

Antitrust Outline Winter 2000

Antitrust Outline (2)

Means of ordering the US will be through competition

Resources allocated to consumers

Good and services allocated to purchasers

Economic efficiency concepts

Operating efficiency

Better to expend fewer resources in accomplishing a task

Allocative (resources) efficiency, speaks in global fashion toward the performance of an economy or a nation

Where consumer satisfaction is maximized, the resource allocation is greatest

The primary benefit of competition is to produce lower prices, better products and greater purchasing convenience. This will happen when things are near pure competition (e. g. a number of independently functioning economically viable competitors in the United States)

Market structure

Number of seller in the market

Relative percentage of the market that they sell

monopolies were bad

used to be a problem that oligopolies were bad (could be reinvigorated)

business conduct

has to do with behavior by individual firms in the market

in 1890 there was a clearer perception that some forms of collusive business conduct, or collusion were bad for economic performance

where one has competitors in the market to fix prices, that the Economic effect, was that they monopolize the market

general consensus -- but there can be good things (there can be good things)

monopolies were not a good thing (bad market structure)

collusive business conduct has been seen as a suspect type of activity

what would have the potential of harming market structure

Foreclosure by a seller of access by a competitor to purchases or inputs that are needed to produce what the competitors would like to make

Predatory pricing: pricing that is designed to price competitors out of the market

The views these things have changed over the past several years

There could be a reason for anti-trust laws that is to preserve political and social values (political and social life best preserved when there are smaller competitive markets)

Alcoa and Brown Shoe

Exemptions (Congressional or Constitutional)

Common law exemption for major league baseball
Constitutional

Patent rights (US Supreme court has not views in restrictive manner)

17 year exclusive right to control who makes sells, and uses the invention in the economy.

Statutory

Organized Labor Activities (Section in Clayton Act)

Union activities
Management collective bargaining
Agreements that are struck through collective bargaining activities

Government regulated (viewed restrictively)

When congress spells out that regulation is to be the federal policy in an industry or market

E. g. SEA, Power
Congress needs to be specific in the extent to which it wants an exemption created

Insurance to the extend that the insurance business at issue is regulated by state authorities

Regulation has to be active

State action: Federalism

In order to preserve federalism, the supreme court established an exemption from the anti-trust laws, states act in their governmental capacity, in areas where the states have reserved rights and the powers to act

States, local, and private parties that operate under some action by the states or those local governments

States have no liability when a state official is operating pursuant to a clearly expressed policy adopted by the state in question – but if the state is a commercial participant, this doesn't count
Local governments: if operating by a clearly articulated policy on the part of the state to give the local government the ability to regulate, and thereby restrain competition in a particular market

The local government will have no liability under the anti-trust laws
This is also true, if it is clearly foreseeable, if local governments would restrain this from free and open competition
There is a commercial participant to local government activity

There is no exception for conspiracy
Supreme court was faced with the issue of whether or not, if these facts were true, there would be some liability for the local government involved, the city of Columbia, that there is no such exemption for conspiratorial or illegal activities

Immunized private parties if there is active government supervision

Industries that are regulated by the state, if the regulation is pursuant to an expressed policy, or if they are acting under the regulation of the local government
State or the local government must actively supervise the activity

Political action (from first amendment)

Commercial entities have the rights to free speech and petition

Lobbying
Advertising
Political action activity is exempt

The entities must have as the focus some type of legislative action which is the restraint of trade

The restraint of trade can't be produced by the lobbying, advertising in and of itself (Sham)

Omni: Will apply even if the Plaintiff alleges that the private party engaged in bribery activity with the local government

Superior Court Trial Lawyers: supreme court said that the restraint of trade was imposed by the process (which they engaged in) -- the process in and of itself

Allied Tube: First amendment doesn't apply to private action: Doesn't apply to activities on the part of firms to influence private orderings (even if this is to put out a uniform code) -- t

Act of state exemption

If foreign governments were subject to judgments, this would create a foreign relations committee

If a foreign state officially acts, the activity of the foreign state is exempt from the application

Private parties who operate abroad under compulsion from foreign government, also enjoy – but it really has to be compelled

Doesn't cover acts of firms seeking foreign government action

Allegation that a defendant bribed an official, in order to get a contract to build something has cause of action under the anti-trust laws

Principle of comity is applicable. Might lead a court to decline to exercise full jurisdiction

