University of Zurich[UZH]

Institute of Law

U.S. Antitrust Law

Principles of Common Law – Lecture 11
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Main Points / conceptualities

- History / economic background
- Applicability
- Enforcement and procedures
- Three pillars of antitrust law
- Per se rules vs. rule of reason
- Digital markets / platform regulation
- Comparative approach

Why do we protect competition?

«People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.»

(*Adam Smith*, An Inquiry into the Nature and Causes of the Wealth of Nations, 1776)

Constitutional perspective

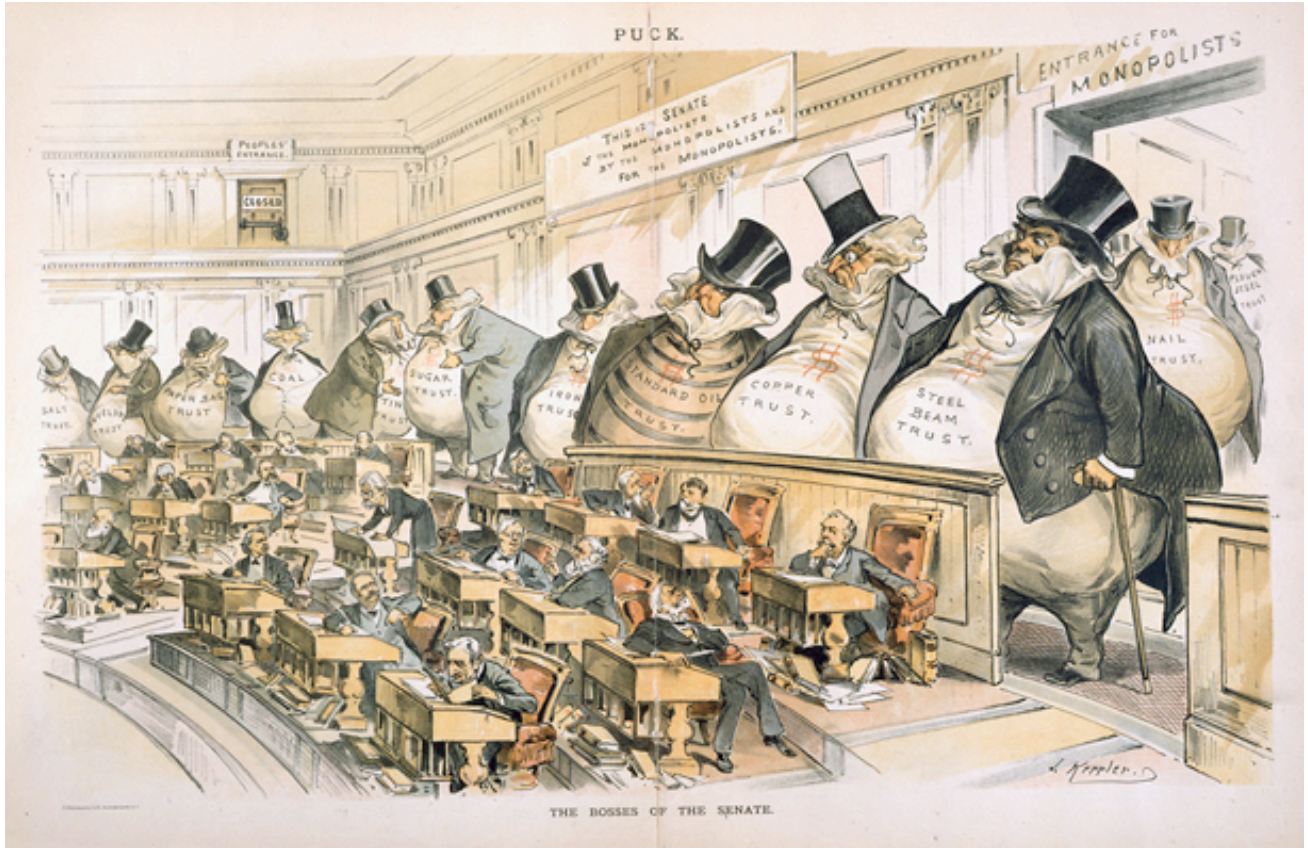
„Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom an our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster“ (*Topco Assocs., Inc*.)

Sherman Act (1890)

„If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition an to fix the price of any commodity.“

(*Senator Sherman*, Congressional Record, Volume XXI, Part III, 2457)

„Anti-Trust“


PUCK.
ENTRANCE FOR MONOPOLISTS
PEOPLE'S ENTRANCE
THIS IS THE SENATE OF THE MONOPOLISTS AND BY THE MONOPOLISTS AND FOR THE MONOPOLISTS!
SALT TRUST
COAL
SUGAR TRUST
IRON TRUST
STANDARD OIL TRUST
COPPER TRUST
STEEL BEAM TRUST
NAIL TRUST
THE BOSSES OF THE SENATE.

