



The business of relationships.

*The Western Pennsylvania Chapter of
the Association of Corporate Counsel and
Reed Smith LLP present*

ANTITRUST FOR IN-HOUSE COUNSEL



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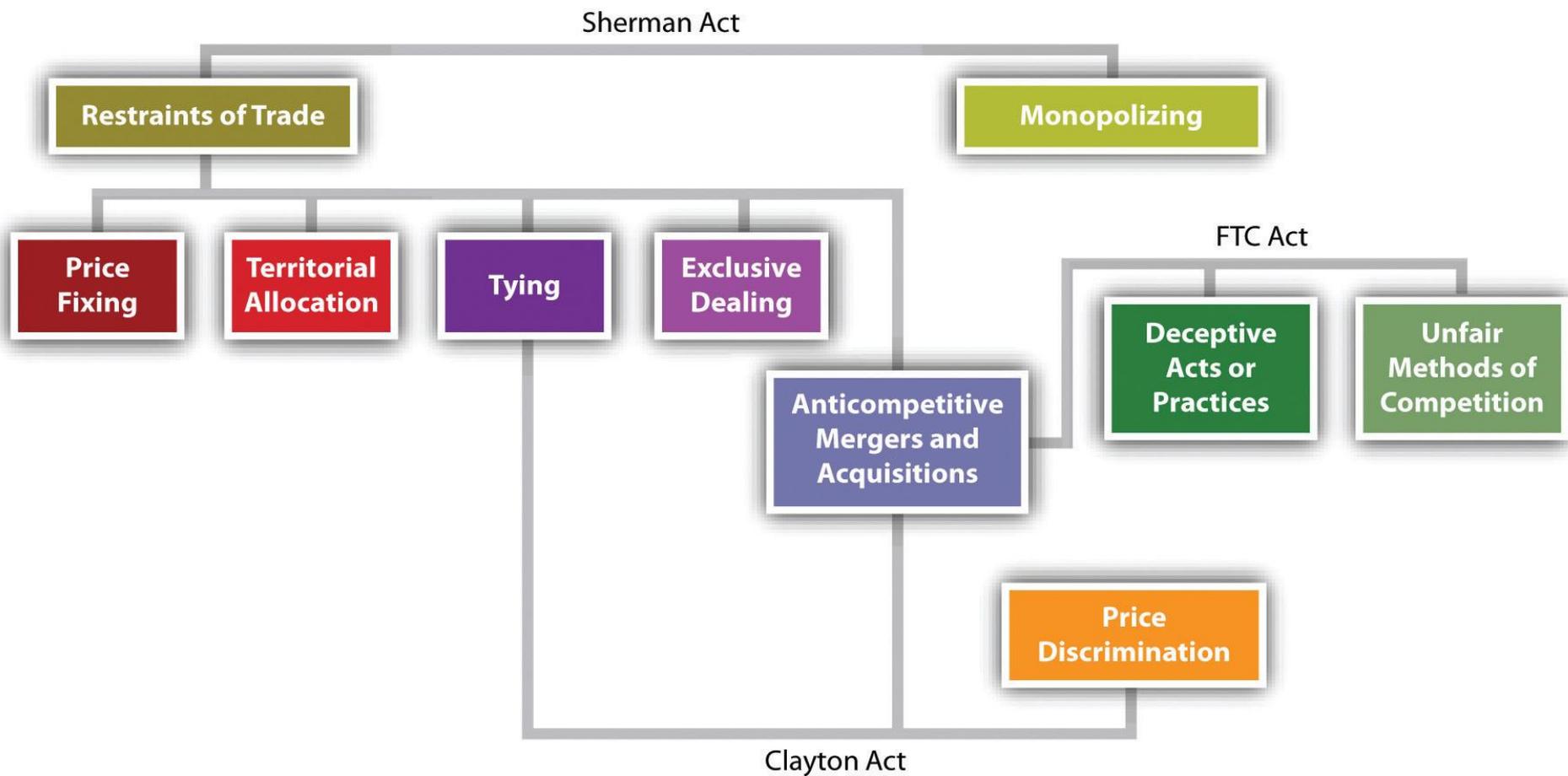
Agenda

Key Antitrust Principles & Recent Developments for the In-House Lawyer

1. Horizontal Agreements
2. Mergers & Acquisitions
3. Vertical Agreements and Policies
4. Enforcement Trends & Leniency – What Good Is Your Company's Antitrust Compliance Program?



