

United States

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

Mergers and acquisitions are governed primarily by section 7 of the Clayton Act (*15 USC § 18*), which prohibits transactions that may substantially lessen competition or that tend to create a monopoly.

The Department of Justice's Antitrust Division (DOJ) and the Federal Trade Commission (FTC) are primarily responsible for enforcing the federal anti-trust laws. State attorneys general (AGs) can also challenge mergers under federal and state anti-trust laws.

The Hart-Scott-Rodino Act (*15 USC § 18a*) (HSR Act) requires that transactions meeting specific size-of-party and size-of-transaction thresholds must be notified to the DOJ and FTC before closing and not close until certain statutory waiting periods have elapsed or been terminated. However, even transactions which do not require HSR notification are subject to government review under section 7 of the Clayton Act and other anti-trust laws.

Triggering events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

The HSR Act applies to:

- Mergers.
- Consolidations.
- Acquisitions of voting securities, non-corporate interests and certain assets.
- Formations of joint ventures and partnerships.
- Acquisitions of certain exclusive licences.

Thresholds

A transaction must be notified to the DOJ and FTC if it meets the following thresholds:

- The value of the transaction exceeds US\$66.0 million (as at 1 November 2010, US\$1 was about EURO.7) but is less than US\$263.8 million and if:
 - one party has US\$131.9 million or more in annual net sales or total assets; and
 - the other party has US\$13.2 million or more in annual net sales or total assets.
- The value of the transaction exceeds US\$263.8 million.

The size of the transaction includes the value of voting securities and non-corporate interests, and in some circumstances the assets, of the target held by the acquiring party prior to and as a result of the transaction.

The size of the parties is determined by the annual net sales or total assets of the ultimate parent entity of each of the parties to the transaction.

These thresholds are revised annually to adjust for inflation.

Exemptions

The following transactions are exempt from notification:

- Acquisitions of certain goods and real estate in the ordinary course of business.
- Certain transactions made only for the purpose of investment if the acquiring party holds 10% or less after the acquisition of the acquired party's voting shares.
- Intra-person transactions (that is, transactions where the same party controls the acquiring entity and at least one of the acquired entities).
- Transactions involving foreign firms.
- Acquisitions by certain government entities.
- Acquisitions subject to review by other government agencies.
- Formation of unincorporated entities where no acquiring party obtains control.

Notification

3. Please give a broad overview of notification requirements. In particular:

- Is notification mandatory or voluntary?
 - When should a transaction be notified?
 - Is it possible to obtain formal or informal guidance before notification?
 - Who should notify?
 - To which authority should notification be made?
 - What form of notification is used?
 - Is there a filing fee? If so, how much?
 - Is there an obligation to suspend the transaction pending the outcome of an investigation?
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Mandatory or voluntary

HSR notification is mandatory if the transaction meets the thresholds and is not exempt (see *Question 2, Thresholds and Exemptions*).

Timing

A transaction can be notified at any time after the parties reach a letter of intent or binding agreement. While there is no filing deadline, the statutory waiting period does not begin to run until the parties have correctly notified the DOJ and FTC.

Formal/informal guidance

Parties can seek informal guidance (on an anonymous basis) from the FTC's Premerger Notification Office (PNO) on pre-merger notification and filing requirements.

Responsibility for notification

Both parties to a transaction, which meet the thresholds, must make an individual filing. However, in the case of tender offers and formations of joint ventures, only the acquiring party or parties must file.

Relevant authority

Filings must be made with both the DOJ and FTC.

Form of notification

Filings must be submitted using the HSR Notification and Report Form (Form), which requires information on the:

- Parties':
 - corporate structure;
 - nature of business; and
 - revenues.
- Structure of the transaction.

The filing must also include:

- Any relevant agreements.
- Various regularly prepared reports.

- Company materials, prepared by or for officers or directors, regarding the competitive aspects of the transaction (Item 4(c) documents).

The Form and instructions for notification are available from the PNO and at www.ftc.gov/bc/hsr/hsrform.shtm.

Filing fee

The acquiring party must pay a filing fee, determined by the transaction's size, which ranges from US\$45,000 to US\$280,000.

Obligation to suspend

See *Question 4, Initial waiting period*.

Procedure and timetable

4. Please set out the procedure and timetable.

Initial waiting period

Parties must wait 30 calendar days after filing (15 calendar days for cash tender offers and certain bankruptcy proceedings) before they can complete their transaction (*HSR Act*). However, the DOJ and FTC can grant early termination of the waiting period if requested by the parties and the DOJ and FTC choose not to investigate.

Both the DOJ and FTC conduct a preliminary review of notified transactions. If both the DOJ and FTC choose to investigate further, they will decide through a clearance process which regulator will conduct the investigation. The decision is usually based on industry expertise.

During the initial waiting period, the reviewing agency can:

- Request voluntary submissions of information, such as customer lists and marketing plans.
- Interview executives of the notifying parties.
- Contact relevant third parties, such as competitors, customers and suppliers.

The notifying parties can request meetings with the reviewing agency and submit position papers addressing the reasons for the transaction and its likely competitive effects.