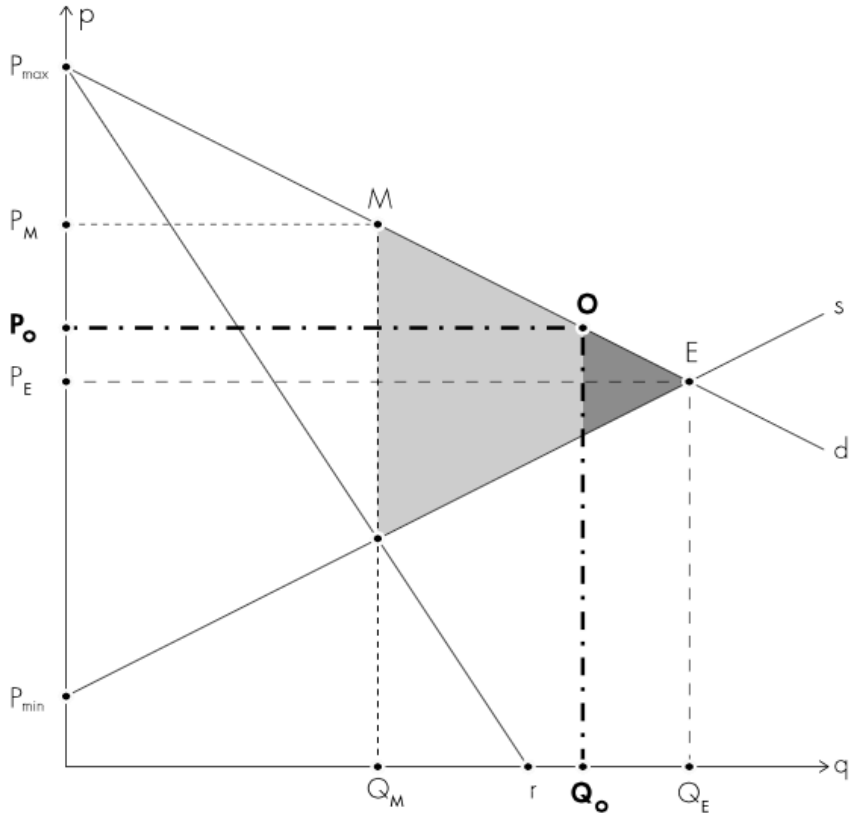
Subsequent developments

- Clayton Act (1914): (ex post) merger control
  → controlling M&A as a substitute for cooperation
- Federal Trade Commission Act (1914): creation of FTC
- Hart-Scott-Rodino Antitrust Improvements Act (1976): (ex ante) merger control
- Foreign Trade Antitrust Improvements Act (1982): international applicability
- 20xx: Digital markets/platforms regulation?

Three pillars of antitrust enforcement

- Section 1 Sherman Act prohibits contracts, combinations and conspiracies „in restraint of trade“
- Section 2 Sherman Act makes it illegal to „monopolize or attempt to monopolize“, or to „combine or conspire“ with others to monopolize any relevant market
- Section 7 Clayton Act (amended) prohibits acquisitions where „the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly“

Deadweight losses of imperfect competition (static view)