Antitrust Fundamentals - Principle Statutes



Antitrust Fundamentals

Horizontal Agreements

- Agreements between competitors
- Mergers



Vertical Agreements & Policies

- Agreements between parties at different levels of the distribution chain (manufacturers, retailers, etc.)
- Minimum Advertised Price (MAP)



Antitrust Fundamentals - Rules of Liability

Per Se Illegal

- Price Fixing
- Bid Rigging
- Allocation (Market/Territory/Customer)
- Agreed Limitations on Output/Production
- Group Boycotts

“Per se” means the court will not ask whether there is a significant impact on competition in general, or whether consumers were actually harmed

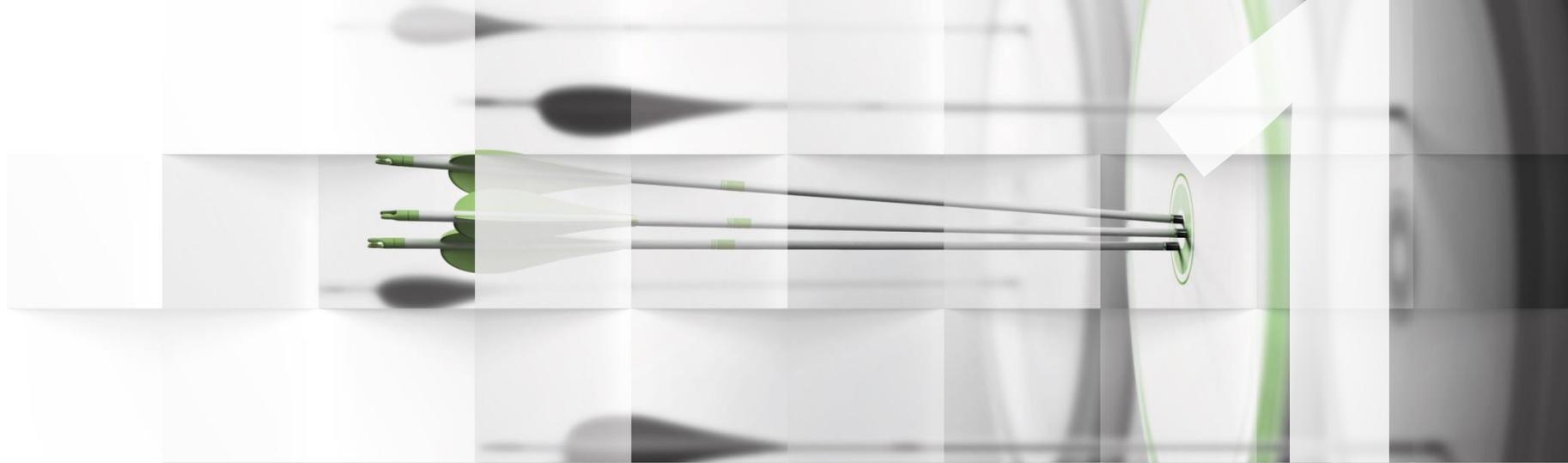
Rule of Reason

- Exclusive Dealing Arrangements
- Tying, Loyalty Discounts or Bundling Arrangements
- Resale Price Maintenance
- Refusals to Deal/Dealer Termination

Requires proof of relevant market and market power

Antitrust Fundamentals - Antitrust Law in 3 Bullets

- If it **benefits customers** – by lowering prices, increasing choice, increasing supply or adding new technology – it should be considered lawful.
- If it **excludes competitors** – by raising prices, or limiting supply without some offsetting customer benefit or other pro-competitive justification, it's probably unlawful, especially if done by agreement between firms with market power.
- If it involves competitors **fixing prices** for services each sells, allocating accounts or territories, or **rigging bids**, it's automatically unlawful – perhaps even criminal.



