United States

Debbie Feinstein and Jonathan Gleklen
Arnold & Porter LLP

www.practicallaw.com/5-501-2849

MERGER CONTROL

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

The primary federal authorities charged with investigating mergers and acquisitions under the anti-trust laws are the:

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

Under the Hart-Scott-Rodino Act (HSR Act), transactions that exceed certain thresholds in terms of the size of the parties involved and size of the transaction are subject to a pre-merger notification scheme and cannot close until after certain waiting periods have expired (*see Question 2*).

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

Triggering events

The merger control process applies to:

- Mergers.
- Acquisitions of shares or voting securities.
- Formation of partnerships and joint ventures (including limited liability companies).
- Acquisitions of certain exclusive licences.

Thresholds

Transactions are subject to the pre-merger notification scheme (unless subject to an exemption) if either:

- The following all apply:
  - one party has at least US$12.7 million (about EUR8.6 million) in sales or assets;
  - another party has as at least US$126.9 million (about EUR86 million) in sales or assets; and
  - the transaction is at least US$63.4 million (about EUR43 million).
- The transaction is over US$253.7 million (about EUR172 million).

These thresholds are subject to an annual change based on inflation. These figures are for February 2010.

Transactions where exemptions may apply include:

- Foreign firms.
- Certain types of assets (for example, real estate assets).
- Transactions where the same party controls the acquiring and acquired entity.
- Formation of a partnership or limited liability company where no acquiring party obtains control of the entity.
- Transactions made only for the purposes of investment.
- Acquisitions that are subject to notification or approval from other governmental agencies.

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?**

- **Mandatory or voluntary.** The filing is mandatory if a transaction meets the thresholds (*see Question 2, Thresholds*).
- **Timing.** A transaction can be notified at any time once a letter of intent or definitive agreement has been reached. There is no requirement that a filing be made within a certain period.
- **Formal/informal guidance.** It is possible to obtain informal guidance on an anonymous basis on whether a transaction is subject to the merger control regime.
- **Responsibility for notification.** Typically, both the acquiring and acquired entities must make a filing, although there are circumstances under which only the acquiring party is required to make a filing.

- **Relevant authority.** All filings are made with both the DOJ and the FTC.
- **Form of notification.** The DOJ and FTC produce a standard form that must be used in submitting a filing. It requests information relating to the parties, their structure and their sales. The relevant agreement between the parties must be filed, along with documents prepared by or for officers or directors analysing the transaction for competition-related issues.
- **Filing fee.** The filing fee depends on the size of the transaction and ranges from US$45,000 (about EUR31,000) to US$280,000 (about EUR193,000).
- **Obligation to suspend.** See *Question 4*.

4. Please set out the procedure and timetable.

Parties must wait 30 calendar days after notification before completing their transaction, unless granted early termination of the waiting period or unless the reviewing agency issues a request for additional information. A request for additional information prohibits the parties from completing their transaction until 30 days after both parties have substantially complied with the request. These waiting periods are shorter in the event of cash tender offer or certain bankruptcy transactions.

At the end of the waiting period, the reviewing agency can:

- Let the waiting period expire so the parties can close the transaction.
- Request additional time to investigate the transaction with the threat that it will otherwise challenge it in court.
- Enter into a consent settlement in which the parties make concessions (typically divestitures) (*see Question 8*).
- Seek an order in federal court to block the transaction.

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

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?**

- **Publicity.** The DOJ and FTC do not publish either the fact that a transaction has been notified or the filing itself, unless the parties request early termination and it is granted (if so, the DOJ or FTC publishes the names of the parties and the date early termination is granted). The DOJ and FTC may informally make the transaction public during the investigation.
- **Procedural stage.** See above, *Publicity*.
- **Automatic confidentiality.** In addition to confidentiality for the fact of the filing (*see above, Publicity*) the DOJ and FTC must maintain the confidentiality of all information relating to the filing and submitted in response to any response to a request for additional information (*HSR Act*).
- **Confidentiality on request.** This is not relevant as there are statutory requirements that information submitted under the HSR Act be kept confidential (*see above, Automatic confidentiality*).

