficiency benefits to be gained from doing so. This type of agreement to exclude a competitor without a procompetitive justification violates the antitrust laws.
 - **Information Sharing:** Competing cable companies agree to exchange nonpublic and competitively sensitive information about negotiations with a particular content provider, including their companies’ future plans about whether to carry the provider’s channel. By facilitating collusion, this agreement harms competition and will violate the rule of reason unless any procompetitive benefits are ultimately shown to outweigh the anticompetitive harm.
 - **Patent Settlements:** A brand pharmaceutical company agrees to settle patent disputes with two generic manufacturers. In exchange, the generics received millions of dollars and agreed not to launch their products for nearly ten years. This type of agreement is analyzed under the rule of reason to determine whether the payment reflects legitimate value, such as saved litigation costs, or is simply a payment to keep competitors off the market and maintain higher pricing.
 - **Quality Certifications:** A trade association for egg producers announced a set of welfare standards for egg-laying hens. Plaintiffs alleged that these standards were a ploy to restrict supply and raise prices. Defendants demonstrated that the standards did not restrict output and may have actually expanded output by preventing health problems in hens. The economic effects of this agreement were unclear and therefore did not warrant per se treatment. The court had to weigh the evidence to determine whether the standards had the net effect of increasing prices and restricting output.
 - **Vertical Restraints**
 - **Minimum Resale Price Maintenance:** A leather goods manufacturer enters into agreements with retailers to charge prices no lower than those fixed by the manufacturer. Under a rule of reason analysis, the manufacturer’s pricing policy is likely lawful, particularly if strong efficiencies result

from the policy. But under a number of state laws, the arrangement would be per se illegal, as it previously was under federal law.

- **Territorial Restrictions:** A television set manufacturer divides regional markets across its retail franchisees and requires them to sell only in their own franchise area, where each is the exclusive seller. Under a rule of reason analysis, the possible harm caused by the practice (facilitating collusion among the franchisees) will need to be balanced with its procompetitive effects, such as inducing the franchisees to invest in marketing and other promotional programs.
 - **Tying:** A financial services company implements a policy that requires merchants that accept the company's credit cards to also accept its debit cards, which have an artificially inflated transaction fee and as to which the company faces competition from smaller debit card providers. The company is using its power in the credit card market to restrain competition in the debit card market, which can constitute an unlawful tying arrangement. Rather than condemn tying as per se unlawful when done by a firm with market power in the tying market, some courts appear to have required a plaintiff to show that the tying arrangement results in coercive foreclosure that harms consumers.
 - **Exclusive Dealing:** A manufacturer enters into a five-year agreement to be the exclusive buyer of a supplier's products. The supplier has a substantial share in the upstream supply market and is otherwise the most efficient source of supply for the manufacturer and its rivals. Through the exclusive dealing arrangement, the manufacturer is able to foreclose its rivals from inputs they need to compete. As a result, the manufacturer is able to raise the costs of its rivals and obtain greater market power in the downstream market.
 - **Market Share Discounts:** A manufacturer enters into a series of long-term supply agreements that offer its dealer customers substantial discounts tied to market penetration and purchasing targets relative to other competitors. These "de facto" exclusive dealing agreements may require dealers to purchase most of their supply from the manufacturer, effectively locking competitors out of the market. The manufacturer would therefore be able to drive out competition, not because competitors could not compete with its prices, but because the agreements foreclosed them from the opportunity to compete and harmed consumers.
 - **Customer Steering:** A credit card company implements rules in its contracts with merchants prohibiting them from steering customers away from using competitors' credit cards at the point of sale. The effect of these restraints on merchants must be weighed against the benefits to credit card users. These kinds of restraints may be illegal if plaintiffs can demonstrate anticompetitive effects on the combined consumer and merchant market as a whole.
 - **"No-Hire" Franchise Agreements:** A national sandwich chain requires its franchisees to not hire any employee of another franchisee for one year after their employment ended. This type of agreement can be used to drive down wages and restrict employee mobility. However, the franchisor and franchisees may be able to demonstrate that these restraints are needed to encourage new franchises to enter the market or that these agreements do not affect wages due to the presence of competing sandwich chains. This area of the law is still in flux. Courts deciding motions to dismiss have come to conflicting conclusions on whether these types of agreements should be analyzed under the per se, quick look, or rule of reason framework.
 - **Most-Favored Nation Clauses:** A distributor of e-books requires that publishers not charge it higher prices than charged to any other e-book distributor. A rival distributor has a policy that most major
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e-books will be priced at \$9.99, including new releases and best sellers. The publishers agree to the most-favored nation clause to, in effect, conspire among themselves to fight the rival distributor's practice of selling best sellers at a uniform (lower) price. These agreements are potentially anticompetitive as a means to facilitate collusion and increase prices.

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