If early termination is not granted, the reviewing agency can allow the waiting period to expire or issue a request for additional information and documents (second request).

Second request and extended waiting period

A second request includes requests for further information, including data and documents. Requests can be substantial and the notifying parties can negotiate with the reviewing agency to narrow the scope, such as limiting the issues to be addressed or number of executives required to produce documents.

The reviewing agency has the right to:

- Interview party executives and relevant third parties informally or under oath.
- Issue voluntary request letters to third parties for information and documents.
- Issue compulsory process requiring the submission of documents by third parties.

Once the parties have substantially complied with the second request, the reviewing agency has a 30-day review period (ten days for cash tender offers and certain bankruptcy proceedings), which is often extended by the parties' consent, to determine whether to:

- Allow the parties to complete the transaction.
- Enter into a consent order requiring the parties to take certain actions to alleviate anti-competitive concerns (see *Question 8*).
- Seek a preliminary (DOJ and FTC) or permanent (DOJ only) injunction in federal court to block the transaction.
- Initiate an administrative proceeding before an administrative law judge (FTC only).

In the absence of a preliminary injunction, the parties can close the transaction while a decision is pending in an administrative or judicial proceeding.

Failure to issue a second request or challenge the transaction does not prevent the DOJ or FTC from challenging a completed transaction. Additionally, state AGs and private parties can challenge completed transactions.

For an overview of the notification process, see flowchart, *United States: merger notifications*.

Confidentiality

5. In relation to merger inquiries:

- How much publicity is given?
 - At what stage of the procedure is information released?
 - Is certain information automatically kept confidential?
 - Can the parties request that certain information be kept confidential?
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Publicity

HSR notifications (and subsequent information submitted) are confidential under the HSR Act and exempt from disclosure under the Freedom of Information Act unless the parties request and are granted early termination. Early termination notices are published with the parties' names in the Federal Registrar and online at www.ftc.gov/bc/earlyterm/index.html. However, the existence of an investigation into a transaction can become clear to third parties interviewed by the reviewing agency (see *Question 4*).

Procedural stage

The DOJ and FTC can disclose confidential information in an administrative or judicial proceeding if the transaction is challenged. Consent orders between the parties and a reviewing agency are also published and subject to a public comment period (see *Question 8*).

Automatic confidentiality

All information provided by the parties pursuant to the HSR Act is automatically kept confidential (see *above*, *Publicity*). Information obtained through compulsory process must also be kept confidential.

Confidentiality on request

The parties can seek a protective order to prevent disclosure of confidential information during litigation and, after the investigation is closed, can request the return or destruction of materials provided to the agencies.

Rights of third parties

6. Can third parties be involved in the procedure and, if so, how? What rights do they have to make representations, access documents or be heard?

Although there is no formal procedure for third parties to participate in merger investigations, the DOJ and FTC routinely contact third parties to conduct voluntary interviews and obtain information about the market and potential competitive effects of the transaction. The agencies can also use compulsory process to obtain oral testimony, documents and other information from third parties.

Third parties can request a meeting with the DOJ or FTC to express concerns and submit information to illustrate potential anti-competitive effects. In addition, third parties can comment on negotiated consent orders during the public comment period. However, the DOJ or FTC usually cannot share information or documents with third parties in relation to an investigation.

Third parties can also independently challenge a transaction in court if they will suffer anti-competitive harm from a transaction.

Substantive test

7. What is the substantive test?

The substantive test is whether the transaction may result in a substantial lessening of competition or tend to create a monopoly (*section 7, Clayton Act*).

The DOJ and FTC have jointly issued Horizontal Merger Guidelines (Guidelines), available at www.ftc.gov/os/2010/08/100819hmg.pdf, which outline the framework and analytical techniques the agencies use in reviewing proposed transactions. The Guidelines are designed to detect mergers that may create or enhance the merged entity's market power to (§ 1, *Guidelines*):

- Increase prices.
- Reduce output.
- Diminish innovation.
- Engage in exclusionary conduct toward competitors.