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?

There is no formal procedure for third parties to participate in investigations under the HSR Act. However, third parties can submit documents and information at any time in the process and the DOJ and FTC typically solicit documents and information from third parties.

7. What is the substantive test?

The substantive test applicable to transactions is whether their effect is to substantially lessen competition or to tend to create a monopoly (*section 7, Clayton Act*).

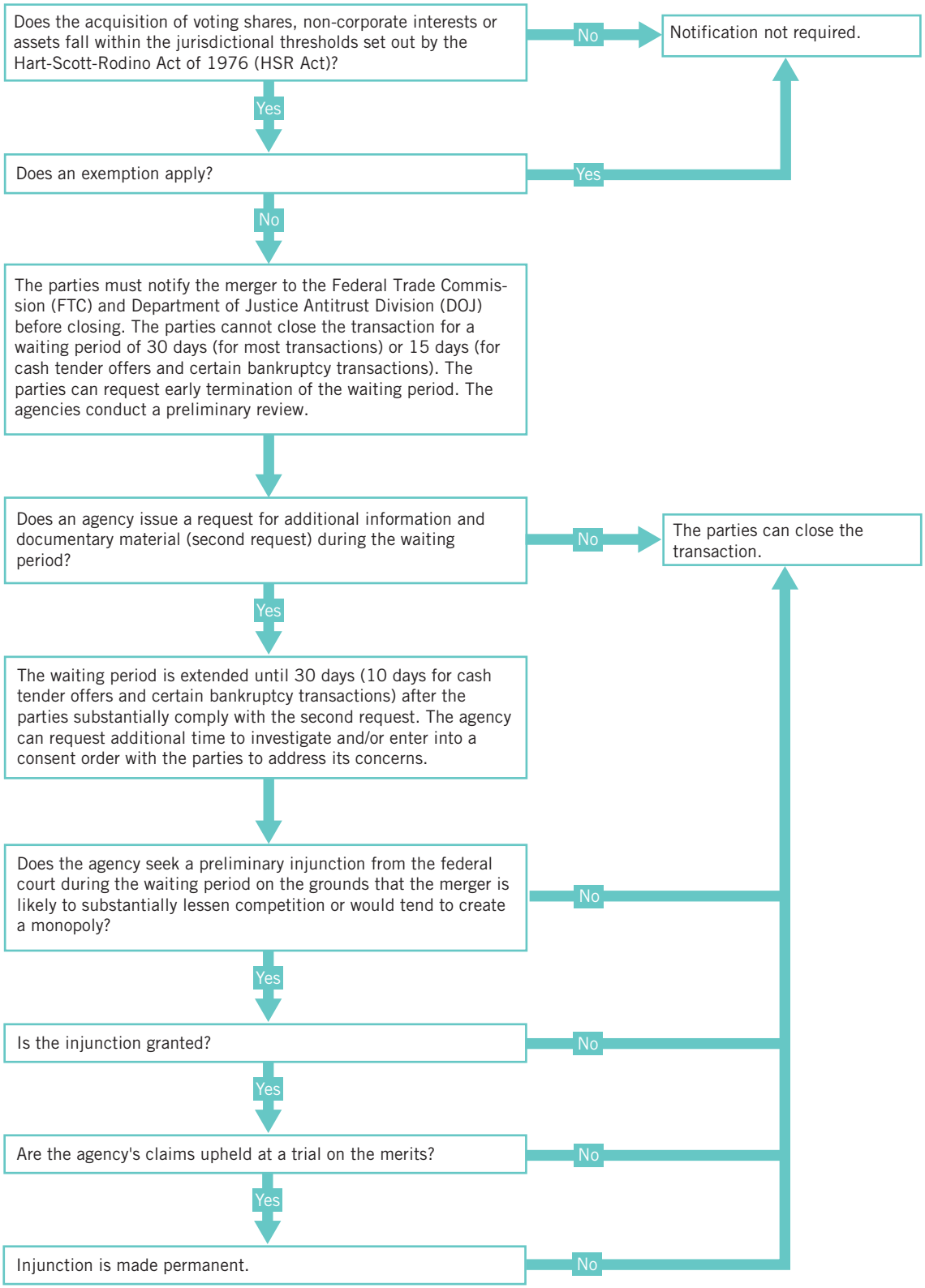
The 1992 DOJ and FTC Horizontal Merger Guidelines (Guidelines) provide the analytical framework for the agencies' review of a transaction. Under the Guidelines mergers should not create or enhance market power or facilitate the exercise of market power. Market power is defined as the ability to maintain prices above competitive levels profitably for a significant period (*§0.1, Guidelines*). Anti-trust enforcement seeks to avoid the exercise of market power, either:

- Unilaterally by the merged firm. Unilateral effects occur when a single firm, even if not a monopolist, is able to exercise market power through unilateral conduct. For example, if a merger eliminates strong competition between two brands, the combined entity may be able to raise the price of its own brand profitably because it knows that sufficient lost sales will be transferred to the acquired brand and not to other competing brands.
- Through co-ordination of market participants. Co-ordinated effects occur when the merger results in a market concentration sufficient to encourage or enable co-ordinated responses by market participants. For example, a merger that removes a discounter from an otherwise concentrated market, may facilitate successful co-ordinated action by remaining market participants.

The agencies analyse a transaction by defining the relevant product and geographic markets and determining industry concentration. They also examine whether entry would be timely, likely and sufficient to counteract or deter an anti-competitive price increase.

While the guidelines also point to the existence of efficiencies, or the fact that the acquired firm is failing, as a defence for an otherwise anti-competitive transaction, such defences almost never prevail.

UNITED STATES: MERGER NOTIFICATIONS



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 agencies have broad authority to require a wide range of remedies for any anti-competitive concerns arising from a transaction. These remedies can be contained in a consent decree issued by a court, or the parties can voluntarily implement the remedy, after which the agency will not challenge the transaction. Remedies include:

- Divesting overlapping assets to create a viable competitor to the merged firm. This is the most common remedy.
- Licensing of assets (this is less common).
- Behavioural remedies. These are typically ancillary to the main remedy. Behavioural remedies may include firewalls to protect confidential information or conduct restrictions to prohibit the merged firm from foreclosing rivals.

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.** The 30-day waiting period applicable to the transaction does not begin to run until the notification is properly made, which penalises an incorrect notification.
- **Implementation before approval or after prohibition.** The penalty for completion of a transaction before the waiting period has expired is US$16,000 (about EUR11,000) (subject to annual adjustment based on inflation) per day in civil penalties, enforceable by court order. These penalties can be imposed against both the company and its officers. In addition, the agencies can seek an injunction requiring divestiture of overlapping assets or other remedies (*see Question 8*).
- **Failure to observe.** The penalty for a failure to make a filing or to observe the waiting period is the same as for 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 agencies cannot unilaterally prohibit a transaction. They must bring an action in a court proceeding challenging the transaction to prevent it from closing (injunction proceedings). The parties to a transaction can then defend against that proceeding. Adverse court decisions can be appealed up to the US Supreme Court.

In some circumstances, third parties can independently challenge a transaction if they have suffered competitive injury as a result of the transaction. Third parties cannot appeal against the agencies' decision or any court decision.

In addition to injunction proceedings, the FTC may also bring administrative proceedings before an administrative law judge of the FTC to obtain remedies against anti-competitive transactions.

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?