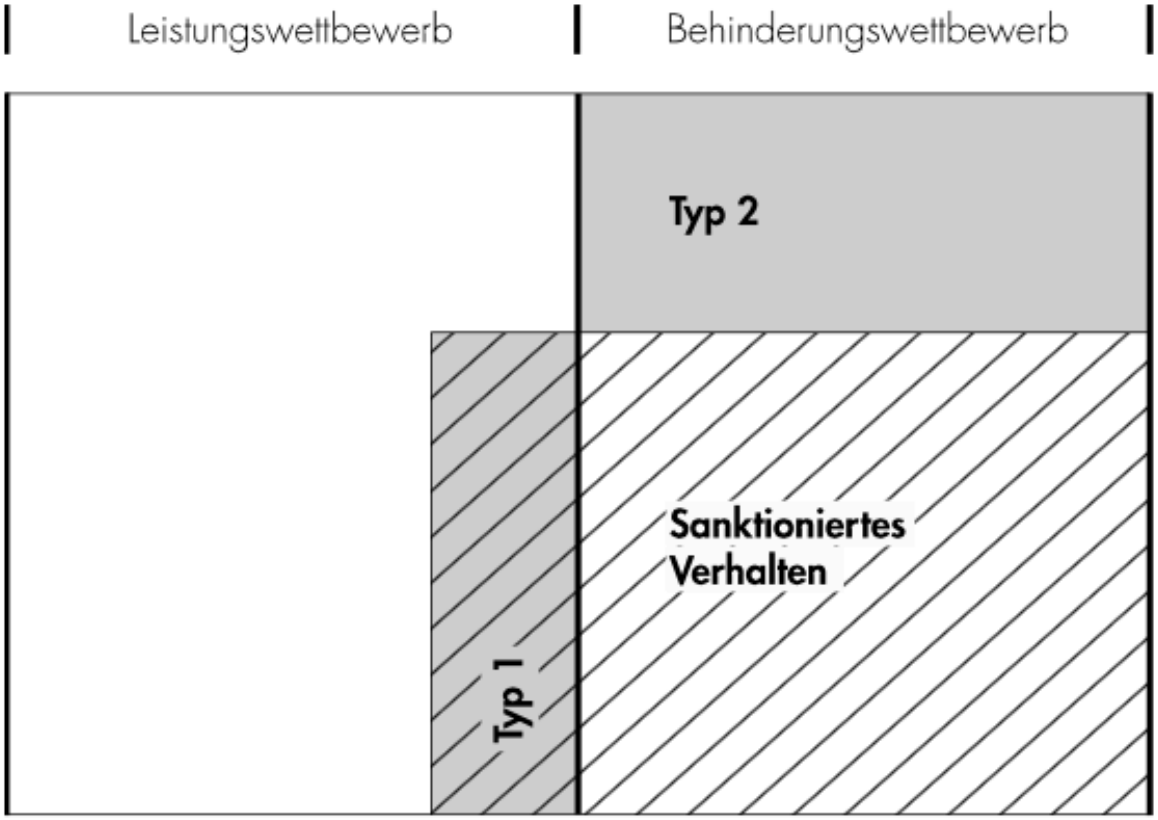


From „Harvard“ to „(Post-)Chicago“

- Harvard-School
  - i.a. application of S-C-P paradigm:
    interplay of market structure, competitor(s)‘ conduct and market performance
  - Monopolistic market structure causes monopolistic behavior, resulting in bad market performance
    → Policy advice: maintain competitive market structure
- Chicago-School
  - Emphasis on static microeconomic theory
  - (monopolistic) market structure may be efficient result of market competition
    → Harvard School policy advice may have an adverse effect on market performance; call for less intervention

Director/Levy (1957): „We believe the conclusions in economics do not justify the application of antitrust laws in many situations in which the laws are now applied“

Type I- and type II-errors: „false positives/negatives“, over and under-enforcement



CH: comparison

- Federal authority for Cartel Act (CA) since 1947 (art. 31 para. 3 lit. d FC of 1874; art. 96 para. 1 FC [of 2000])
- First CA of 1964/Second CA of 1986
  - Enabling *potential* competition; merely preventing misuses of restraints
  - „Saldomethode“ (broad effects balancing)
- Third CA of 1996/Revision of 2004:
  - Safeguarding *effective* competition
  - Preventive merger control
  - Financial sanctions for first time offenses

Scope of applicability

- Federal vs state antitrust laws: „among the several States, or with foreign nations" (cf. Section 1 f. Sherman Act)

  → competing competences (cf. U.S. constitution foreign/interstate commerce clause); all U.S. states have antitrust statutes

- *Qualified* effects doctrine (Foreign Trade Antitrust Improvements Act [1982])
  - Direct effects
  - Substantial effects
  - Reasonably foreseeable effects
  - Relevance of „intent"? (*Alcoa*)

CH: comparison

- Art. 96 FC: „The Confederation shall legislate against the damaging effects in economic or social terms of cartels and other restraints on competition“

  → sole competence; only federal antitrust law (CA)

- *Unqualified* effects doctrine
  - Art. 2 para. 2 CA: „This act applies to practices that have an effect in Switzerland, even if they originate in another country“
  - *Gaba*: Examination of effects‘ intensity (on Swiss markets) „nicht notwendig und auch nicht zulässig“; even potential effects suffice

Enforcement and procedures

- Two Federal enforcement agencies
  - Departement of Justice (DOJ), Antitrust Division
  - Federal Trade Commission (FTC), Bureau of Competition
  - Complex, partly overlaping competences
    - DOJ has sole jurisdiction for telecommunications, banks, railroads and airlines
    - FTC focuses on markets with high consumer spending, e.g. health care, food, energy
  - Criminal prosecution is solely with the DOJ
- State agencies
- Private parties
  - Section 4 Clayton Act: Recovery of damages by „any person [...] injured in his business or property by reason of anything forbidden in the antitrust laws“.
  - Case law on „any person“: individuals; classes of persons; partnerships; corporations; associations; federal, state and foreign governments
  - Civil prosecution: treble damages (federal; some states: only double damages)

CH: comparison

- Predominantly administrative enforcement
  - Competition Commission (ComCo)
  - Administrative sanctions (punitive and compensating component)

- Reasons for very limited significance of private enforcement
  - Passing-on defense
  - No right to sue for end consumers
  - Single, „dispersed“ damage disproportionate to litigation cost/risk

Section 1 Sherman Act

"Every contract, combination in the form of trust or otherwise, or conspiracy [→ agreement], in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony [...]."