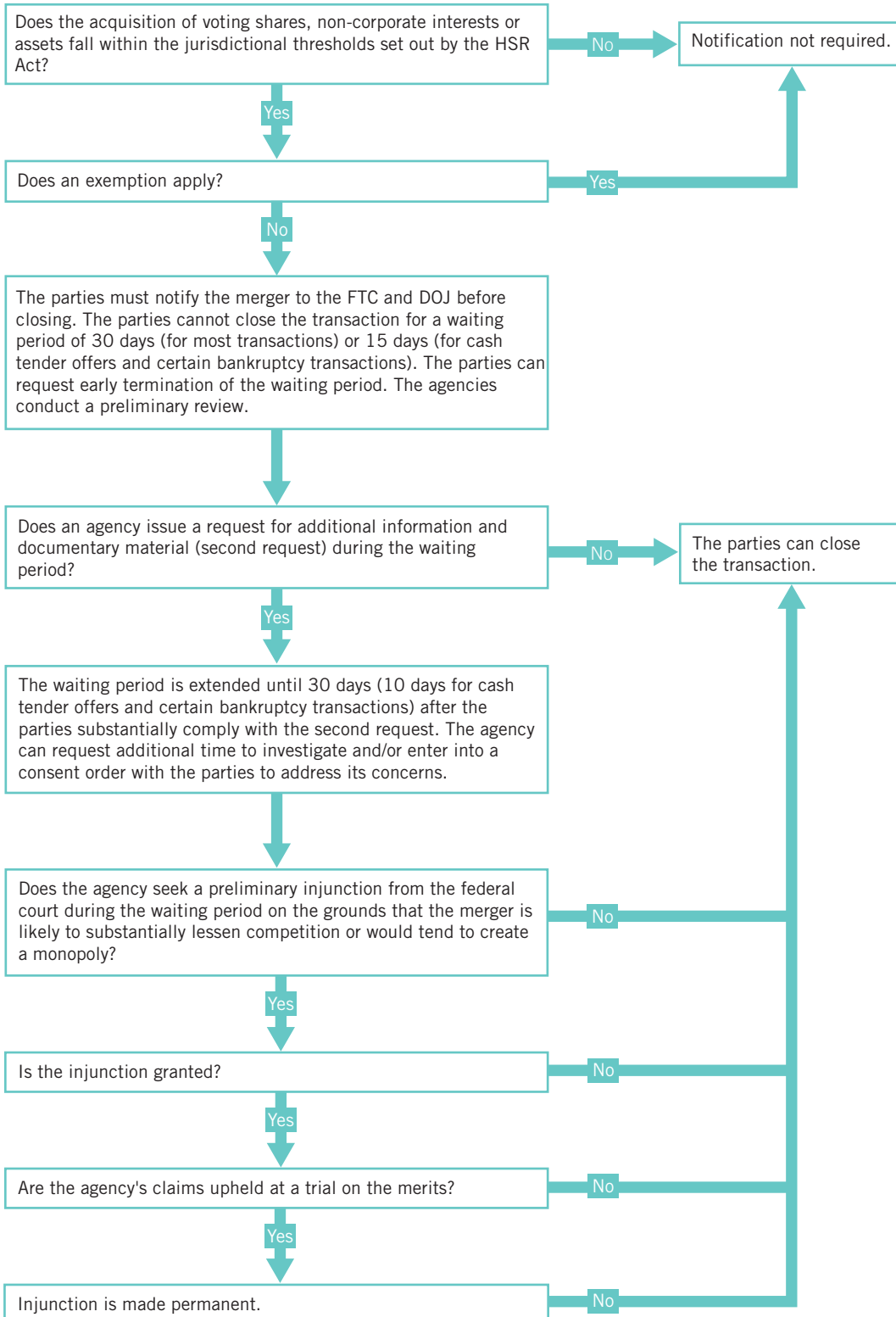
The FTC and DOJ issued revisions to the existing Guidelines in August 2010 to account for legal and economic developments, and more accurately reflect the agencies' current horizontal merger review process.

Market definition and market concentration

The agencies typically define the relevant anti-trust market(s) to determine the area(s) in which anti-competitive harm can occur and to calculate market shares and market concentration levels in those areas. The agencies can rely on evidence of anti-competitive effects to define the market(s) (§ 4, *Guidelines*).



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Market definition is based on the customers' willingness and ability to substitute other products for either of the merging entities' product(s). The relevant market includes the:

- **Relevant product market.** This is defined to include a product of one merging firm that competes with a product of the other merging firm and the substitutes for that product.
- **Relevant geographic market.** This is, generally, the geographic area where suppliers make sales, including all competing suppliers with facilities in that region, regardless of their customers' location. However, when suppliers can price discriminate based on their customers' location, such as when suppliers deliver the products to customers, the geographic market will be where customers are located.

Adverse competitive effects

If market concentration raises concerns in the relevant market(s), generally the reviewing agency will assess whether anti-competitive effects are likely to result from (§ 2, *Guidelines*):

- **Unilateral effects.** This is the merged firm's ability to unilaterally engage in anti-competitive conduct as a result of the transaction, including increasing prices, reducing output, or diminishing innovation (§ 6, *Guidelines*).
- **Co-ordinated effects.** This is the increased likelihood of coordination among remaining competitors to engage in anti-competitive conduct, such as explicit or implicit agreements to increase prices (§ 7, *Guidelines*).

To determine the likelihood of these anti-competitive effects, the agencies consider:

- The actual effects of a completed merger.
- Relevant events in the industry, such as other mergers.
- The extent to which the merging firms are direct or close competitors.
- Whether the merger removes a maverick firm (that is, one that plays a disruptive role in the market) from the market.
- The existence of powerful buyers that can constrain otherwise potential anti-competitive effects.

Entry analysis

The enforcement agencies will consider whether new entry into the relevant market or expansion by existing competitors constrains the merged entity's market power. To be considered an effective restraint, new entry must be timely, likely, and sufficient to deter or counteract the likely anti-competitive effects from the merger. Entry analysis includes the history of actual entry into (or exit from) the relevant market and the effort required to enter the market (§ 9, *Guidelines*).