As the US merger control system does not clear transactions but rather empowers the agencies to challenge a transaction, there is no concept of automatic clearance for any restrictive provisions in the agreements. If the agency believes that any provisions in the agreement raise anti-trust concerns, those will be raised in the course of the investigation and the parties may decide unilaterally to change them, or may be required to enter into a consent decree. While the agencies can challenge such restrictions in court, they can do so only as part of a larger attack on the underlying transaction. If the agencies decide not to challenge a transaction, they will not later challenge any restrictive provisions that are part of a transaction they have closely reviewed. Third parties, however, can challenge such provisions after the transaction has gone through.

12. Are any industries specifically regulated?

There are a number of industries where the industry's regulatory agency shares transaction oversight with the DOJ or FTC. These include banking, telecommunications, railroads and energy.

RESTRICTIVE AGREEMENTS AND PRACTICES

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

Section 1 of the Sherman Act (*15 USC§ 1*) (Section 1) can be enforced by the DOJ and by state attorneys general, and prohibits concerted action that unreasonably restrains trade. State attorneys general also can investigate anti-competitive conduct and bring cases under state anti-trust law. Although the FTC enforces section 5 of the Federal Trade Commission Act (FTC Act) rather than enforcing Section 1 directly, conduct that violates Section 1 also violates section 5 of the FTC Act.

Section 1 has two modes of analysis:

- ***Per se* illegality.** Naked restraints among horizontal competitors such as price-fixing and bid-rigging are illegal *per se*, and proof of the agreement is all that is required to show a violation. In addition to potential civil liability, the DOJ may prosecute hard-core violations of Section 1 as a criminal violation of the anti-trust laws. The *per se* rule has also been applied to some group boycotts and to some tying arrangements, but these agreements are not prosecuted criminally.
- **Rule of reason.** This applies to most co-ordinated conduct. Under this test, conduct is unlawful only where its pro-competitive virtues are outweighed by anti-competitive effects. In a rule of reason case, the claimant bears the burden of proving the existence of an agreement and that the agreement

has or is likely to substantially reduce competition. If it does so, the burden shifts to the defendant to come forward with evidence of the legitimate pro-competitive justifications for the conduct (such as efficiencies that improve quality, lower prices, or increase output). If the defendant successfully shows efficiencies, the claimant must show that:

- the conduct is not reasonably necessary to achieve the efficiencies; or
- the anti-competitive effects outweigh the pro-competitive virtues.

The DOJ and the FTC can seek only injunctive relief for non-criminal violations of the anti-trust laws. Private parties that are injured by an anti-competitive agreement can sue for violations of the Sherman Act. However, only parties that are directly injured by the violation can bring a private anti-trust action (generally competitors and direct-purchasing customers). Successful claimants are entitled to recover three times their actual damages, plus their attorneys' fees.

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

Section 1 applies to agreements and not conduct that is merely parallel. However, the agreement need not be a formal one. Since direct evidence of an express agreement is only rarely available, the Courts have accepted allegations of restrictive agreements based on circumstantial evidence, such as a pattern of uniform business conduct that is inconsistent with the parties' unilateral self-interest.

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

There are a number of statutory exemptions to the anti-trust laws, including for:

- Agricultural co-operatives.
- Insurance companies (where regulated by state law),
- Organised labour.
- Export trading companies.
- US and foreign air carriers, where granted by the US Department of Transportation.

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

In addition to the statutory exemptions, the courts have interpreted the anti-trust laws as not applying to certain types of conduct, including:

- Efforts to influence legislative, administrative, or adjudicatory government action.
- Anti-competitive conduct by states, or private parties' conduct that is actively supervised by a state and pursuant to state policy.

The courts have held that in certain circumstances federal regulatory schemes pre-empt the anti-trust laws, where enforcement of the antitrust laws would disrupt an existing regulatory scheme.

The US Supreme Court has recently held that the anti-trust laws did not apply to conduct that was heavily regulated by the Securities and Exchange Commission (*Credit Suisse v. Billing, 551 US 264 (2007)*).

There is no exclusion for small agreements.