Elements:

1. agreement
2. "unreasonable" restraint of trade

Agreement

- Between independent entities (vs parent company/subsidiaries)
- „A unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement (*Independence Tube Corp.*)
  - Express/tacit agreement
  - But: mere parallel conduct (tacit collusion) does not suffice
  - Plus factors indicating a tacit arrangement (along with parallel conduct):
    - Motive to conspire
    - Evidence of contacts with competitor
    - Use of facilitating practices
- Horizontal agreements: between competitors (on the same level)
- Vertical agreements: between companies at different levels of distribution chain

„Horizontal shareholding“ and (tacit) collusion

- Common set of (institutional) investors holding minority equity shares in multiple competing firms
- Synonym: common ownership; ≠ cross shareholding
- Anticompetitive concerns: common shareholders have an incentive to soften competition between firms because this increases profitability
- No need for coordination between common shareholders or common shareholders and firms‘ management
  – antitrust issue?
- Empirical evidence: U.S. airline and banking industry – Increase in common ownership leads to higher ticket prices, banking fees and lower interest rates for deposit accounts

„Unreasonable“ (*Standard Oil*)

Prohibition per se — unlawful, „unreasonable“

Quick look analysis

Truncated rule of reason — „grey area“

Rule of reason — lawful

... and respective burdens of proof with regard to the facts of the case

Per se unlawful

- Horizontal restraints
  - Price fixing (and bid rigging)
  - Output limitation
  - Allocation of territories or customers
- Vertical restraints – change in federal case law!
  - Territorial restrictions (-) (*GTE Sylvania*)
  - Resale price maintenance (-) (*Leegin*)

  → Rule of reason, not „per se reasonable“

„Certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances“ (*Discon*)

Consequences of falling into per se category

- „Unreasonable“ without further looking at
  - market definition,
  - market structure and
  - market share/power
- No efficiency defense
- Exceptions: Atypical constellations, unsufficient case practise („doubts“)
  → quick look analysis, truncated rule of reason

Rule of reason: criteria for analysis

- Effects on market in question
- Efficiency considerations
  → balance of competitive/anti-competitive effects
- Necessity of restraint for achieving efficiency gains
- Intentions

CH: comparison

- Agreement: art. 4 para. 1 CA
- Unlawful agreements: art. 5 CA
  - Significant restriction / elimination of competition
  - Presumption of elimination: art. 5 para. 3 and 4 CA
  - „On principle“ significance if presumption is overturned (*Gaba*)
    → unlawful (cf. per se rule / art. 101 TFEU: restriction by object)
  - But... Motion Français: „qualitative and quantitative assessment“ – bye-bye *Gaba*?
  - Rule of reason examination for non-para. 3 and 4 CA cases
  - Efficiency defense if presumption is overturned

CH: comparison

– Art. 4 Definitions

1 Agreements affecting competition are binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of production which have a restraint of competition as their object or effect.

2 Dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market.[9]

3 Concentration of undertakings are:

a. the merger of two or more previously independent undertakings;
b. any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts thereof.

[9] Amended by No I of the FA of 20 June 2003, in force since 1 April 2004 (AS **2004** 1385 *1390*; BBl **2002** 2022 5506).

CH: comparison

- Chapter 2 Substantive Provisions
- Section 1 Unlawful Restraints of Competition
- Art. 5 Unlawful agreements affecting competition

1 Agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful.

2 Agreements affecting competition are deemed to be justified on grounds of economic efficiency if:

a. they are necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
b. they will under no circumstances enable the parties involved to eliminate effective competition.

3 The following agreements between actual or potential competitors are presumed to lead to the elimination of effective competition:

a. agreements to directly or indirectly fix prices;
b. agreements to limit the quantities of goods or services to be produced, purchased or supplied;
c. agreements to allocate markets geographically or according to trading partners.

4 The elimination of effective competition is also presumed in the case of agreements between undertakings at different levels of the production and distribution chain regarding fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted.[10]

[10] Inserted by No I of the FA of 20 June 2003, in force since 1 April 2004 (AS **2004** 1385 *1390*; BBl **2002** 2022 5506).

Section 2 Sherman Act

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [...]"