Efficiencies

The enforcement agencies will consider potential merger-specific efficiencies that will benefit customers and are unlikely to be obtained without the merger, such as reduced costs and the introduction of new products. However, efficiencies must be substantiated by the merging firms and verifiable by reasonable means (§ 10, *Guidelines*). An efficiencies defence alone will almost never justify an otherwise anti-competitive transaction.

Failing firm defence

The agencies will also consider whether the acquired entity is otherwise likely to fail, and its assets likely to exit the market, making the merger no more anti-competitive than if the acquired firm had been permitted to fail (§ 11, *Guidelines*). However, the failing firm defence very rarely succeeds.

Remedies, penalties and appeal

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The parties can negotiate a consent order with the reviewing agency to resolve remaining anti-competitive concerns at any time during the investigation, including after the regulator has started litigation to block the transaction. Consent orders are subject to a public comment period and either judicial scrutiny (DOJ) or internal agency review (FTC).

Remedies which can be imposed as conditions of clearance to address competition concerns include:

- **Structural.** The most common structural remedy is the divestiture of assets of one of the overlapping businesses to create a viable new competitor in the relevant market. Divestitures can be coupled with behavioural remedies to further minimise harm to competition, including:
 - providing assistance to the purchaser of divested assets;
 - licensing assets;
 - entering or amending certain business agreements; and
 - implementing firewalls to prevent sharing of sensitive information between the merging parties.
- **Behavioural.** In some cases, a behavioural remedy alone can suffice, but the agencies are less confident in the ability of behavioural remedies to maintain competition in the market.

Alternatively, the parties can propose and implement a structural remedy which, if the reviewing agency accepts it, allows the transaction to proceed without a formal consent order. However, this "fix-it-first" remedy is not favoured by the agencies and is not frequently used.

9. What are the penalties for:

- **Failure to notify correctly?**
- **Implementation before approval or after prohibition of the merger?**
- **Failure to observe a decision of the regulator (including any remedial undertakings)?**

Failure to notify correctly

Failure to correctly notify the anti-trust authorities prevents the statutory waiting period from beginning to run.

Implementation before approval or after prohibition

Violations under the HSR Act can result in a civil fine of up to US\$16,000 for each day of the violation, which can be imposed on reporting entities and individual officers and directors. In addition, if a transaction is completed in violation of the HSR Act, the agencies can require a divestiture of voting securities or assets by the merged firm. These penalties can be enforced in a civil action brought by the federal government.

Failure to observe

See above, *Implementation before approval or after prohibition*.

10. Is there a right of appeal against any decision and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

The FTC, DOJ and state AGs must initiate litigation in court to prevent a proposed transaction from closing until after a final determination on the merits. The merging parties can appeal these decisions by a federal district court to the federal court of appeals. In addition to injunction proceedings, the FTC can bring administrative proceedings before an ALJ, which can be appealed to the FTC's full Commission and then to the US Court of Appeals.

Third parties cannot appeal a decision in an action brought by an enforcement authority but can bring a private action to challenge the transaction (see *Question 6*).

Automatic clearance of restrictive provisions

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

The merger review process authorises the relevant authorities to investigate and challenge potentially unlawful transactions. However, the agencies' failure to challenge a transaction or restrictive covenant in the merger agreement does not make such conduct lawful under the anti-trust laws. In addition, failure to object to a restrictive covenant does not prevent the DOJ, FTC, state AGs, or private parties from later challenging the provision in court.

Specific industries

12. Are any industries specifically regulated?

Certain industries are regulated by federal and state agencies that share enforcement powers with the DOJ and FTC, including:

- Railroads.
- Energy and electricity providers.
- Telecommunications companies.
- Banks and other financial institutions.
- Insurance companies.

These regulators can impose additional requirements on merging entities including prior approvals and notifications.

RESTRICTIVE AGREEMENTS AND PRACTICES

Scope of rules

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

Unreasonable restraints of trade are prohibited (*section 1, Sherman Act, 15 USC § 1*). This can be enforced under civil or criminal law by the DOJ and under civil law by state AGs. However, criminal penalties are generally reserved for clearly unlawful conduct. In addition, restrictive practices are subject to civil investigation by the FTC under section 5 of the FTC Act (*15 USC § 45*) and civil or criminal investigation by state AGs under state anti-trust laws. While the DOJ and FTC can only seek injunctive relief for civil anti-trust violations, private parties who suffer direct anti-competitive harm from violations under section 1 of the Sherman Act can bring private actions for triple the amount of actual damages (treble damages) or injunctive relief.

Unlawful restraints of trade generally raise prices, diminish the amount or quality of output or affect market power. To determine whether conduct unreasonably restrains trade, one of two standards is applied:

- **Per se rule.** Certain categories of naked restraints among horizontal competitors are deemed *per se* illegal because their effects almost always harm competition and have been deemed to include horizontal price-fixing, bid-rigging and market allocation.
- **Rule of reason.** The parties' conduct is analysed for its actual competitive effects and will be found unreasonable if its anti-competitive effects outweigh the pro-competitive benefits. This approach considers the relevant market conditions and the restraint's history, nature, and effect in a relevant market.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

Violations under section 1 of the Sherman Act occur only where the restrictive practice results from an agreement between two or more entities. The agreement can be:

- Formal or informal, including tacit agreements between parties.
- Proven by direct or circumstantial evidence that tends to exclude the possibility that the entities acted independently.