No first amendment right to petition foreign government

statutes

Sherman act: any act or practice is subject to its prohibitions (the application of the Sherman act is every bit as broad as the power of Congress to legislate) -- acts or practices that have an effect on the US, or have an effect on exports

Combination in restraint of trade (business conduct): Types of contracts were restraints of trade in and of themselves (illegal per se)

Between competitors

Price fixing (between competitors)

Market division (between competitors)

Boycott (between competitors)

E. g. excluding a surgeon

Between sellers and buyers

Price fixing (between sellers and buyers (vertical))

Market division (between sellers and buyers (vertical)) -- no longer considered to be per se

Tie-in sales agreements Price fixing (between sellers and buyers (vertical))

Monopolize or attempt to monopolize (market structure)

Clayton act (more specificity) – have to predict an anti-competitive effect (smaller, scope, there must be actual sales involved in interstate commerce)

§ 2: prohibited price discrimination by sellers (smaller, scope, there must be actual sales involved in interstate commerce)

Robinson-Patman Act (six concepts)

§ 3: prohibited tie-in selling agreements and exclusive dealing agreements and exclusive dealing agreements by which the seller restricted the activities of the buyer

§ 7: mergers
for tripple damages

violation

harm must have been casued in fact by the violation

damage that the Plaintiff has suffered constitutes anti-trust injury: the activity of the defendant must actually harm competition

this is still undergoing development, stemming from the Brunswick case, as it is still somewhat vague

the general idea is that harm to competition or anti-trust injury occurs when there is a decrease in competitors or higher prices

pass on concept: price-fixing

the purchasers of such a product cannot recover for the payment, unless the buyer is a direct buyer from the defendant's who engaged in the price-fixing or, more generally the violation of the anti-trust laws

Federal Trade Commission act (doens't need to be actual sales)

Unfair methods of competition

Any activity that is illegal under the Sherman or Clayton Act

Any act or practice which violates "the spirit" of the Sherman or Clayton act prohibition

Penumbra power: the power of the FTC to find that a competition violates the spirity

Horizontal agreements: agreements between competitors

§ 1 of Sherman Act makes illegal contracts, combinations, or conspiracy in restraint of trade

per se treatment concept and its application to horizontal restraints

can't mean all contracts that restrain are illegal, but progression

contracts between competitors has been considered legal, and these contracts contract has been considered legal, and were ancillary restraints that were subsidiary to a lawful contract (Adyston)

Ancillary

Covenants not to compete: preserves good will

Contracts not to compete between persons forming a partnership

Necessary if you are going to have people in a professional business

Naked restraints: Trenton Potteries

Agreements between competitors to eliminate competition between them

These price fixing agreements or market division were not ancillary to any other type of agreement

Later there were only unreasonable restraints of trade

Trenton Potteries: Although there was an agreement to fix price, it was a "reasonable range"

Reasonableness of fixed prices is not a justification

Socony: any agreement that tampers with price structures will be illegal per se under §1 of Sherman act:

Fn 59: all that is necessary is to show that a particular contract falls into a category of contract that do not have any reasonable justification in the sense of furthering competition in any way.

If such an agreement is proved, then there is no need to show any effect
Doesn't need to show the power to restrict the price

Illegality is established by the type of agreement entered into

Could conserve judicial resources (Northern Pacific Railway)
Provides certainty for business community (Northern Pacific Railway)

Price fixing (From Northern Pacific)

Things that interfere with competition as a means of setting price
Where competitors act together pursuant to an agreement, for something that restricts the availability of product pursuant to the agreement

Market division (From Northern Pacific)
Collective boycotts (From Northern Pacific)
Tie-ins (From Northern Pacific)

Geographic divisions (Topco)

Old Market division agreements are illegal per se

Price fixing

In Superior Court Trial Lawyers, it was hinted that one should look at the purpose of the agreement (uncertainty)

Rule of reason: There could be subtleties in commercial life which render things not unreasonable (still could be unreasonable)

Has to be shown that they will limit directly the price they quote: National Professional Engineers: Needs to be quite clearly warranted

Forshortened rule of reason analysis: Differentiation between This was not a price-fixing agreement, this was an agreement to restrict bidding

Price fixing

In Superior Court Trial Lawyers, it was hinted that one should look at the purpose of the agreement (uncertainty)

Maricopa county: would consider a maximum price fixing agreement illegal per se, but the court still hints at a rule of reason

Conspiracy: If the defendant's were allegedly in agreement to follow a per-se illegal horizontal restraint. There is no difference, between contracts, conspiracies, or combinations

All we need is proof of agreement.