Horizontal Agreements

Horizontal Agreements - Governing Law

Sherman Act Sections 1 and 2:

- **Section 1:** All contracts, combinations, conspiracies in restraint of trade
 - Per Se: Agreements between competitors on price are automatically illegal
 - Rule of reason: Does an agreement have anticompetitive effects and, if so, do they outweigh procompetitive benefits?
- **Section 2:** Monopolization and attempted monopolization
 - Conspiracies to monopolize
 - Rule of reason

Horizontal Agreements – Case Update

Price-Fixing Conspiracy Case: *Meyer v. Kalanick*

- Plaintiff brought a class action on behalf of Uber riders against Travis Kalanick, CEO and co-founder of Uber, before Judge Rakoff in the Southern District of New York December 16, 2015
- Complaint alleged that Kalanick facilitated illegal price-fixing by conspiring “with Uber drivers to use Uber’s pricing algorithm to set the prices charged to Uber riders, thereby restricting price competition.” *Meyer v. Kalanick*, No. 15-09796, slip op. at 1-2 (S.D.N.Y. Mar. 31, 2016)



Horizontal Agreements – Case Update (cont.)

Horizontal Restraints

- Restraints imposed by agreement between competitors. *Bus. Elecs. Corp. v. Sharp. Elecs. Corp.*, 485 U.S. 717, 730 (1988)
- These restraints are generally per se unlawful

Defendant's Argument

“Plaintiff relies on nothing more than the independent decisions of hundreds of thousands of driver-partners to use the Uber App as evidence of parallel conduct to support a conspiracy” and does not detail “the timing of the alleged agreement,” “where the agreement was entered,” or “how such a numerous and geographically diffuse group of co-conspirators came to reach a single, common agreement.”

Plaintiffs' Allegations

- Uber drivers agreed to conspire when they assented to Uber’s written agreement
- Uber drivers met, including at picnics and other “partner appreciation” events
- Kalanick is a Uber driver himself
- Kalanick agreed to raise fares for UberBLACK and UberSUV following drivers’ efforts to negotiate higher rates
- This is a horizontal and vertical conspiracy

Horizontal Agreements – Case Update (cont.)

March 31, 2016: The court denied the motion to dismiss and held that plaintiffs had plausibly alleged:

- A per se illegal horizontal conspiracy
- A vertical conspiracy to constrain prices
- A market for mobile app-generated ride-share services
- An adverse effect on that market through restriction of competition





Mergers & Acquisitions

Mergers & Acquisitions– Governing Law

Clayton Act Section 7

- Will a merger substantially lessen competition in a relevant market?
- Small but Significant and Non-transitory Increase in Price (SSNIP)

Also, Sections 1 and 2 of the Sherman Act

Mergers & Acquisitions – Key Developments

Mergers

- Increased Merger Scrutiny
 - Hospital Mergers
 - Staples/Office Depot

“The more complex the deal – and the more markets it potentially endangers – the greater our skepticism” – AG Loretta Lynch

- Enforcers not willing to accept fixes that don't resolve competitive problems

DOJ is “[n]ot interested in settling for the sake of settling” – AG Loretta Lynch

Mergers & Acquisitions – Key Developments (cont.)

Hospital Merger Challenges – Key Takeaways

- FTC challenging three hospital mergers at one time – Pa. / W. Va. / Ill.
- FTC: Affordable Care Act does not affect antitrust analysis of enforcement
- Judge Jones: Affordable Care Act has changed the market
- Population Health Management is new strategy for controlling costs and improving quality

Mergers & Acquisitions – Key Developments (cont.)

