

CHAPTER 13

Antitrust Laws

A detailed analysis of the antitrust law implications of the target company's activities is not required in every acquisition. Except for the possibility of a target company's participation in unlawful concerted activity, such as price fixing, the need for analysis of the target company's exposure is influenced by the structure of the industry and the relative position of the firm within the industry. If the industry is highly concentrated and has high entry barriers, and if the target dominates or has a leading position in the industry, the target company's trade practices can raise significant antitrust issues.

The following outline identifies the principal types of target-company activities that would indicate the need for further inquiries about possible antitrust violations. It will be apparent that much of the information called for by the outline can be obtained only from the target company, and it cannot be assumed in all cases that the target will be forthcoming with all such information unless a detailed examination of the target's trade practices is contemplated by the acquisition agreement. In many cases the purchaser's officers may be familiar with the target company's practices, and counsel conducting the review should coordinate his or her efforts with such officers. For those situations in which the purchaser's counsel is given access to the target's files and allowed to interview its officers, the concluding section of the outline identifies the sources most likely to produce relevant information.

The inquiries described in this chapter have been framed entirely in respect of issues that may arise under federal antitrust law. Purchaser's counsel also should be aware of applicable state trade regulation and franchise laws and state laws regulating commerce in particular lines of business, and counsel should consider appropriate inquiries under such laws. The essential provisions of federal antitrust laws relevant to examining a target corporation are Sections 1 and 2 of the Sherman Act, Sections 1 and 2 of the Robinson-Patman Act, and Sections 3 and 8 of the Clayton Act. These sections prohibit activities and conspiracies in restraint of trade¹ including, but not limited to, monopolization,² price discrimination,³ exclusive use contracts,⁴ and interlocking directorates and officers.⁵

A. The Target's Relationship with Competitors

Agreements or understandings with competitors, including trade association activities and other cooperative undertakings between competitors, are prime sources of antitrust risk.

___ 1. To uncover any indications of price fixing, counsel should determine the answers to the following inquiries:

___ a. How does the target make its pricing decisions known?

___ b. How does the target obtain information regarding the prices of

competitors?

___ c. Does the target send to or receive price lists from competitors?

___ d. Are there any unusual or suspicious patterns in the pricing activity within the industry that would be difficult to explain in the absence of collusion?

___ 2. The possibility of illegal trade association activities should be considered by pursuing the following inquiries:

___ a. What is the purpose of the trade associations to which the target belongs?

___ b. Which personnel go to trade association meetings?

___ c. Does the target receive the minutes and agenda of association meetings?

___ d. Does the trade association have a lawyer, and does the lawyer attend the meetings?

___ e. Are data on prices collected or exchanged?

___ f. What, if any, cost-reporting, product-standardization, or other arrangements regarding common or joint action have been entered into or discussed?

___ g. Do contacts or conversations take place between target personnel and competitors outside the formal meetings?

___ h. Has the trade association or any of its members recently been involved in antitrust litigation or investigations?

___ i. Have other companies who desired to join the association been excluded from membership?

___ 3. Determine whether the target is a participant in any joint ventures; if so, ascertain the facts, circumstances, and competitive effects.

___ 4. Determine whether the target has joined any competitors to petition the government or engaged in any other joint activity before any government agency. (Although good faith petitioning is permissible, activity that is a mere sham to cover attempts to interfere directly with the business relationships of a competitor is not.)

___ 5. Determine if there have been boycotts or concerted refusals to deal among competitors or between suppliers and customers, either by the target or by another organization or trade group to which the target belongs.

B. The Target's Relationship with Customers and Suppliers

Relations with customers and suppliers may present antitrust problems in the form of resale price maintenance, territorial and customer restriction, requirements contracts, tying arrangements, boycotts, and reciprocal dealing.

___ 1. Determine whether the target suggests resale prices; if so, does it refuse to deal with buyers who do not adhere to those resale prices?

___ 2. Determine whether there are written or oral agreements or understandings with dealers limiting the territory or customers to which they may resell:

___ a. Does the target require information about the territory or customers to which its distributors resell, or engage in any policing activities to enforce such restrictions?

___ b. Has the target terminated any distributors based on failure to adhere to territorial or customer restrictions?

___ 3. Examine distributorship agreements to determine the existence of requirements and exclusive dealing contracts that limit the purchaser from buying goods from firms other than the target.