Consciously Parallel conduct: independent action by competitors

There is no agreement or illegality under § 1 – has to be an agreement that anyone would infer
Oligopolistic interdependence

Each competitor anticipates that whatever it does, each competitor will be known, and after having considered what is the anticipated reaction by the competitors in the market

Theory is that competitors will be slow to cut prices individually
Some people had the idea that price would ratchet upwards

This meant that the US supreme court took a bad view of mergers

Conspiracy: Plus factors that would support a finding by the judge that there was a conspiracy. (Interstate circuit)

Course of parallel action: Each of the competitors had ended up in the same place, even though each one of them was negotiating separately. Interstate circuit

In dicta: Conscious parallelism might, alone, be enough

Matsushita: conscious parallelism enough is not enough, alone, to get the issue of whether there was a conspiracy to a jury

Contractual terms constituted a radical departure from past industry practice

Though it was individually advantageous for a supplier sell to a retailer at a price, if it sold to everyone at that price it wouldn't best

Exception (rule of reason) for horizontal restraints

Where the price fixing agreement is part of a "novel economic arrangement" the court won't apply per-se treatment:
Broadcast Music

Flat fees could be considered price-fixing, where the "price fixing agreement"

Necessary agreements: Output restricting agreements, would not have per se treatment, because the particular product may require horizontal restraints, in order to make the product possible: NCAA

Agreements to withhold information from consumer, would not get per-se treatment. Indiana Dentists

Rule of Reason Criteria (CBOT): once the court determines what the nature of the contract is, then the court is to look at the purpose (good purpose), and what the likely effect of the rule

What did the rule do (nature of the contract)

What was the purpose

Competition is the best way to organize resource allocation: Indirect fear of members doing a sloppy job is not enough
Court looks at whether the premise on which the rule is based, is consistent with the intent of anti-trust (competition is good)

Power of the parties to the agreement – by looking at the net effect

The amount of the market that was under the agreement

The historical effect, and prediction on competition will be observed

Continental TV (vertical): the effect is whether, competition, is, on the whole promoted by the restraint, or there is retraction from the restraint.

There could be other forms of competition that were being promoted

Note: it is only pro-competitive – social, lifestyle, etc. Doesn't count

What the effect of the agreement would be

Also what the observed effect should be

Things that get rule of reason

Ancillary agreements

Joint venture agreements

Formed for a pro-competitive purpose to produce a new product

May be some restrictive side agreements

Agreements to share data will get rule of reason

All parties to the market would need to have this information, so that all parties to the market can rationalize their planning

If the information is circulated among competitor sellers

Container Corporation is an illustration of a rule of reason analysis being given to a data-sharing agreements

Boycotts (illegal per se under Northern Pacific)

Fashion Originators: acting as an extragovernmental agency

Boycotts by which competitors agree to disadvantage another competitor by denying that customer an asset, such boycotts have been found to be illegal.

This was a collectively generated asset

Per se treatment given if one or more of three conditions (Northwest Stationiers)

Competitors agree to disadvantage another competitor by denying the target competitor access to customers, suppliers, or an asset, which is necessary in order to compete

The boycotting competitors had a dominant position in the market

No plausible argument was made in support of their actions

(e. g. there could be some reasonable requests)

things might really be a form of price-fixing – where the target isn't a competiro, but an attempt to force a purchaser to pay a higher price, and hence, per-se treatment

Competitors who had created an asset through a joint venure operation refused to allow a competitor to have access to the product

Evidence that an agreement exists – has to be evidence that someone would infer

Plaintiff or the prosecution has to produce evidence that the conspirators acted independantly

Circumstantial evidence has to reasonably point to the evidence of an agreement

§ 1 of Sherman as to boycotts

Vertical Agreements: between buyers and sellers: Appraised under § 1 of the Sherman act as restraints of trade

Resale restrictions cases where a product is composed of components that are purchased by a manufacture

RPM is illegal per se

Dr. Miles

Vertical price fixing with price fixing between competitors

Somewhat dubious

Maximum resale price has been declared illegal: Herald Tribune

If there is to be a change in the law, it will have to be via Congress

From 1937-74 there was exemption in the Sherman act – was repealed as an anti-inflation measure that would legalize minimum resale prices

