Tests:
- Per se
  - Jefferson Parrish: per se rule requires some threshold showing. Infinity case also.
  - Happens in tie-in consideration if have two products or one.
- RoR requires showing of anticompetitive effect. PS doesn’t require it.

OUTLINE

Sherman Act: Collusion
Every contract, combination . . ., or conspiracy, 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.

Sherman Act: Monopolization
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.

Clayton Act, §3
It shall be unlawful . . . to lease or make a sale or contract for sale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.
- Microsoft tie-in

Robinson Patman Act
It shall be unlawful for any person engaged in commerce… to discriminate in price between different purchasers of commodities of like grade and quality … where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of such discrimination, or with customers of either of them.
- Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition.
- Note: difference is that action may be substantial, rather than is. Also, competition with any person, not in market.
- Those in competition with those who knowingly receive benefit, grant the benefit, and customers. Primary, secondary, and tertiary lines of discrimination.
- *Brooke Group* tie in (cigarettes)

Enforcers
- USDOJ: Antitrust Division
- FTC: prohibits unfair competition. Enforces Clayton Act and others, not Sherman Act. However, unfair methods of competition also overlaps.
- National Association of Attorneys General: States enforce own antitrust laws. This entity formed to pursue these actions together.
  - EU v US: No separation between what federal and state govt. may pursue. Europe has such boundaries.
  - State attorneys may sue for federal laws, but cannot bring criminal sanctions under federal laws
- Private plaintiffs’ Antitrust bar
  - Damages demanded are automatically trebled. High incentive to bring such cases due to the amount of potential recovery.

EU Reminders
- European Commission → Court of First Instance → Court of Justice (ECJ)
- Appeal a Commission decision: sue Commission for violation of Art 81(1)

Econ reminders
- Competitive market: demand meets supply at marginal cost of production. Monopolies look to their Marginal Revenue curve rather than demand curve for computing production schedules, resulting in a lower quantity produced at a higher price. Demand curve downward sloping since must reduce cost of all units to sell additional ones, absent price discrimination.
  - Note: if a company has lower MC than competitors, charging monopoly prices would increase company profits and improve public welfare. Ex. Public utilities.
- Profits help direct resources to alternative uses in free markets. If profitable, will foster entry
  - Normal Profit: minimum amount required to keep a firm in its current line of production. Includes cost of capital.
  - Supernormal profit: profit made over and above normal profit. (monopoly profits)
    - May exist where firms have market power
    - Indicates existence of welfare loss
    - Prospect of supernormal profits provides inducement to invest and innovate.
- Types of errors
  - Type 1 error: punishing acceptable behavior (more harmful)
  - Type 2 error: failing to punish unacceptable behavior.
MONOPOLIZATION

Monopolization elements: *(American Air)*
(1) that a firm has monopoly power in a properly defined relevant market; and
(2) that it willfully acquired or maintained this power by means of anticompetitive conduct.

Plaintiff’s case
- Define relevant product market: products reasonably interchangeable
- Relevant geographic market: where purchasers may practically turn for product
- Defendant has monopoly power in relevant market (if not, no prima facie case, def. wins): power to control prices or exclude competition. Look for high market share.
- Barriers to entry into that market (if not, no prima facie case, def. wins)
- Defendant acquired or maintained its monopoly power through anticompetitive conduct (if not, no prima facie case, def. wins)
- If ALL met, then prima facie case for monopolization.

Defendant
- Offers pro-competitive justification for anticompetitive effects.
  - Plaintiff may rebut defendant’s justification, or must show anticompetitive harm outweighs competitive benefit.
- Claim Innocently Acquired or Natural Monopoly vs. §2 violation.