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?**

- **Notification.** There is no formal notification process for restrictive agreements and practices or for notification to the agencies to obtain an individual exemption or other clearance.
- **Informal guidance/opinion.** However, the DOJ does have a business review letter process, under which it provides a non-binding statement of its present enforcement intentions concerning any proposed conduct. The FTC has a similar advisory opinion process.
- **Responsibility for notification.** Not applicable.
- **Relevant authority.** See above, *Informal guidance/opinion*.
- **Form of notification.** There is no official form.
- **Filing fee.** Not applicable.

18. Can investigations be started by:

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

The DOJ, FTC and state attorneys general can start investigations on their own initiative or in response to complaints filed by private parties.

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?

A complainant has no right of access to documents or to be heard during the course of an investigation. Statutory confidentiality requirements generally prohibit the sharing of information gathered by the enforcement agencies with private parties.

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

An enforcement authority (the DOJ, FTC, or a state attorney general) often initiates an investigation with an informal inquiry that seeks a voluntary response to requests for documents. If the informal inquiry identifies concerns, it proceeds to a formal investigation requiring the production of documents, answers to formal queries, and testimony. Following this formal investigation, the enforcement authority may initiate civil litigation, in federal district court in the case of the DOJ, in federal or state court in the case of state attorneys general, and before an administrative law judge in the case of the FTC. Remedies are often stayed pending appeal. The full litigation and appeal process can take three or more years.

Criminal enforcement by the DOJ follows a similar investigative track, but information is obtained from parties through the grand jury process. If the DOJ wishes to obtain criminal sanctions, the grand jury must vote and return an indictment in open court to a judge who then issues a warrant or summons to compel the appearance of the defendant at an arraignment.

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 investigation may be disclosed by the parties to the investigation or by the enforcement agency, at its discretion, although the agencies typically only publicly disclose an investigation after disclosure by the target or when it files a complaint in court. Information obtained through investigations is typically not made public until litigation begins, at which time certain commercially sensitive information may be precluded from public disclosure by court order, often at the request of one or more parties.
- **Automatic confidentiality.** Various statutes and rules strictly limit the DOJ's and FTC's disclosure of information obtained either through compulsory or informal processes. Some of these statutes and rules require that the party submitting the information designate it as confidential. For criminal investigations by the DOJ, Federal Rule of Criminal Procedure 6(e) requires government attorneys, the grand jurors, interpreters, and the court reporter to keep grand jury proceedings secret. However, the rule does not apply to witnesses.
- **Confidentiality on request**. See above, *Automatic confidentiality*.

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

The DOJ, the FTC, and most state attorneys general can obtain documents and responses to questions and compel testimony during civil anti-trust investigations. After beginning litigation, the enforcement authorities are able to use the broad pre-trial discovery allowed under US and state civil procedure rules. The DOJ and state attorneys general typically use the grand jury process to obtain documents and compel testimony during criminal anti-trust investigations. In criminal cases the DOJ and state attorneys general can also use search warrants, wiretaps, and electronic surveillance where approved by a magistrate.

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.

The FTC may reach a consent agreement with the parties that it then enters as an order before reaching a formal decision in an administrative hearing. Such orders are typically negotiated and result in a proposed consent agreement and order, a draft complaint, and an explanation of the consent agreement terms. If the FTC accepts the proposal, it is published for public comment. Following a 30-day comment period, the FTC may issue the order. The party agreeing to the consent order does not admit liability.

The DOJ can also enter consent decrees in civil investigations, which must be approved by a federal district court. The DOJ also prepares a competitive impact statement to be filed simultaneously with the consent decree, describing the nature of the proceeding and explaining the proposed consent decree. The defendant must file with the court descriptions of all communications concerning the consent decree on its behalf with any US government officer or employee, except communications between its counsel of record and the DOJ. The competitive impact statement and the proposed decree are published to solicit comments. Before entering the order, the court must find that the consent decree is in the public interest. As in the case of an FTC consent decree, a party to a DOJ consent decree does not admit liability.