Agency and patent exception: Consignment (retention of title):

1964: supreme court limited GE agency theory to patented goods

Simpson: rule of reason will be given to a consignment, followed by a sale. If patented, the good is legal

Manufacture can chose a sole outlet: doctrine of trader's prerogative

Territorial and non-price restraints restrictions are under the rule of reason

Sylvania: rule of reason: can have increase in intra-brand competition make up for

In GTE-Sylvania, it required its retailers, to sell from established location – non-price resale restrictions will allow a manufacture to guarantee to a retailer a competition free enclave - free of intra-brand competition

Says that the increase in inter-brand competition increase will make up for any decrease in intra-brand competition

Reasons why manufactures impose resale price restricts on retailers

Manufacture is a pawn of powerful retailers

Retailers want force them to force them to do something

Manufacturers may have agreed to fix prices and maintain stable market shares

Setting minimum retail prices Could be a way of manufactures implementing a price-fixing agreement and market division agreement

Promotion of luxury image

Interest in getting good retailers

Existence of agreement

No agreement if the manufacture recommends a price (no agreement): Colgate

This could be "trader's prerogative" (free to announce terms which it would continue to make sales)

But extracting any sort of commitment to future action was enough'

There is no inference of an agreement, simply because of recommendation, and later termination: Monsanto

Termination of one dealer by a manufacture because the terminated retailer was selling below recommended resale price, which had the effect of establishing something as the sole outlet: Business electronics

Tying arrangements (§ 3 of Clayton act): illegal to condition the sale (or fixing of lower good) on the condition that the buyer buy another set of goods. Was never really per se

laws

Sherman: broader

Clayton: needs to be across state line, and only goods

Tying arrangements are illegal per-se under the Sherman act as long as there a not-insubstantial amount of interstate commerce effected

for a Plaintiff to prevail under a per-se analysis has to be a showing that people were "coerced" to buy the tied product or that competitors were placed at a measurable disadvantage
Services Tied to Land: Northern Pacific
Seller has sufficient economic power to appreciably restrain in the tied product market
Supplementary product : International Salt
Repair services are a separate market and defined the market as being a market of only one brand: Kodak

Exceptions

Don't have to tie in the sale to the machines, and one can write product specifications, and a general agreement is acceptable (e. g. to use high quality supplemental product)
There could be problems with infinite industry and trade secret issues
Continuing obligation to repair (but see Kodak)

Jefferson Parrish (hospital and anesthesiologists) analyses

(lower courts said illegal per se)

court recognized that although there were two products (using a commercial reality test – whether the two products could be sold separately)

court was divided as to whether or not tie-ins should receive per-se treatment

majority: per se treatment authorized only when a substantial volume of commerce is effected

seller needs to have enough market power in the tying market to force people to buy things in the tied market power

could be patent
could be dominant market share in tying market

Jefferson Parrish was 30%

if the market product is so unique, so that people need it

concurrance – consumer welfare

must have tying power
risk that the tied market will fall prey to the tied agents (very little if stable providers)
must be a coherent economic for treating the tied product as distinct

Exclusive dealing contracts: promise that they won't buy from a competitor

Where there is a substantial quantity of product then these exclusive details may be less under the Clayton act

Substantial Quantity is a market share :National Coal Company
Good things Could be price protection, and assured source of supply (as prevalent in the market): Standard Stations

Jefferson Parrish: court may be interested in purposes and advantages, and the court won't be fixated on a small market share as triggering an automatic finding

Patent exemption (Constitution): has to be non obvious and novel

Types of products

Product patents
 Process patents
 Improvement patents (separate patents)

Patent misuse: patents won't be enforced if abused (e. g. if one abuses a patent and license a non-patented part of it)
 – this is because it is in equity
 Or for longer than the 17 years

First sale doctrine

Creator of the patent can sell the patent, but if the buyer sells the product the creator has no control

Patent settlements problem

Cross licenses

Unless market dominance is obtained through market dominance, there can be no anti-trust challenge, because of cross-licensing pursuant to a settlement agreement between those firms: Standard Oil

"Cracking case": protection of the Standard Oil doctrine, and the cross licensing was done for an improper purpose: In a patent settlement agreement, we are talking about an agreement to stop competing.