- Monopoly Power
  - *Griffith:* firm (a) has the power to exclude competition, and (b) has exercised it, or has the purpose to exercise it
  - *Alcoa:* firm with overwhelming market share 'monopolizes' whenever it does business, apparently even if there is no showing of any exclusionary practice.
- May achieve position naturally due to competitive superiority
  - *Grinnell:* Monopolization requires: (1)Possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished form growth or development as a consequence of a superior product, business acumen, or historic accident.
    - For national brand, variation in rates and terms on the local level indicates that local brands should be considered.
    - May become a monopoly under regular competition. Superior skill, foresight and industry. *Alcoa.*
  - *duPont:* power to control prices or exclude competition. Using structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers.
    - Relevant market must include all products reasonably interchangeable by consumers for the same purposes.
  - A firm is a monopolist if it can profitably raise prices substantially above the competitive level.
- Defining the market:
  - Commodities reasonably interchangeable by consumers for the same purpose make up the part of the trade or commerce monopolization of which may be illegal. *US v duPont (Cellophane)*
    - Competition with other products: manufacturers in each industry take into consideration the price of the containers of the opposing industry in formulating their own pricing policy. *United States v. Continental Can Co*
      - Also think of: Supply substitutability: importers may potentially shift a significant amount of their production into the US quickly. Erodes ability to control output.
    - Functional interchangeability of those products: Interchangeability of goods, ability for consumers to transfer brands.
    - Ability to fully substitute goods should be considered
      - If cannot fully substitute goods, don’t anticipate the ability to do so in the future, don’t include them. *Microsoft.*
  - Company actions: Look at extent of planning: national or regional
  - NOTE:
    - Don’t require §2 liability to depend on plaintiff’s (in)ability to reconstruct marketplace absent defendant’s anticompetitive conduct, since it would encourage monopolists to take earlier actions.
    - A single brand of product or service can be a relevant market under the Sherman Act. *Kodak.* (Controversial)
      - Whether a product can compose the entire market, such as services and parts, and the company has the power to control prices or exclude competition may be a triable claim. *Kodak*
    - Switching Costs: Costs of services and parts may contribute to high switching costs. *Kodak*
      - However, switching costs apply only to those already using system. Lack of switching options creates barriers to entry.
        - Includes investment in equipment, education in how to use.
    - Lock-in: permits some increase in price, before changing brands. Supercompetitive prices.
      - Criticism: Information costs, Turnover
- Relevant geographic markets: area in which defendant and competing sellers sell product: Local, regional or national. Consider practical alternatives.
  - Commonly consider: price, transportation costs, delivery limitations, customer convenience and preference, location and facilities of other producters/distributors.
  - Won’t switch in response to a substantial price increase due to high switching costs.
  - Consider territorial limitations on distribution. *F. T. C. v. Procter & Gamble Co.,*
- Ability of foreign producers to enter market? (including tariff, transport).
  *Alcoa.*
  - Domestic competition: limited in quantity, and can increase only by an increase in plant and personnel
  - Foreign competition: produce much more than they import, a rise in price will presumably induce immediately to divert to the American market what they have been selling elsewhere. Place a ceiling on domestic prices.

- Availability of substitute goods. US v Continental Can

- Monopoly power: Power to control prices or exclude competition in the relevant market. *duPont.*
  - Marked by high monopoly profits over an extended period of time and failure of other goods or services to enter market.
  - Cross-elasticity of demand: the responsiveness of the sales of one product to price changes of the other” - responsiveness of products in one market to changes in the price of products in another market. *Cellophane*
  - Monopolist power to raise prices w/o other substitute products potentially available.
    - Note: Seller may have significant market power if has lower costs, permitting the monopolist to sell profitability at a lower price than her competitors. If such a seller does lower her price and capture the entire market, this is not a violation of §2 since monopoly would be due to efficiency unless predatory pricing. *Grinell.*
  - Company nearly depleted its reserves and will not continue to dominate market may not possess monopoly power. *General Dynamics*

- Numbers
  - In excess of 70% strongly suggestive, generally sufficient. *Alcoa.*
  - 90% sufficient. *Grinell*
  - Below 40% INSUFFICIENT
    - 20% *DuPont*

- Entry barriers
  - Need for capital and technical skills
  - Barriers entrants would need to endure that monopolist did not need to endure.

- Monopoly Conduct: that by which a monopolist obtained/maintains a monopolistic position.
  - Demonstrate
    1. must harm the competitive process
    2. thereby harm consumers
    3. harm to one or more competitors will not suffice
    - Note: Not so for EU

- Burden of Proof
  - Plaintiff must demonstrate that monopolist's conduct has the requisite anticompetitive effect.
    - focus is upon the effect of that conduct, not upon the intent behind it.
- If plaintiff successfully establishes prima facie case, then monopolist may proffer a "procompetitive justification"
- If the monopolist's procompetitive justification stands unrebutted, then plaintiff must demonstrate that anticompetitive harm outweighs the procompetitive benefit.
  - Not anticompetitive behavior
    - Free Products: No problems with offering product at an attractive price.
    - Exclusive Contracts: exclusive contract does not violate the Clayton Act [§ 3] unless its probable effect is to "foreclose competition in a substantial share of the line of commerce affected." *Tampa Electric*
    - foreclosing rivals from substantial percentage of opportunities maintains monopoly
    - OS and Browser: No competition on merits, significantly reduce use of rival products, protects monopoly.
    - IP: Not barring rivals from all means of distribution, but from cost effective ones.
    - Incompatible products: Monopolist does not violate the antitrust laws simply by developing a product that is incompatible with its rivals’ *Java*
    - Bad actions: deception of versatility of product, threatens to retaliate for interactions with competitors.
  - Notes
    - Conduct engaged in predatory or other coercive conduct that itself violates the antitrust laws clearly sufficient for a violation. *Standard Oil.*
    - If monopoly, acquired lawfully, might violate §2 if company having power purposefully and intentionally acquired, maintained or exercised that power, unless monopoly power was by superior skill, foresight or industry OR thrust upon defendant. *Alcoa, Grinell.*
    - Anti-competitive conduct: Exclusionary conduct, predatory pricing, refusal to deal.