Elements:

1. monopoly power
2. "willful" acquisition or maintenance
   → exclusionary conduct

Monopoly power on a relevant market

- „Without a definition of th[e] market, there is no way to meason [the defendant‘s] ability to lessen or destroy competition“ (*Food Mach. & Chem. Corp.*)
- Product market
  - Interchangeability
  - Supplier substitutability (market entry of new supplier)
- Geographic market - scope of supply
- Monopoly power
  - Market share (below 50 % – grey area – above 70 %, especially with further factors)
  - Further factors
    - Barriers to entry – market contestability
    - Size and strength of competing companies
    - Existence of alternatives
    - Strength of demand

Market contestability

- „A contestable market is one into which entry is absolutely free, and exit is absolutely costless“ (*Baumol*) → „hit-and-run entry“
- Entry barriers
  - Natural barriers: minimal efficient scale in relation to market demand, reputation (trade marks)
  - Legal barriers: regulation, e.g. patent protection, (i.a. attorney) licenses
  - Strategic barriers: e.g. trade secrets, „data treasures“ and respective exclusionary conduct
- Exit barriers: sunk cost

„Willful“ (*Grinell*)

- „The offense under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident“ (*Grinell*)
- Monopolies by themselves are not unlawful
- However: monopoly acquisition may be illicit by itself (vs European/Swiss „abuse of dominance“)
- „Willful“ (i.e. anticompetitive and unlawful) means to not compete „on the merits“ but to exclude (potential) competitors by impediment competition
- Exclusionary ~~and exploitative~~ abuse (*Trinko*)
- Non-exhaustive, partially overlapping categories (see next slide)

Categories of exclusionary conduct

- Monopoly leveraging
- Market foreclosure
- Refusal to (continuous) deal / of access (to essential facilities; ?)
- Predatory pricing
- Loyalty or bundled discounts

... and the (ongoing) „attempt to formulate meaningful and workable tests“ (Areeda/Turner [1975])

Example: predatory pricing

- „[U]nderselling for predatory purposes“ (*Giddings* [1887]);
  „[P]redatory competition differs from ordinary competition in that producers who have the [...] most influence on the market [...] do not stop lowering prices at a point which covers all costs [...] but go below this level“ (*Elzinga/Mills* [2014])
- i.a. *Posner* (1976): „I believe the most useful definition of predatory pricing is the following: *pricing at a level calculated to exclude from the market an equally or more efficient competitor*“
  → i.e. below own cost pricing
- Reason: rational only if for excluding competitiors
- EEC/REC standards

Example: predatory pricing

- Price/cost comparison
  - Fixed + variable cost = total cost
  - Sunk and avoidable cost
  - Average, marginal and incremental cost
  - Cost in the short run / in the long run
  - Price as mono-dimensional measure... (what about e.g. „follow on“ revenues)
- Dual cost tests
  - Short run and long run pricing examination:
    A(verage)V(ariable)C/AT(otal)C; AA(voidable)C/L(ong-run)AI(incremental)C
  - Below AVC/AAC – grey area – above ATC/LAIC
- and (!): chances of recoupment (separate criterion)

CH: comparison

- Market dominance (art. 4 para. 2 CA; see above)
  - Above 50 %: strong indicative effect; especially with further factors (c.f. above)
- Abuse of market dominance (art. 7 CA)
  - Exclusionary and exploitative abuse (cf. art. 7 para. 2 lit. c CA)
  - Stronger focus on protection of residual competition („Restwettbewerb“)
    - No recoupment criterion for predatory pricing cases
    - „Margin squeeze“ (by vertically integrated dominant firm) accepted as a category of exclusionary conduct (vs U.S.: no abuse if no predatory pricing downstream, since no obligation to deal upstream; *Trinko*)
    - Unwritten efficiency defense
    - New art. 4 para. 2bis in conj. w/ art. 7 CA: relative market power

CH: comparison

– Art. 7 Unlawful practices by dominant undertakings

1 Dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners.

2 The following behaviour is in particular considered unlawful:

a. any refusal to deal (e.g. refusal to supply or to purchase goods);
b. any discrimination between trading partners in relation to prices or other conditions of trade;
c. any imposition of unfair prices or other unfair conditions of trade;
d. any under-cutting of prices or other conditions directed against a specific competitor;
e. any limitation of production, supply or technical development;
f. any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

Section 7 Clayton Act

"No person … shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where … the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

(15 USC § 18)

Elements:

1. mergers, acquisitions & joint ventures
2. "substantial lessening of competition"

Horizontal merger project review

- Identification of relevant markets (products and geography, cf. above), market participants, competitive concerns, remaining substitutes
- DOJ and FTC, Reviewed Horizontal Merger Guidelines (2010)
- Market shares and concentration levels pre- and post merger: Herfindhal-Hirschman Index (HHI)

$$HHI = s_1^2 + s_2^2 + s_3^2 + \ldots s_n^2$$

where:

s_n = the market share percentage of firm n
expressed as a whole number, not a decimal