In criminal proceedings, parties commonly enter plea agreements with the DOJ, which are provided for under the Federal Rules of Criminal Procedure. Before accepting a plea other than not guilty, a court must determine that the plea is voluntary and is entered into by the defendant with full knowledge of procedural rights.

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

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.** The FTC may, after notice and a hearing, issue cease and desist orders prohibiting conduct that is an

"unfair method of competition." While the FTC can order disgorgement, it has rarely sought this in anti-trust cases. The FTC may seek civil penalties through litigation in federal district court for violations of cease and desist orders.

The DOJ does not have the power to issue orders, but may seek equitable relief, including injunctions and divestitures through the litigation process in a civil proceeding. The DOJ prosecutes hard-core cartel offences (price-fixing and bid-rigging) as criminal violations and several state attorneys general have the power to seek civil orders and criminal fines similar to that of the DOJ. Several state laws also have civil fine provisions.

- **Fines.** Civil penalties for violation of FTC orders are limited to US$16,000 (about EUR11,000) per violation or US$16,000 per day for a continuing violation. Criminal fines can be up to US$100 million (about EUR68 million) or double the gain obtained by participants in the cartel or losses suffered by victims of the cartel.
- **Personal liability.** Individuals can be held criminally liable for violations of the Sherman Act. Individuals are not typically the target of civil investigations by the federal enforcement agencies, but individuals can be held personally liable in civil litigation brought by private claimants.

  Individual civil liability is possible where an individual participated in the violation, but cases finding such liability are rare.
- **Immunity/leniency.** The DOJ has leniency policies for criminal prosecutions for corporations and individuals. If a corporation reports an anti-trust violation to the DOJ before the DOJ has initiated an investigation and before the DOJ receives any information about the illegal activity from another source, the corporation and its officers, directors, and employees can receive amnesty from prosecution if the corporation promptly ends its involvement in the activity and provides full and continuing co-operation to the DOJ throughout the investigation. Amnesty may also be available after the DOJ begins an investigation, provided the corporation or individual is the first to come forward. A leniency applicant can also qualify for a limitation on damages in a civil suit to actual damages (as opposed to treble damages) if the applicant co-operates with the civil claimant. This limitation on civil damages is available only to applicants who have entered a leniency agreement with the DOJ before 23 June 2010 unless Congress acts to extend the limitation.
- **Impact on agreements.** It is possible for an entire agreement to be declared void. The FTC, in particular, has the power to prohibit otherwise lawful activities that could be used to facilitate unlawful conduct. However, more commonly, it is up to the parties to the agreement to determine whether certain provisions or aspects of the agreement can be performed without violating the order.

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?

Any person injured in its business or property by a violation of the federal anti-trust laws has a private cause of action (*section 4, Clayton Act, 15 USC § 15*). Successful claimants can recover three times their actual damages plus their attorneys' fees. It is also possible to receive injunctive relief against loss or damage threatened by a violation of the anti-trust laws.

With the exception of the provisions for treble damages and attorneys' fees, the same procedures and rules apply in anti-trust cases as apply in other civil matters. Class actions are possible, and many private anti-trust cases are brought as class actions.

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 attorneys general must seek a court order to prohibit conduct under the anti-trust law, and those court orders are subject to appeal (*see Question 20*). The FTC has enforcement powers (after a trial by an administrative law judge), and FTC's decisions may be appealed to a court of appeals within sixty days after the the order's issue. Only the respondents in the underlying FTC proceeding have the right to appeal.

MONOPOLIES AND ABUSE OF MARKET POWER

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.

Section 2 of the Sherman Act (*15 USC § 2*), (Section 2) prohibits:

- **Monopolisation.** The monopolisation offence applies where the defendant:
  - possesses monopoly power;
  - has acted anti-competitively to obtain or maintain monopoly power.
- **Attempts to monopolise.** The attempted monopolisation offence applies where there is:
  - "dangerous probability" that the defendant will obtain monopoly power;
  - anti-competitive conduct; and
  - a specific intent to obtain a monopoly.
- **Conspiracies to monopolise.** The conspiracy to monopolise offence applies where there is:
  - an agreement among two or more parties to monopolise; and
  - an overt act in furtherance of the conspiracy.