Parties: Cabell Huntington Hospital and St. Mary's Medical Center

- A merger between two Huntington, W. Va. hospitals was proposed in November 2014. The merger was challenged by the FTC in November 2015.
- West Virginia's attorney general approved the merger in 2015, subject to certain conditions meant to preserve competition in the area. The FTC did not find the conditions sufficient and took the parties to court.
- 3/18/2016: West Virginia's governor signed a bill into law that made the West Virginia HealthCare Authority (WVHCA) the decision-maker on health care provider mergers within the state.
- 4/18/2016: the FTC filed a public comment urging the WVHCA to deny the merger, which the FTC said would harm patients in the four counties surrounding Huntington.
- 4/22/16: Matter withdrawn from adjudication until 14 days after WVHCA issues its written decision.

Mergers & Acquisitions – Key Developments (cont.)

Parties: Penn State Hershey Medical Center and PinnacleHealth System

- The parties signed a letter of intent to merge in June 2014
 - The merger was challenged by the FTC in December 2015.
 - **4/11/2016: Preliminary injunction hearing began in U.S. District Court for the Middle District of Pennsylvania.**
 - The FTC argued that the merger would give the parties 76 percent of the market in central Pennsylvania and that they are the two largest providers in the Harrisburg area.
 - The parties argued that many of their patients lived outside of the FTC's defined market area.
- Further, the parties stated that they had agreements with insurance companies to protect them from potential rate increases, and that the merger was meant to help the parties compete with other hospitals aligning with larger hospital networks.
- 5/19/2016: U.S. District Judge John E. Jones III denied the enforcers a preliminary injunction following a hearing on the likely competitive effects of the merger.

Mergers & Acquisitions – Key Developments (cont.)

Parties: Advocate Health Care Network and NorthShore University HealthSystem

- A merger between the two Chicago-area hospital systems was announced in September 2014. The merger was challenged by the FTC in December 2015.
 - **4/11/2016: The preliminary injunction hearing began in U.S. District Court for the Northern District of Illinois.** The FTC argued that the merged entities would run six of 11 hospitals in Chicago's northern counties, and that the price of medical services would rise by 8 percent.
- The parties argued that the FTC is incorrectly defining the market by ignoring most of the general acute care hospitals in the Chicago area, and that the merger would lower prices at the party hospitals by 10 percent, benefitting people in Chicago by \$200M-\$500M per year.
 - Executives from Northwestern Memorial Healthcare and Blue Cross Blue Shield of Illinois claimed that the merger would raise prices. However, NorthShore's CEO claimed that Northwestern executives told him they hoped NorthShore would lose the merger case so that Northwestern could merge with NorthShore.
 - **4/15/2016: The judge rejected the parties' request to have the merger thrown out.**
 - **4/26/2016: A motion was filed to move the start of the administrative trial from May 24, 2016 to June 15, 2016.**

Mergers & Acquisitions – Key Developments (cont.)

Staples/Office Depot – Key Takeaways

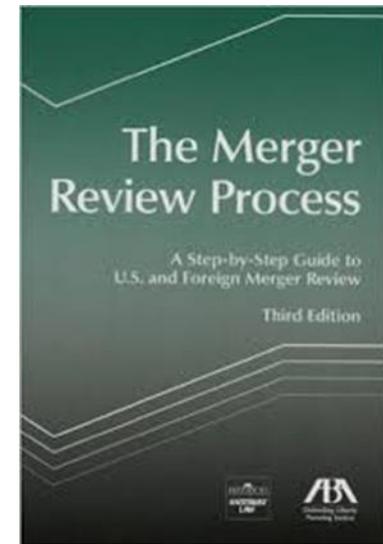
- A relevant market can be made up of only large corporate buyers (like Sysco/US Foods)
- The relevant product market was office supplies, but the court excluded ink and toner
- Potential entry – not enough evidence to show Amazon would be a key player within three years
- Litigation strategy



Mergers & Acquisitions – Key Takeaways

When to Call Outside Antitrust Counsel

- Early in the Process
- Advocacy before Authorities – For & Against
- Merger Control
- Pre-Closing Conduct



U.S. Merger Control

- Is an HSR filing required?
 - Does an exemption apply?
 - Civil penalties (\$16,000 per day)
 - Even if no filing required, is there antitrust risk?
- Don't jump the gun – know what is permitted pre-closing