Implications of HHI increases

- Post-merger increase in HHI less than 100 points
  → *Unlikely to have adverse competitive effects and ordinarily requires no further analysis*
- Post-merger HHI below 1‘500 points
  → *Unconcentrated market; unlikely to have adverse competitive effects and ordinarily requires no further analysis*
- Post-merger HHI between 1‘500 and 2‘500 and increase in HHI over 100 points
  → *Moderately concentrated market; potentially raises significant competitive concerns and often warrants scrutiny*
- Post-merger HHI over 2‘500 and increase in HHI between 100 and 200 points
  → *Highly concentrated market; potentially raises significant competitive concerns and often warrants scrutiny*
- Post-merger HHI over 2‘500 and increase in HHI over 200 points
  → *Rebuttable presumption that the merger likely will enhance market power*

Further criteria

- Potential for unilateral prices raises or output reduction post-merger
- Potential for coordinated action or collusion post-merger
- Timely, likely and sufficient market entry of new competitors post merger?
  → contestability of involved markets
- Failing firm defense: exit absent merger

Non-horizontal merger project review

- Mergers involving potential competitors
  - Elimination of future competition?
  - One party widely perceived as potential competitor → constraining factor?
- Mergers involving firms that operate at different levels of an industry
  - Increasing barriers to entry since entry in both markets becomes necessary?
  - Facilitation of collusion?
  - Special situations in (partly) regulated markets

CH: comparison

- Concentration (art. 4 para. 3 CA; see above)
- Prohibition criterion (art. 10 para. 2 CA): creation or strenghtening of a dominant position liable to eliminate effective competition (→ „qualified dominance“) *and* no outweighing improvements in another market
- Test for „qualified dominance“ sets in tendency too high a threshold
- Furthermore: taking-up criteria very high (in comparison to Swiss market sizes)
- Revision proposal: Switch to SIEC test („significant impediment to effective competition“; applied on EU level or also in Germany)
- Failing firm defense is on principle recognised

CH: comparison

– Art. 10 Assessment of concentrations

1 Concentrations that have to be notified shall be investigated by the Competition Commission if a preliminary assessment (Art. 32 para. 1) reveals that they create or strengthen a dominant position.

2 The Competition Commission may prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration:

a. creates or strengthens a dominant position liable to eliminate effective competition; and
b. does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.

3 If a concentration of banks within the meaning of the Banking Act[15] is deemed necessary by the Swiss Financial Market Supervisory Authority (FINMA) for reasons related to creditor protection, the interests of creditors may be given priority. In these cases, FINMA takes the place of the Competition Commission, which it shall invite to submit an opinion.[16]

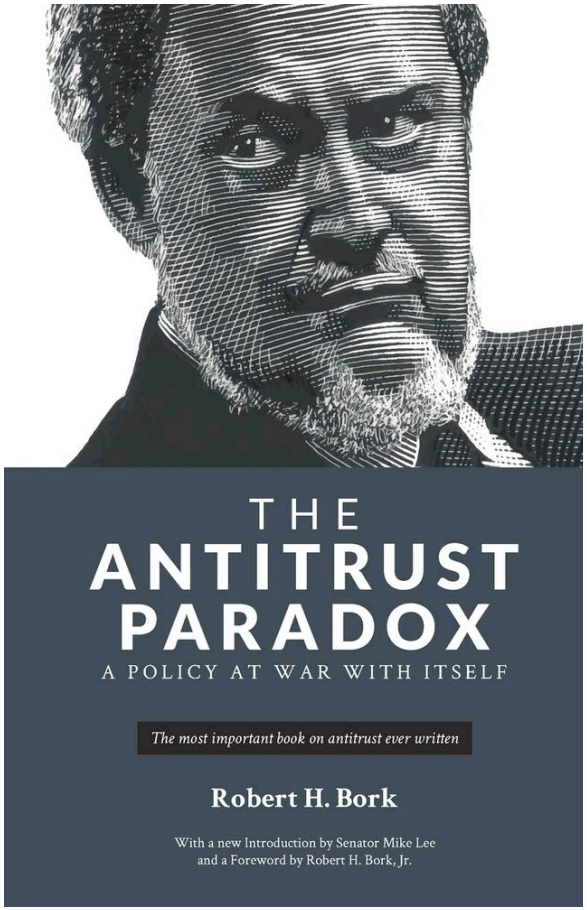
4 In assessing the effects of a concentration on the effectiveness of competition, the Competition Commission also takes account of any market developments and the position of the undertakings in relation to international competition.

[15] SR 952.0

[16] Amended by Annex No 8 of the Financial Market Supervision Act of 22 June 2007, in force since 1 Jan. 2009 (AS 2008 5207; BBL 2006 2829).