In patent validity considerations, there is a problem with adequate representation for everyone else

General Electric doctrine: Setting of price at which the licensee will sell a patented product is valid under the patent code, and has no anti-trust implications, whatsoever

Heavily criticized

If a patent holder gives a license, it still isn't a matter of concern to the courts

Monopolization (market definition)

Market definition

Defining what a market is

Step 1: define the market in which a firm or firms are competing
 Merger guidelines provide definition

General principle is to isolate the firms that a given firm must take into account in pricing products
 Determining a group of sales of various products, which if one hypothetical seller made all of the sales, that manufacturer could successfully raise its price for a substantial period of time, and continue to operate properly

Determining the products that are in competition with one another in the marketplace

Hypothesize a theoretical price rise that is "small but insignificant" and not transitory (e. g. for a while) – this is the foiling standard -- this would foil the hypothetical monopolist

Define the relevant geographic market (taking a location where it is sold) and one can hypothesize a standard price-rise, consumers in that geographic area, consumers would set it away in the adjacent area, than the new area would be included in the geographic markets

Will be defined by consumer convenience

When we are talking about goods that are sold to other businesses – shipment costs are what is important there

Identify the sellers in the market: using the foiling standard

New entrants: if there is a foiling standard, there may be new entrants or an increase in competitor production

Ascertaining the market share of the market share of the firms in the market

What would be the total market if you had one standard price rise, and you had production facilities shifting in the market.
 Estimate what the new entrants would be producing at the end of the year
 Take into account the existing production, and one would get the total production
 Would fix each firms' share of the market
 Would get the estimated production of the individual firm, as a percentage of the total the total (for each of the four steps)
 – would derive the percentages for each firm for the percentages

This would give you market shares in the market

Sometimes people accept the idea that market share is a surrogate for market power

This isn't necessarily true

Supreme court established a presumption of market show from market share
 Market shares held by the firms were not the proper indicator :General Electric

Since market share is presumed to reflect market power, and is therefore crucial, even though there is a presumption, the presumption is rebuttable

Market power: needed to show some form of conduct on the part of the defendant

Ability of a seller in the market to price its product in a way the produces the greatest profit for the firm

The ability of a firm to ignore its competitors
 Total market power is defined as a market for a product for which there are no substitutes

The vast majority of firms function in a competitive environment in which there are substitutes and there are competitors
 – market power is not total, and dependant on how close the substitutes are

Question of how much name brand identification the firm has

Defining monopolization (§ 2)

Any of the offenses as defined in § 2 of the Sherman act section
 Crimes (§ 1 of Sherman act includes any contract, or restraint of trade prohibition in § 1 without the showing of the possibility of obtaining monopoly power)

Monopolization

Power element: Alcoa: set 90% floor – just needs to be approaching total power

"a monopolist has the ability to exclude competitors and to set its own prices in the market" (same thing)
 doesn't need to be an absolute power
 market share is going to determine whether or not someone has monopoly power

the process of market definition will be crucial as to whether the firm holds monopoly power
 market power

can be difficult (e. g. different types of product defintiino

monopolization behavior for violation of the Sherman act -- there must be some element or taint in § 2

it would be unfair to say that the winner of a commercial struggle did it through illegal conduct
 Alcoa: Skill, foresight, and industry will never me enough for monopolization conduct

Shoe: whether or not a monopolist had engaged in monopolziation power, there is the following defintion

Government proves that once that company has monopoly power, the burden shifts to the defendant to prove that it got there by skill, foresight, and industry

Any illegal conduct which positively effects market share is going to be monopolization conduct (torts, included)

Fraudulent sales

Filing of frivolous lawsuits

Tortious behavior

Cannot merge to monopoly (not illegal, but still monopoly)

Long term exclusive supply (tie up exclusive supply)

Exploiting leverage

Bundling of repair services in the sales of machines (

Shoe Machinery because by doing so, no independent repair industry grew up

Predatory pricing

Background: sales below ATC

Exception: could also be below sales below AVC

Another formulation was: anything other than socially desirable conduct on the merits -- irrational in the short run that becomes rational only when the holder of the monopoly power can figure that they will drive the competitor out of business

Aspen Skiing: Can monopolize by withdrawing from a JMA that pre-existed

Failure to accept full purchase price unless there is a long run goal in driving a competitor out of business

Criteria

Hard for a competitor to complete

Economically irrational in short run

Long run is defined as length of time to enter and exit

Where there is a business purpose which is compatible with "socially desirable competition on the merits" – if the alleged monopolization conduct is motivated by one of these legitimate business purposes, than it won't be considered to be legitimate business monopolies