European Merger Control

- Exclusive jurisdiction of the European Commission
- Member State jurisdiction
- Jurisdictional criteria
- Notifications
- Procedure





Vertical Agreements & Policies

Governing Law

- Governed by Section 1 of the Sherman Act
- Rule of Reason
 - Anticompetitive Effects
 - Procompetitive Benefits

When Vertical Goes Horizontal

Apple E-Books Second Circuit Decision Remains Intact

- Because this conspiracy consisted of a group of competitors—the Publisher Defendants—assembled by Apple to increase prices, it constituted a “horizontal price fixing conspiracy” and was a per se violation of the Sherman Act.

United States v. Apple, Inc., 791 F.3d 290, 312 (2d Cir. 2015)



When Vertical Goes Horizontal (cont.)

March 7, 2016: Supreme Court denied Apple's petition for certiorari seeking review of the Second Circuit's decision in the e-books case.

- **Issue:** Whether vertical conduct by a disruptive market entrant, aimed at securing suppliers for a new retail platform, should be condemned as per se illegal under Section 1 of the Sherman Act, rather than analyzed under the rule of reason, because such vertical activity also had the alleged effect of facilitating horizontal collusion among the suppliers.



When Vertical Goes Horizontal (cont.)

In re Musical Instruments (9th Cir. 2015)

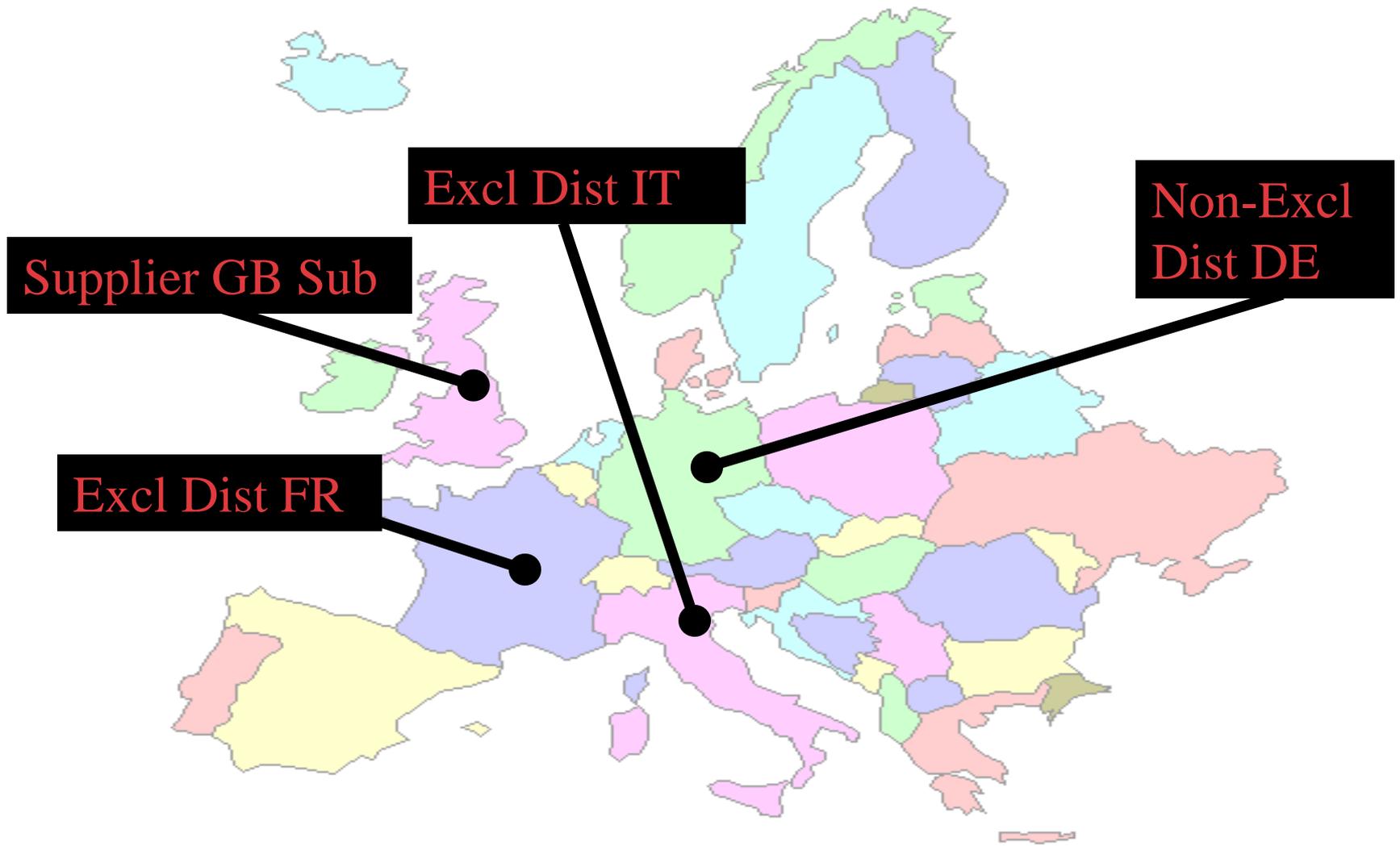
- The dominant retailer of musical instruments imposed on several manufacturers the adoption of a new "minimum advertised price" that tended to result in higher prices for consumers (increasing profits for both the retailer and the manufacturers).
- Plaintiffs alleged that the retailer orchestrated a horizontal hub-and-spoke conspiracy among the manufacturers, arguing it would be contrary to the manufacturers' self-interest to agree to this term, but for assurances that others would do the same.
- The courts disagreed with plaintiffs' characterization of the conduct as contrary to defendants' self-interest
 - Plaintiffs failed to account for the fact that in an oligopoly, the manufacturers would maximize their self-interest by observing their competitors' conduct and taking it into account.
 - Further, a dominant retailer imposed the change on the manufacturers over the course of many months, allowing each manufacturer to observe the conduct between the retailer and competing manufacturers.