Recent developments - is predation really a phantasm?

From „consumer“ welfare to (again) preserving competitive process and market structure



LINA M. KHAN

Amazon's Antitrust Paradox

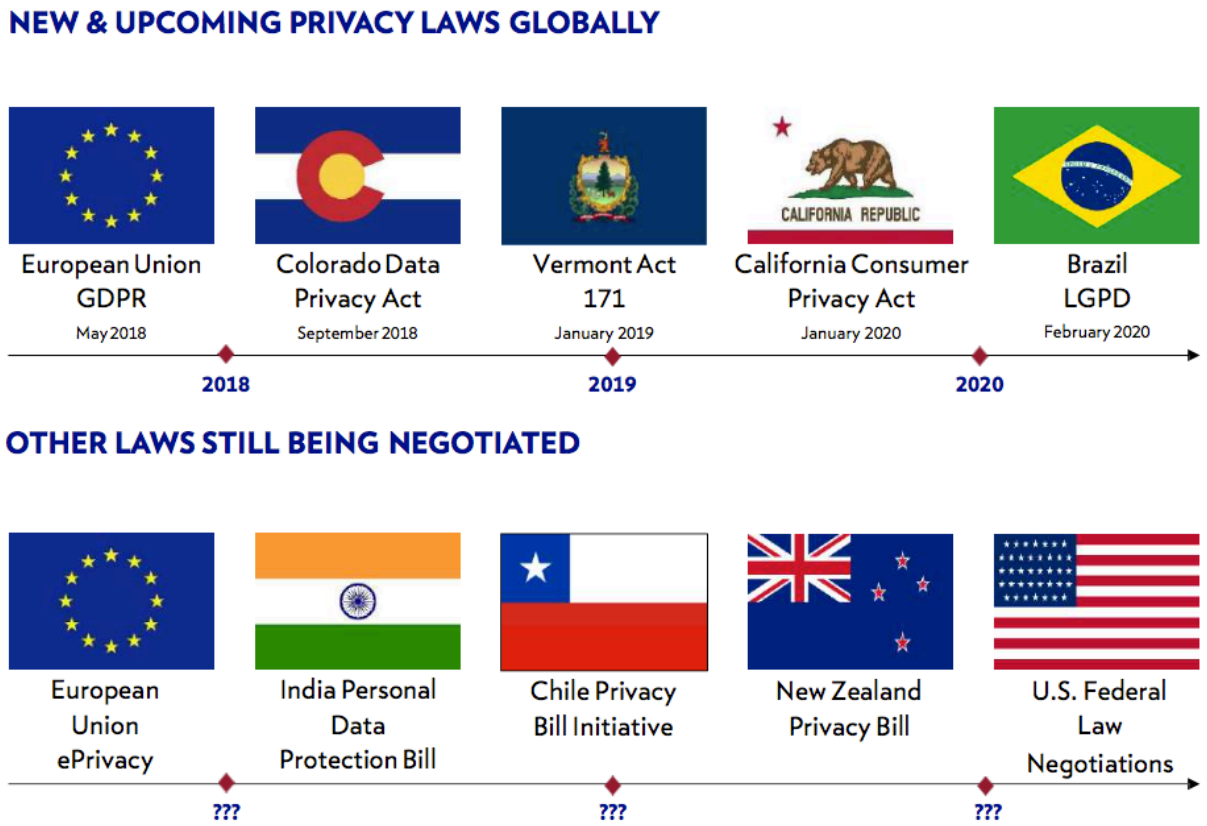
ABSTRACT. Amazon is the titan of twenty-first century commerce. In addition to being a retailer, it is now a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading host of cloud server space. Although Amazon has clocked staggering growth, it generates meager profits, choosing to price below-cost and expand widely instead. Through this strategy, the company has positioned itself at the center of e-commerce and now serves as essential infrastructure for a host of other businesses that depend upon it. Elements of the firm's structure and conduct pose anticompetitive concerns—yet it has escaped antitrust scrutiny.

This Note argues that the current framework in antitrust—specifically its pegging competition to "consumer welfare," defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy. We cannot cognize the potential harms to competition posed by Amazon's dominance if we measure competition primarily through price and output. Specifically, current doctrine underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive. These concerns are heightened in the context of online platforms for two reasons. First, the economics of platform markets create incentives for a company to pursue growth over profits, a strategy that investors have rewarded. Under these conditions, predatory pricing becomes highly rational—even as existing doctrine treats it as irrational and therefore implausible. Second, because online platforms serve as critical intermediaries, integrating across business lines positions these platforms to control the essential infrastructure on which their rivals depend. This dual role also enables a platform to exploit information collected on companies using its services to undermine them as competitors.