Mere parallel conduct by multiple firms, even conscious parallelism after competing firms recognise it is in their best interests to avoid price competition, is not an agreement punishable under section 1 of the Sherman Act.

Exemptions and exclusions

15. Are there any exemptions? If so, please provide details.

There are express statutory exemptions for certain industries and activities, including:

- Insurance companies (where regulated by state laws).

- Organised labour activities.
- Agricultural co-operatives.
- Export trade companies.
- Professional sports leagues.
- Air carriers.

Judicial exemptions from enforcement of the anti-trust laws include:

- **State action doctrine.** This exempts action taken by state and local governments or private parties in accordance with state policy and subject to active state supervision.
- **Noerr-Pennington doctrine.** This affords anti-trust immunity to efforts to influence government action such as agreements to seek legislation or file a lawsuit.

In addition, courts have provided implied immunity to certain activities where enforcement of the anti-trust laws would be incompatible with an existing federal regulatory scheme, such as regulation by the Securities Exchange Commission (*see Credit Suisse v. Billing, 551 US 264 (2004)*).

16. Are there any exclusions? If so, please provide details.

There are no exclusions for *de minimis* restrictive agreements. However, enforcement authorities and courts can choose not to investigate or punish restrictive conduct not likely to have a substantial effect on commerce or competition, such as where the agreeing parties have an insignificant share of market power.

Notification

17. Please give a broad overview of formal notification requirements. In particular:

- **Is it necessary (or, if not necessary, possible/advisable) to notify to obtain an individual exemption or other clearance?**
 - **Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?**
 - **Who should/can notify?**
 - **To which authority should/can notification be made?**
 - **What form of notification is used?**
 - **Is there a filing fee? If so, how much?**
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Notification

There is no notification requirement for restrictive agreements or practices, and a party cannot obtain clearance from the government that proposed conduct is not unlawful. However, parties can limit their exposure to enforcement and damages (being potentially liable only for actual, not treble, damages) by voluntarily notifying the agencies of:

- Joint ventures for research and development.

- Standards development organisations engaged in standards development activity.

Informal guidance/opinion

Under the DOJ's business letter process and FTC's advisory opinion practice, parties can obtain a non-binding statement of the agency's enforcement intentions regarding proposed business conduct.

Responsibility for notification

Not applicable.

Relevant authority

The DOJ and FTC.

Form of notification

There is no official form for voluntary notification or informal guidance.

Filing fee

Not applicable.

Investigations

18. Can investigations be started by:

- **The regulator on its own initiative?**
 - **A third party by making a complaint?**
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Regulators

The DOJ, FTC and state AGs can start investigations on their own initiative.

Third parties

The agencies can also initiate investigations in response to complaints filed by third parties. In addition, third parties can challenge restrictive agreements directly through private actions.

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Third parties have no right to be heard or to access confidential documents obtained during the course of an anti-trust investigation. However, third parties can file complaints with the government and are often permitted (or required) to make representations and submit documents to the reviewing agency. Third parties can also comment on proposed consent agreements before they are implemented (*see Question 23*).

20. Please set out the stages of the investigation and timetable.

Investigation

There is no set procedure for investigating restrictive conduct and the duration of an investigation depends on the type of conduct at issue and whether the investigation is civil or criminal.

Once an enforcement authority elects to investigate restrictive conduct and clears the investigation with the other agency, the regulator can conduct a preliminary investigation, including requests for voluntary submissions from and interviews with the target firms and relevant third parties. If the agency believes an anti-trust violation may have been committed, it can proceed directly to a formal investigation using compulsory process to obtain documents, testimony, and answers to interrogatories.

Post-investigation

Following a completed investigation, the reviewing agency can bring a civil action for injunctive relief in court or before an ALJ (FTC only). The full litigation and appeal process can take years. At any time during the investigation, the parties can attempt to negotiate and enter a consent agreement with the reviewing agency to avoid litigation (*see Question 23*).

Criminal prosecution

If the DOJ decides that criminal prosecution is more appropriate, the agency can open a grand jury investigation and obtain similar discovery through grand jury subpoenas and other discovery tools. The DOJ then decides whether to seek an indictment from the grand jury, enter a plea agreement, or terminate the investigation.

21. In relation to an investigation into a potentially restrictive agreement or practice:

- What details (if any) of the investigation are made public?
- Is certain information automatically kept confidential?
- Can the parties (or third parties) request that certain information be kept confidential?

Publicity

The enforcement agencies or the parties can disclose the existence of an anti-trust investigation. However, investigations generally remain private and confidential until the reviewing agency terminates the investigation, files a complaint, or the parties release a public statement regarding the investigation.