___ 4. Establish whether customers purchase competitive items from other firms, and if not, why not.

___ 5. Examine recent terminations of customers or dealers:

___ a. Review all agreements, written correspondence, and memoranda relating to the termination.

___ b. Verify that the termination was not pursuant to an agreement or understanding with any other person.

___ 6. If the target sells or leases two or more distinct products, determine whether customers are permitted to buy each separately, or whether they are forced to take both in order to obtain either.

___ a. If so, discover whether a valid business justification can be shown, such as the necessity of protecting consumer goodwill.

___ 7. Determine whether there is any evidence of reciprocity where the target's purchases from a supplier are based upon the supplier's patronage of the target:

___ a. Discover any records by which purchases and sales to particular firms are compared or matched.

___ b. Discern whether purchase figures are distributed to sales personnel or sales figures to purchasing officials.

C. Price Discrimination

___ 1. Determine whether the target engages in price discrimination by selling the same product at different prices to customers who are in competition, either directly or indirectly.

___ a. If so, was the lower price necessary to meet an equally low price of a competitor on a specific sale?

___ 2. If quantity discounts are given, verify that they can be cost justified in terms of demonstrable cost savings in selling that quantity of product to that customer.

___ 3. If functional discounts are given, confirm that they are based on valid differences in the actual business functions of buyers, such as the difference between wholesalers and retailers.

___ 4. Ascertain whether advertising or sales promotional materials or allowances have been provided to one customer but not to all competing customers in the same class.

___ 5. Identify any deviations from current price lists or from promotional plans.

D. Monopolization and Attempted Monopolization

___ 1. If the target has sufficient market power to support an allegation of either monopolization or attempted monopolization, determine whether there have been corporate actions that would constitute monopolizing conduct:

___ a. Has the target engaged in conduct calculated to injure or discipline specific firms, e.g., actions to deny specific competitors access to scarce resources, or price cuts affecting particular firms or segments of the market?

___ b. Have any such predatory actions driven one or more competitors from the market?

___ c. Has the target engaged in activities that essentially raise its competitors' costs without lowering its own, or that will be profitable only if competitors are eliminated or competition is reduced?

E. Patent and Trademark Licensing Agreements

___ 1. Examine patent and trademark licensing agreements in which the target is the licensor to determine whether such agreements unreasonably restrict the licensee:

___ a. Are licensees restricted with respect to handling competing products, resale prices, or customers?

___ b. Do patent licenses provide for patent grantbacks, purchases of unpatented supplies, or royalties payable after some or all patents have expired?

___ c. Do royalty rates discriminate in favor of one or more licensees?

___ d. Does the target insist on "package licensing" of patents whether or not the licensee wants the full package?

F. Interlocking Directorates and Officers

___ 1. Confirm that no director or officer of the target serves as a director or officer of any corporation that competes with the target.

G. Review of Target Corporation Documents

To the extent that purchaser's counsel is given access to the pertinent corporate records of the target, examination of the following documents will provide necessary background to conduct knowledgeable interviews with target personnel and may suggest particular areas to explore. The documents that should be reviewed include the following:

___ 1. All antitrust files, including complaints and litigation threats from suppliers, customers, and competitors

___ 2. Minutes of board of directors' meetings and of important committees of the board or corporation

___ 3. The files of policy-making executives, particularly sales executives

___ 4. Any file bearing the name of a competitor

___ 5. Sales and marketing department files, including, as appropriate,

communications from the field

___ 6. Trade association files, including reports relating to trade association meetings and any price-reporting or cost-reporting systems, product standardization, lobbying, or other joint or common activity of the trade association

___ 7. Management-issued directives or guides on antitrust topics

___ 8. Correspondence, interoffice memoranda, and documents relating to executive decisions as to dealings with competitors, customers, and suppliers

___ 9. Written distributorship agreements

___ 10. All licensing agreements that involve patents, trademarks, or other proprietary information

Determine whether the target has an effective record management plan (a systematic program that routinely discards material after a specified period of time).

NOTES

1. Sherman Act § 1, 15 U.S.C. § 1 (1992).
2. Sherman Act § 2, 15 U.S.C. § 2 (1992).
3. Robinson-Patman Act §§ 1, 2, 15 U.S.C. §§ 13, 13a (1992).
4. Clayton Act § 3, 15 U.S.C. § 15 (1992).
5. Clayton Act § 8, 15 U.S.C. § 19 (1992).