Need for additional regulation? - proposals

- The American Innovation and Choice Act
  → Prohibition of covered platforms‘ self-preferencing; enhanced interoperability and data access
- The Platform Competition and Opportunity Act
  → Prohibition of acquisitions that enhance covered platforms‘ market position
- The Ending Platform Monopolies Act
  → Eliminate covered platforms‘ ability to leverage control for self-preferencing
- The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act
  → Lower entry barriers and switching costs through requiring covered platforms to enable interoperability and data portability
- „Covered platforms“:
  - Mio 50 U.S.-based monthly users or at least 100k U.S.-based montly business users
  - Owned or controlled by „person“ with annual sales or market capitalization > Bio 600 USD
  - „Critical trading partner“
- EU: Digital Markets Act; Germany: 10th GWB amendment; CH: ...

Touch points of antitrust and data (protection) law – international developments



Right to data portability (art. 20 GDPR; cf. art. 28 revDPA)

- New data subject right
- Possibility to transmit its personal data from one controller to another
- Reason: Change of service provider should be as simple as possible
  → reducing lock-in effects due to switching costs, enhancing competition
- Scope not fully clear:
  - Only personal data provided by the data subject,
    or rather all personal data (generated by/in possession of service provider)?
  - Applies to processing based on consent and contractual necessity, not if there are other legal grounds for processing (e.g. public interest/obligation)
- Right to receiving the personal data in a *structured, commonly used, machine-readable and interoperable format*
  → technical feasability often questionable; e.g. Does a PDF file suffice?
- Relation to right to erasure: Can be exercised subsequently

Case Study: *Facebook* (1)

- Bundeskartellamt (German Federal Cartel Office) initiated the proceeding in March 2016
- Facebook‘s use of term: Users can only use the social network if Facebook is allowed to collect data about these users from outside the social network, and assign this data to the users‘ Facebook accounts

  → outside the social network, Facebook collects data from the group‘s other services („Whatsapp“, „Instagram“, „Masquerade“, „Oculus“) and from third parties via „Facebook Business Tools“ (Like-Buttons etc.)
- Facebook claimed legal bases: Consent by accepting terms of use (Art. 6 para. 1 lit. a), contractual necessity (lit. b), legitimate interest (lit. f)
- Prohibition Decision on 6 February 2019, „internal unbundling“, but no fine

Case Study: *Facebook* (2)

- Data protection assessment of the Bundeskartellamt
  - No effective, voluntary consent;
    acceptance is compulsory / a prerequisite for using the social network
  - No contractual necessity to process data to this extent
  - Facebook‘s interests don‘t outweigh the consequences for users
- ... but why the Bundes*kartell*amt?! → Accordingly: Abuse of a dominant position
  - *Dominance* in the national market for social network for private users
    (above 95 % share with daily users, 80 % with montly, 50 % among registered; strong network effects; „innovative power of internet“ does not per se exclude dominance)
  - „*Abusive* data policy“ → exploitative business terms / conditions (Konditionenmissbrauch)
    (Reference to *VBL-Gegenwert*, *Pechstein*; competition law is *also* applicable)
  - „Normative causality“: Links between dominance and conduct suffice,
    dominance is not a prerequisite for conduct

Case Study: *Facebook* (3)

- Facebook filed an appeal with the Düsseldorf Higher Regional Court
  + Application for a temporary injunction since appeal itself: suspensive effect (-)
- Interim Decision of 26 August 2019
  - Facebook‘s data collecting and processing has no anti-competitive effects and is not exploitative (users are not economically weakened since data could be easily duplicated; users don‘t suffer loss over their data; users are not forced to join the social network)
  - No causal link between market dominance and breach of data protection rights
- Bundeskartellamt lodged an appeal against the interim decision to the BGH (German Federal Court of Justice)
- Interim decision annuled by the BGH, 23 June 2020:
  Facebook appeal has no suspensive effect during Düsseldorf main proceeding
  (change of theory of harm: focus on ~~exploitative~~ exclusionary abuse;
  see further: https://www.d-kart.de/blog/2020/08/28/facebook-case-the-reasoning/)
- 24 March 2021: Düsseldorf asks for preliminary ruling by ECJ

(Unintended) consequences of data protection regulation

Data protection regulation has arguably the potential to create further market concentration by strenghtening (platform) incumbents:

- Data protection implementation and compliance may create entry barriers or cause exit
- Consumer / business partner trust higher towards large companies
- Easier to obtain end-consumer consent when having consumer-facing products
- Data privacy as an excuse for no data sharing
- Risk of arbitrary enforcement (depending on competent data protection authority; „one-stop-shop“ system)

See further Michal S. Gal/ Oshrit Aviv, The Competitive Effects of the GDPR, JCLE Vol. 16 (2020) Issue 3, 349–391 (also available on SSRN)