Automatic confidentiality

Information submitted to the enforcement authorities is protected from public disclosure by statute. However, information or documents can be disclosed in connection with litigation or an administrative proceeding. In a criminal investigation by the DOJ, Rule 6(e) of the Federal Rules of Criminal Procedure requires that grand jury proceedings and information disclosed in these proceedings must be kept confidential. However, the rule does not prevent witnesses from disclosing information.

Confidentiality on request

To prevent disclosure of voluntarily submitted information without prior notice by the government, the parties can:

- Request written assurance from the DOJ that the information will be kept confidential.
- Mark information as confidential to the FTC and DOJ.

During litigation, the parties can attempt to prevent disclosure of commercially sensitive information with a protective order but courts generally favour a more liberal approach to disclosure.

22. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

Civil investigations

In addition to requests for voluntary submissions of documents and informal interviews, the enforcement agencies can issue subpoenas or civil investigative demands requiring the production of documents, responses to interrogatories and oral testimony from target entities and third parties. If an enforcement authority commences litigation, it can then use the broad discovery allowed under the Federal Rules of Civil Procedure and corresponding state rules.

Criminal investigations

The DOJ and state AGs can also employ various methods to obtain information, including:

- Grand jury subpoenas.
- Search warrants.
- Wiretaps.
- Electronic surveillance.

23. Can the regulator reach settlements with the parties without reaching an infringement decision (for example, by accepting binding or informal commitments)? If so, please summarise the procedure and the circumstances in which settlements can be reached.

Civil investigations

The reviewing agency can enter into a consent order requiring the parties to discontinue the restrictive practice at any time. Consent order agreements proposed by the FTC are subject to a 30-day public comment period before the Commission's vote to issue the order. Consent decrees proposed by the DOJ must be approved by the Assistant Attorney General (AAG), accompanied by a competitive impact statement, and filed in federal district court. Consent decrees are then published in the Federal Register and subject to a 60-day public comment period. Following the public comment period, the court must find the settlement to be in the public's best interest before entering the decree. In both cases, parties to consent agreements do not admit liability.

Criminal investigations

The DOJ often enters into plea bargaining discussions. A plea agreement must be approved by the AAG and accepted by a federal district court to become effective.

Many state AGs have similar procedures for settling anti-trust investigations.



Penalties and enforcement

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice? In particular:

- What orders can be made?
- What fines can be imposed on the participating companies? What are the consequences if they are not paid?
- Can personal liability, including fines, attach to individual directors or managers?
- Is it possible to obtain immunity/leniency from any fines?
- Can an entire agreement be declared void (that is, not only any restrictive provisions)?

Orders

If an ALJ decides that section 5 of the FTC Act has been violated, the FTC can issue a cease and desist order requiring termination of the restrictive conduct. The FTC can also seek disgorgement or restitution in court, although these remedies are rarely sought in anti-trust cases. The DOJ and state AGs cannot issue orders, but can seek civil remedies or criminal sanctions by initiating litigation in court. In addition, all enforcement authorities can enter into consent agreements with the target parties.

Fines

The following fines can be imposed on the participating companies:

- A civil penalty of up to US\$16,000 can be imposed for each violation, or each day of a continuing violation, of an FTC cease and desist order by initiating litigation.
- Criminal penalties of up to US\$100 million for corporations and US\$1 million for individuals can be imposed for violations under section 1 of the Sherman Act prosecuted in court by the DOJ.

Under federal law, the statutory maximum fine can be exceeded and a fine of up to twice the amount of financial gain to parties to the agreement or harm suffered by victims can be imposed.

Personal liability

Individuals can be subject to:

- Criminal fines of up to US\$1 million and a prison sentence of up to ten years for violation of section 1 of the Sherman Act.
- Civil liability for violations of section 1 of the Sherman Act or an FTC cease and desist order in which the individual was personally named. However, individuals are not often the target of civil investigations.

Immunity/leniency

In the case of criminal anti-trust enforcement, the DOJ offers leniency to corporations and individuals if certain requirements are met. This includes:

- **Corporate leniency.** The DOJ grants leniency to a corporation (and its current directors, officers and employees) that:

- reports illegal anti-trust activity before an investigation is initiated or information is received from another source, if the corporation promptly terminated its part in the illegal activity;
- provides continuing and complete co-operation throughout the investigation; and
- was not the sole ringleader in performance of the illegal activity.

Leniency can be available after an investigation has begun if the corporation is the first party to come forward and the DOJ does not yet have incriminating evidence against the corporation.

- **Individual leniency.** Individuals who approach the DOJ on their own behalf to report illegal anti-trust activity will be awarded leniency if:
 - the DOJ has not yet received the information from another source;
 - the individual provides continuing and complete co-operation through the investigation; and
 - the individual was not the sole ringleader in carrying out the illegal activity.

Persons who qualify for leniency can also be entitled to limited exposure to civil damages of only actual damages rather than treble damages.

Impact on agreements

Where an agreement contains a provision that violates the anti-trust laws, the entire agreement can be enjoined in court or terminated by a cease and desist order.