Attempting to monopolize

Two requirements

Defendant, unless restrained, will obtain a monopoly

Conduct must reveal a "specific intent" to achieve a tainted monopoly

Hard to define

Bad conduct or makes no sense, unless predicated on the idea that the alleged pretender will drive everyone from the market

Coercive refusals to deal can constitute monopolization attempt: (e. g. we will do business, if you refuse to do business with competitor)

Dangerous probability: Needs to show either market power, or a common sense substitute. Also needs to show a reasonable amount of market power, or its common sense substitute: Spectrum Sports:

Doubt in 9th circuit

Combining to monopolize

Mergers: § 7 of Clayton act (market definition): any type of activity by which two companies become one: all for supreme court to be restrictive on mergers.

Horizontal: hard to know when a merger would substantially lessen competition

Brown Shoe: The fact that, at a large number of cities, there were maximums as much as 5% on both companies, joining these competitors would probably lessen competition

Where there was a combined share in the merged entity in a particular line of shoes, than the courts felt that this could lessen competition

There could be an oligopoly situation which congress sought to avoid at hand

There could be a triggering of reactive mergers toward oligopoly

Philadelphia Bank: where there is a merger which produces a combined entity of a high share, unless this can be rebutted.

Von's market was only 7.5%, but there was a trend toward concentration

Merger guidelines (HHI) by 1984 guidelines

If the top 4 firms sell 75, and a merger between two of 4%, would be challenged)

If the top 4 sold less than 75%, the government would challenge mergers between 5%

If there were a trend to concentration, the numbers do not matter

No credence in oligopolistic interdependence, where there are fewer sellers that need to be coordinate (in an oligopoly it is easier to arrange an alliance)

HHI

Sum of the squares of the shares

No horizontal mergers of 1k or less than would be challenged

If HHI above 1800, something that produces an increase of 100 or more points

Multiplying the merging firms together, and doubling it

Won't challenge if less than 50%

In a concentrated market where the increase is between 50-100 the Justice department will challenge based on a discretionary review of certain factors or circumstances

Entry (is it easy?)

Makes it harder or easy to price-fix

Is there a history of price-fixing

History of suspicious circumstances indicating price-fixing

Between 1000-1800, the department won't challenge if the increase in the HHI is less than 100, if more than 100, it will review

There is "failing company defense"

Clear probability of business failure

The proposed merger must be less anti-competitive than other possible mergers

Vertical:

Old guidelines: problem was foreclosing a manufacturer from selling

New guidelines: foreclosure is not a concern, but is important -- three points

Brown shoe: there could be a greater incentive to price fixing, because the fruits could be entered into with less fear of entry into that market

Entry: There vertical acquisition to entry must increase entry costs

If there is enough purchasing power to buy the output of two new entrants entering on an efficient scale, then the justice department will consider a challenge

Entry by a manufacturer, along with entry into the retail market -- the added expense of two-level entry must be a significant factor

Conglomerate: any merger which is neither horizontal nor vertical

Reciprocity threat: (Consolidated Foods): where a merger establishes a situation where one firm can threaten another firm with drawing its patronage, this is reciprocity. If the potential was significant this was a goal for producing a conglomerate merger

If a car company buys a coal company

Synergies If the car company now has a coal division, and one now has reciprocity potential or threat which is a conglomerate

Disproportionate size

The court said there were two independent grounds for striking down

Where a conglomerate merger produces a merger between the firms that are merging, and the firms already there, it is natural that they will be reluctant to compete aggressively, the threat to competition is clear

Potential entrant (still there) -- 84 (reasonable to do so for fear of collusion)

"wings effect": Firms in a market are reluctant to increase their prices even if they are not colluding for fear that they will draw the attention of a potential entry

the firm that in the market is acquired by the people who are one of the most likely potential entrants in the market, when this potential entrant merges into the market, the anti-competitive effect requirements is met
three things need to be present

relevant has to be concentrated (Hhi greater than 1800)

entry barriers have to be significant enough, so that less than 3 firms other than the entry have the power to enter in response to artificially high prices

the acquired firm has to have at least 5% market share

at 20% market share, if the acquired firm has 20% market share it will challenge

between 5 and 20 % the justice department will make a discretionary decision based on a review of the same factors

Price discrimination (by Robinson-Patman act)

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