Distribution - Europe

- Territorial exclusivity
- Passive/active sales
- Internet sales and geoblocking
- Resale Price Maintenance/MAP
- Commercial agents



Distribution – Europe (cont.)





Enforcement Trends & Leniency – What Good Is Your Company's Antitrust Compliance Program?

Antitrust Enforcers

Federal

- Federal Trade Commission (FTC)
- Department of Justice Antitrust Division (DOJ)

State

- State Attorneys General
- Other Agencies

Private Plaintiffs

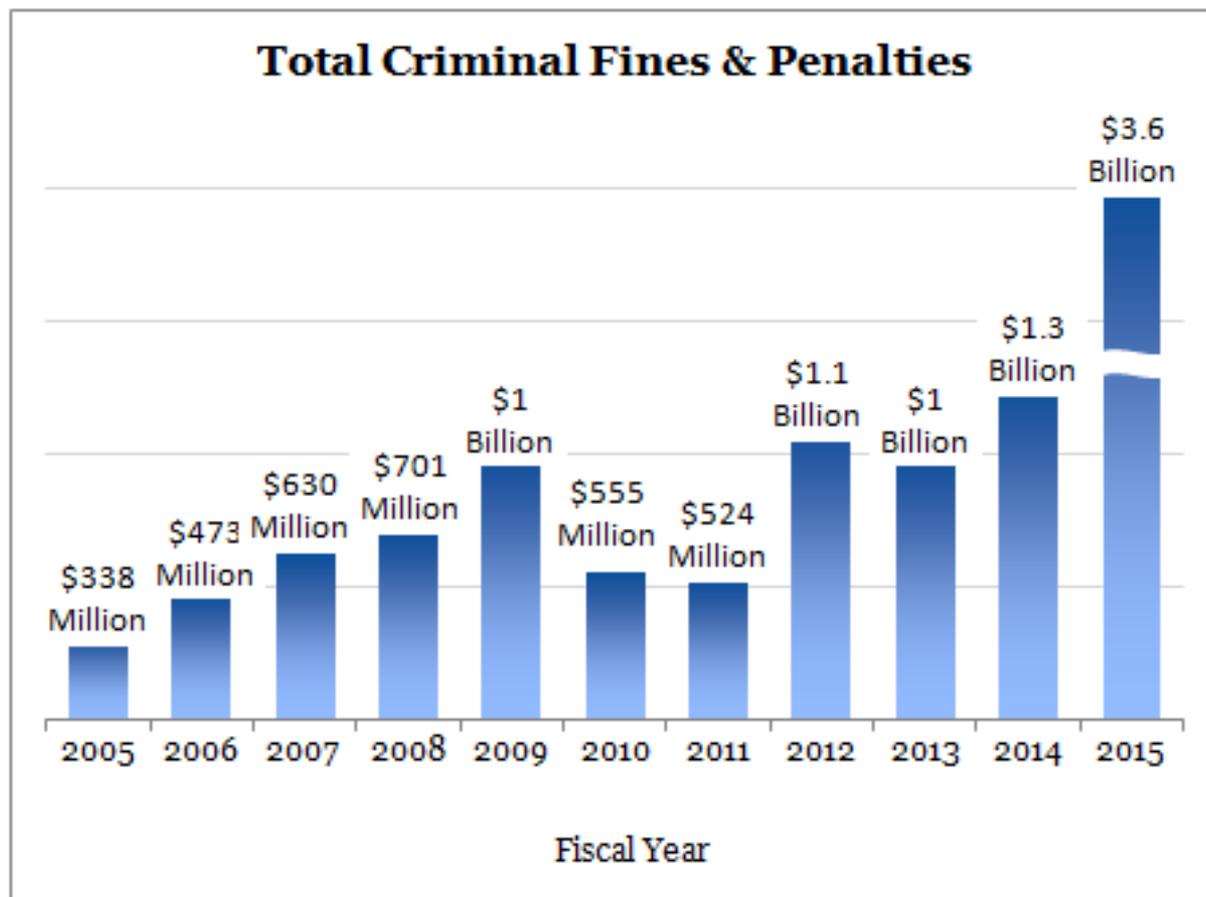
- Individual/Class Actions
- 3x damages
- Attorneys' Fees

International

- EU, China, Australia, Canada, Germany and many others



Criminal Enforcement Trends



Source: <http://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>

Antitrust Leniency Program

- DOJ offers leniency/amnesty to whistleblowers
- Leniency only for the “first in the door” – incentive to apply quickly
- Effect of Yates Memorandum? – may require companies seeking cooperation credit to disclose more about executives
 - Companies must “identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority and provide to the Department all facts relating to that misconduct” in order to be eligible for a cooperation credit.

Antitrust Compliance Programs

- Establish clear corporate policy of full antitrust compliance
- Provide training to raise employee awareness
- Identify clear guidelines for conduct and where employees can direct questions
- Robust program will help establish company's compliance profile, but will not guarantee immunity
- Review and update regularly

Antitrust Compliance Programs

Additional Considerations

- Training – focus on identifying issues
- Types of training – e-learning, scenarios, workshops or seminars
- Consider separate policy for participation in trade associations and additional training for those employees
- Audits – procedural or substantive
 - Employee interviews
 - Targeted transaction reviews
 - Email pulls for targeted custodians
 - Could piggyback on financial or anti-bribery audits

When In Doubt, Call Outside Antitrust Counsel

- Anytime you have questions that you think might be related to antitrust!
- Compliance & training
 - Regular training
 - Updating antitrust statement and related guidance
- Distribution distress
- Formal or informal industry gatherings
 - Golf outings
 - Trade association meetings
- Investigation in your industry (even if your company isn't the target)
 - Subpoenas
 - Suspected collusion by your suppliers/distributors/competitors
- Potential merger or acquisition of stock, assets or other corporate interests
- Litigation (pending or threatened)

Questions?





Thank You!