Third party damages claims and appeals

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Third parties who have suffered an anti-trust injury can bring a private action for treble damages or injunctive relief, as well as costs and legal fees (*section 4, Clayton Act*). Class actions are permissible if the criteria for class certification are satisfied. Excluding provisions for treble damages, private anti-trust actions are subject to the same procedural rules applied in other civil litigations.

26. Is there a right of appeal against any decision of the regulator and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

The DOJ and state AGs must initiate litigation to obtain civil relief or impose criminal sanctions for anti-trust violations. Court orders can be challenged on appeal to the appropriate appellate court. ALJ decisions in actions brought by the FTC can be appealed to the Commission. The Commission's final decisions can be appealed to the US Court of Appeals and, ultimately, to the US Supreme Court.



MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, please give a broad overview of the substantive provisions and regulatory authority.

The following are prohibited (*section 2, Sherman Act*):

- **Monopolisation.** A violation exists if the defendant:
 - possesses monopoly power in the relevant market; and
 - has engaged in exclusionary conduct to obtain or preserve monopoly power.
- **Attempted monopolisation.** A violation exists if the defendant has engaged in exclusionary conduct with the specific intent to obtain a monopoly resulting in a dangerous probability of obtaining monopoly power.
- **Conspiracy to monopolise.** A violation exists if:
 - two or more entities enter a combination or conspiracy;
 - there is specific intent to monopolise; and
 - an overt act is taken in furtherance of this conspiracy.

Only monopoly power obtained or preserved through anti-competitive conduct, with no legitimate business justification, violates the anti-trust laws. Not all monopolies are unlawful, such as those obtained through:

- Superior business acumen.
- A superior product.
- A historical accident.

The DOJ and state AGs enforce section 2 of the Sherman Act directly and the FTC investigates monopoly-related conduct under section 5 of the FTC Act. The DOJ and state AGs can impose criminal penalties under section 2 of the Sherman Act and state anti-trust laws respectively. However, criminal investigations under section 2 of the Sherman Act are highly unusual. In addition, third parties directly harmed by anti-competitive conduct can bring private actions for civil remedies.

28. How is dominance/market power determined?

Courts have defined monopoly power as the ability to maintain prices above a competitive level or exclude competitors from the relevant market. Monopoly power can be proven by:

- Direct evidence of control over prices.
- Direct evidence of exclusion of competitors.
- Indirect evidence such as market share, high barriers to entry and specific market characteristics.

Courts have generally found that a defendant having a market share in excess of 70% is *prima facie* evidence of monopoly power in the relevant market, especially where there are high barriers to entry or increased competitor output. Where a defendant has a market share of 50% or less, courts rarely find that monopoly power exists. In an attempted monopoly case, courts:

- Generally find a dangerous probability of monopoly power where the defendant possesses a market share of 50% or more.
- Are unlikely to find a violation where the defendant's market share is between 30% and 50%.
- Almost never find a violation where the defendant's market share is less than 30%.

29. Are there any broad categories of behaviour that may constitute abusive conduct?

The following types of abusive conduct have been found to violate section 2 of the Sherman Act:

- **Refusal to deal.** This is the refusal to do business with certain suppliers or customers. However, in *Verizon Communications Inc v Law Offices of Cutis V Trinko, LLP, 540 US 398 (2004)*, the Supreme Court concluded that suppliers have no general duty to deal with competitors and, therefore, refusals to deal violate section 2 of the Sherman Act only in limited circumstances, such as where a firm terminates an existing voluntary, and presumably profitable, business agreement without a valid business justification.
- **Exclusive dealing.** These are agreements requiring a buyer to purchase all or almost all of its supplies from one supplier, where that supplier possesses a significant share of the relevant market.
- **Tying arrangements.** This involves tying the purchase of one product to the purchase of another.
- **Predatory pricing.** Pricing below an appropriate measure of cost is anti-competitive where the party has a reasonable prospect of recovering its losses by subsequently driving out competition and raising prices.
- **Misuse of government processes.** A company may engage in anti-competitive conduct through influence over a standard-setting organisation or government standards, bringing sham litigation against a competitor to harm the competitor's ability to do business or fraudulently obtaining government protection from competition.
- **Tortious conduct.** Tortious or otherwise illegal conduct that disparages competitors can violate section 2 of the Sherman Act if it significantly impedes competition.

Exemptions and exclusions

30. Are there any exclusions or exemptions?

There are various statutory exemptions available for various industries and activities (*see Question 15*).

Notification

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, please set out briefly the procedure.

Parties cannot obtain clearance from the regulators through notification. Parties may obtain informal guidance through the DOJ's

THE REGULATORY AUTHORITIES

Department of Justice, Anti-trust Division (DOJ)

Head. Christine Varney (Assistant Attorney General)

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Outline structure. The DOJ is headed by the Assistant Attorney General (AAG) who is nominated by the President and confirmed by the Senate.

The DOJ has 14 litigating sections (including seven field offices), three economic sections, the Appellate Section, the Legal Policy Section, the Foreign Commerce Section and the Executive Office.