Some courts have also required a "dangerous probability" that a monopoly will be obtained.

The DOJ and state attorneys general enforce Section 2. While violation of Section 2 is a criminal offence, DOJ policy is to pursue only hard-core cartel cases as criminal violations and there have been no criminal monopolisation cases for decades. Although the

FTC enforces section 5 of the FTC Act rather than enforcing Section 2 directly, conduct that violates Section 2 also violates section 5 of the FTC Act.

Customers and competitors that are injured by monopolisation or an attempt to monopolise can sue for Sherman Act violations. Successful claimants can recover three times their actual damages, plus their attorneys' fees.

28. How is dominance/market power determined?

Monopoly power is not statutorily defined, although the courts have defined monopoly power as the power to control prices or exclude competition. Judicial decisions have typically found monopoly power where the defendant has a market share of 70% or more in a properly defined market that has high barriers to entry. A dangerous probability of obtaining monopoly power, which is required under the attempted monopolisation offence, is typically found where the defendant has a share of 50% or more of a properly defined market and barriers to entry are high. Courts rarely find monopoly power where the defendant's market share is below 50%, and rarely find a dangerous probability of monopoly power where the defendant's share is below 30%.

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

Generally, conduct is not anti-competitive simply because it harms a competitor and is only illegal where it harms the competitive process and thereby harms consumers. The exact scope of anti-competitive conduct under US anti-trust law is somewhat unclear and cases and commentators have struggled to create a rigorous standard to distinguish anti-competitive conduct from vigorous competition. Among the tests proposed are the:

- **Profit sacrifice test.** This is used in predatory pricing cases, and proposed for use elsewhere, and holds that conduct is anti-competitive only if the firm sacrifices short term profits in return for monopoly pricing in the long term, after competitors are excluded.
- **No economic sense test.** Conduct is anti-completive where it makes no business sense except for its potential to exclude competitors.

Conduct that violates Section 1 and excludes competitors (such as tying or exclusive dealing) may also be anti-competitive conduct as required for a monopolisation or attempted monopolisation claim. Predatory pricing is deemed anti-competitive only where the price set is below an appropriate measure of cost (generally average variable cost) and where it is plausible that the price will force competitors to exit and barriers to entry are high.

Recently, the courts have shown greater hostility to monopolisation claims based upon unilateral refusals to deal. After the US Supreme Court's decision in the *Trinko* case (*Verizon Communications v Law Offices of Curtis V. Trinko, 540 US 398 (2004)*), courts have generally refused to find liability unless a monopolist defendant terminates an ongoing and voluntary course of dealing with a competitor without a valid business justification.

30. Are there any exclusions or exemptions?

The statutory and judicially-created exemptions and immunities apply to monopolisation cases under Section 2 in the same way as they apply to cases involving agreements under Section 1 (*see Questions 15 and 16*).

There is no statutory safe harbour or statutory presumption of dominance. Judicial decisions do, however, create certain safe harbours regarding specific conduct. For example, the US Supreme Court has created a safe harbour for predatory pricing claims where the prices charged are above an appropriate level of cost (usually marginal cost or average variable cost). Some courts have held that conduct permitted by the intellectual property laws (such as refusals to license intellectual property) do not violate the anti-trust laws.

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.

It is not possible to obtain clearance from the regulators. The DOJ has a business review letter process and the FTC has an advisory opinion process under which they provide non-binding statements of their current enforcement intentions with regard to proposed conduct (*see Question 17*).

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.

There is no difference. See *Questions 18 to 21* and *23*.

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

See *Question 22*.

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

See *Question 24*.

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?

See *Question 25*.