The AAG is supported by five Deputy AAGs responsible for:

- Economic analysis.
- International enforcement.
- Criminal enforcement.
- Regulatory matters.
- Civil enforcement.

Responsibilities. The Antitrust Division is primarily responsible for civil and criminal enforcement of the federal anti-trust laws.

Procedure for obtaining documents. Many public documents can be accessed from the DOJ's website, including Business Review letters, case filings, guidelines and policy statements, and press releases.

Federal Trade Commission (FTC)

Head. Jonathan Leibowitz (Chairman)

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Outline structure. The FTC is led by five Commissioners, including the Chairman, who are nominated by the President and confirmed by the Senate. The FTC comprises:

- Bureau of Competition (BC).
- Bureau of Consumer Protection.
- Bureau of Economics.
- Seven regional offices.

The BC, responsible for investigating potential anti-trust violations, is headed by one director and several deputy directors and comprises:

- Premerger Notification Office.
- Four merger divisions.
- Anti-competitive Practices Division.
- Health Care Division.
- Compliance Division.

Responsibilities. The FTC is responsible for civil enforcement of the FTC Act, including preventing unfair methods of competition (anti-trust violations) and unfair and deceptive acts or practices (consumer protection violations).

Procedure for obtaining documents. The FTC's website makes available many public documents including advisory opinions, case filings, guidelines and policy statements, HSR guidance and informal interpretations, press releases, and studies.

business letter process or the FTC's advisory opinion practice. However, such requests are uncommon (see *Question 17*).

Investigations

32. Where different than for restrictive agreements and practices, please explain how investigations are started, the procedures that apply, the rights of third parties, what details are made public and whether the regulator can accept commitments.

The procedure is the same as for restrictive agreements and practices (see *Questions 18 to 21* and *23*).

33. Please summarise the regulator's powers of investigation.

The regulators' powers are the same as for restrictive agreements and practices (see *Question 22*).

Penalties and enforcement

34. What are the penalties for abuse of market power and what orders can the regulator make?

The available penalties and orders are the same as for restrictive agreements and practices (see *Question 24*).

Third party damages claims

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Third parties' rights are the same as for restrictive agreements and practices (see *Question 25*).

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

37. Please explain how joint ventures are analysed under competition law.

Formations of joint ventures are analysed under the Guidelines to determine whether they may substantially lessen competition, or tend to create a monopoly in violation of section 7 of the Clayton Act (see *Question 7*).

Joint venture agreements are also subject to review under section 1 of the Sherman Act prohibiting unreasonable restraints of trade. However, agreements between participants of an efficiency-enhancing joint venture are analysed under the rule of reason, and not deemed *per se* illegal, if they are reasonably related and necessary to achieve the pro-competitive benefits of the enterprise (see *Question 13*). Therefore, in *Texaco Inc v Dagher*, 547 US 1 (2006), the Supreme Court held that the internal pricing decisions of a pro-competitive and legitimate joint venture cannot be deemed *per se* unlawful price-fixing.

A joint venture also is subject to enforcement under section 2 of the Sherman Act if it unilaterally engages in exclusionary conduct to obtain or maintain monopoly power. However, in *American Needle, Inc v Nat'l Football League*, 130 S Ct 2201 (2010), the Supreme Court held that because the 32 football teams comprising the NFL are independently managed and in competition with

each other for business, they are separate economic entities and agreements between them are subject to review under section 1 of the Sherman Act rather than section 2.

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority(ies) in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The US has formal bilateral anti-trust co-operation agreements and informal understandings with foreign countries to obtain co-operation in anti-trust enforcement matters. However, information obtained by enforcement agencies under the HSR Act or through compulsory process remains protected from disclosure and cannot be shared with foreign enforcement agencies without the information provider's waiver.

The US has also entered into bilateral mutual legal assistance treaties with foreign countries for co-operation in criminal anti-trust law enforcement.

PROPOSALS FOR REFORM

39. Please summarise any proposals for reform.

In August 2010, the FTC issued a notice of proposed changes to the HSR Act Form and minor changes to the HSR Rules, and initiated a public comment period ending on 18 October 2010. The Federal Registrar notice is available at www.ftc.gov/os/2010/08/100812hsfrn.pdf.

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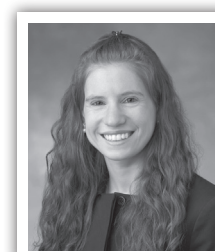
Qualified. New York, 1992

Areas of practice. Anti-trust; litigation.

Recent transactions

- HCA's acquisitions of Heart Hospital of Austin and Texsan Heart Hospital of San Antonio.
- Tyco/ADT's acquisition of Broadview Security.
- Tops Markets/Morgan Stanley acquisition of Penn Traffic Supermarkets.

- JBS Swift acquisition of McElhanev Cattle Co.
- Covidien's acquisition of Triad Isotopes.
- Sirius/XM.
- Smithfield Foods' sale of its Beef Group to JBS Swift and acquisition of Premium Standard Farms.
- PanAmSat in its sale to Intelsat.



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