THE REGULATORY AUTHORITIES

Department of Justice, Antitrust Division (DOJ)

Head. Christine Varney, Assistant Attorney General

Contact details. 950 Pennsylvania Avenue, NW
Washington, DC 20530
US
T+1 202 514 2401
F+1 202 616 2645
E*christine.varney@usdoj.gov*
W*www.justice.gov/atr/index.html*

Outline structure. The Antitrust Division is divided into groups that work on civil, criminal, international enforcement, and policy and appellate matters. Civil enforcement is divided into six sections:

- Three litigation sections (Litigation I, Litigation II, and Litigation III).
- Networks and Technology.
- Telecommunications and Media.
- Transportation, Energy and Agriculture.

There are also eight regional Antitrust Division field offices and a separate economic analysis group.

Responsibilities. The DOJ is responsible for both civil and criminal anti-trust enforcement.

Procedure for obtaining documents. Many non-confidential documents can be downloaded from the DOJ's website, including case filings, press releases, speeches by DOJ officials, business review letters, policy statements, and guidelines.

Federal Trade Commission (FTC)

Head. Jonathan Leibowitz, Chairman

Contact details. 600 Pennsylvania Avenue, NW
Washington, DC 20580
US
T +1 202 326 3400
F +1 202 326 3442
E *jleibowitz@ftc.gov*
W *www.ftc.gov*

Outline structure. The FTC consists of five Commissioners, led by its Chair, Jonathan Leibowitz. The FTC is divided into:

- Bureau of Competition.
- Bureau of Consumer Protection (which investigates deceptive conduct that targets consumers).
- Bureau of Economics.

The Bureau of Competition is led by a director and several deputy directors and divided into a number of investigating divisions:

- Four merger divisions.
- Health Care Division.
- Anticompetitive Practices Division.
- Several regional offices.

The FTC's Premerger Notification Office and Compliance Division are also part of the Bureau of Competition.

Responsibilities. The FTC enforces Section 5 of the FTC Act, which reaches both unfair methods of competition (anti-trust violations) and unfair acts and practices (consumer protection violations). The FTC has no criminal enforcement responsibilities.

Procedure for obtaining documents. Many non-confidential documents can be obtained from the FTC's website, including case filings, press releases, studies, HSR pre-notification reference materials, business guidance, policy statements, and speeches by FTC Commissioners and other FTC officials.

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.

The formation of joint ventures is analysed using the same basic criteria as mergers and acquisitions, that is, whether the joint venture tends to restrict competition or lead to a monopoly.

Agreements among joint venture participants are not unlawful *per se* where the joint venture involves the integration of the parties'

productive assets in a manner that increases a firm's efficiency and enables it to compete more effectively. The US Supreme Court has held that internal pricing decisions of a legitimate joint venture cannot be condemned as *per se* illegal price-fixing (*Texaco, Inc v Dagher, 547 US 1 (2006)*).

However, it is less clear when joint venture participants' actions are unilateral conduct outside the scope of Section 1 and therefore unlawful only when threatening monopolisation under Section 2. In the *Dagher* case the court did not accept that the joint venture's price-setting was unilateral conduct. However, the US Supreme Court is to review the *American Needle v National Football League* case, which presents the question of whether the National Football League and its members should be treated as a single entity.

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 DOJ and FTC co-operate with foreign competition law authorities, under mutual legal assistance treaties and informally. Due to the statutory confidentiality protections afforded to information obtained through compulsory processes, the FTC and DOJ cannot share information they have obtained in this way without the consent of the producing party.

PROPOSALS FOR REFORM

39. Please summarise any proposals for reform.

The DOJ and FTC are currently considering whether to revise the Guidelines, which the agencies use to guide their analysis of transactions. They have not set a timescale for implementation of any changes.

CONTRIBUTOR DETAILS

Debbie Feinstein and Jonathan Gleklen
Arnold & Porter LLP
T +202 942 5015
+202 942 5454
F +202 942 5999
E *deborah.feinstein@aporter.com*
jonathan.gleklen@aporter.com
W *www.aporter.com*