*Anticompetitive Conduct Examples*
- Exclusionary Conduct is conduct, other than competition on the merits OR restraints reasonably necessary to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power
  - 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way. Areeda on *Aspen Ski.*
Examples: sufficient that firm kept increasing production capacity to supply all demand before a competitor could enter the field. Alcoa.

- Intent: relevant to whether the challenged conduct is exclusionary or anticompetitive.
- Criticism
  - W/o purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' United States v. Colgate & Co.

- Consider
  - firm with monopoly power violates Sherman Act § 2 if it excludes rivals from the monopolized market by restricting a complementary or collaborative relationship without an adequate business justification. Baker on Aspen/Kodak
  - conduct that serves no legitimate purpose, or is itself unprofitable, and is undertaken in order to exclude or weaken competitors in anticipation of increased market power and resulting supracompetitive recoupment.” Melamed

- Causation:
  - Whether exclusion of budding threat to market power the type of conduct capable of contributing significantly to defendant’s continued monopoly power.
  - We may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes.
    - (Microsoft)
      - whether exclusion of nascent threats is conduct reasonably capable of contributing significantly to a defendant's continued monopoly power and whether competitors reasonably constituted nascent threats at the time defendant engaged in the anticompetitive conduct at issue.

- Predatory Pricing: Pricing below average or marginal costs.
  - Charges must make economic sense. Matsushita
  - Under Sherm Act §2 or Robinson-Patman Act, (Brooke Group, American Airlines) 2 FACTORS:
    - Must prove below-cost prices below an appropriate measure of rivals costs to establish competitive injury
      - Failure to show pricing below AVC led court to believe failure to prove pricing below an appropriate measure of cost. Brooke Group, American Airlines.
        - Plaintiff must “allege and prove either monopolist priced below AVC or plaintiff is at least as efficient of a producer of the competitive product as the
defendant, but the defendant’s pricing makes it inefficient for the plaintiff to produce. *Ortho Diagnostics*

- Areeda argues: Below short run marginal costs. If above MC, only less efficient firms harmed, and consumer welfare maximized.
  - But *Inglis* (9th Cir): Predation where justification for lowered prices based not on effectiveness but on tendency to eliminate rivals and create market enabling seller to recoup losses. (Less efficient better than no competition)

  ▪ Demonstration that competitor had a reasonable prospect, or, under Sherman Act § 2, a dangerous probability, of recouping its investment in below-cost prices.
    - Recoupment the objective of predatory pricing. Shows whether someone would rationally engage in predation.
    - Charging unreasonably low prices may drive competitors out of business. However, good for the consumer if competition is sustained since prices decreased and oligopolistic coordination disrupted. Concern that supernormal profits will be charged after competition gone.
    - Reputation for predatory pricing keeps others from entering. *US v American Airlines*

  - Note
    ▪ Rational to engage in predatory pricing if know:
      - Can cut prices deeply enough to outlast and drive away all competitors.
      - Can earn supernormal prices afterwards that are enough to recoup lost revenue and gain high profits before new competitors enter the market.
    ▪ Meeting competition prices: Robinson-Patman Act allows as a defense.
    ▪ Intent to protect competition, not competitors.

- Predation other than pricing
  - offering better, larger or more frequent services *US v American Airlines*
  - Predatory Buying: paying too much for raw materials with the goal of forcing competitors out of business by raising their costs. *Weyerhaeuser*
    - Test: jury finds defendant purchased more raw materials than needed or paid a higher price than necessary to prevent competition from obtaining those materials at a fair price.
  - Bundled discount unlawful because a dominant firm drove some retailers away from competitor’s product. *LePage v 3M*
- NOTE: Must distinguish from normal competition: Because "the mechanism by which a firm engages in predatory pricing--lowering prices--is the same mechanism by which a firm stimulates competition," mistaken inferences may deter the very conduct the antitrust laws were created to protect. *American Airlines*

- Def must explain inconsistencies: Predatory pricing is an investment in the future. If the actions make no economic sense, given the facts at hand, respondent must produce persuasive evidence to support their claim than would otherwise be necessary. *Matsushita*.

- Primary line competitive injury under the R-P Act, is of the same general character as a predatory pricing claim under §2 of the Sherman Act: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.
  - *Utah Pie* permits liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure.
  - Criticism: such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition.
    - *Utah Pie*: Drastically declining price structure where jury could rationally attribute to continued or sporadic price discrimination. Protection of small businesses by sanctioning eroding competition rather than requiring show that prices below costs.
      - Court said *Utah Pie* interpreted to permit liability for primary-line price discrimination on a mere showing of erosion of competition.

- Cartel
  - Rule of Reason adopted. *Standard Oil*.
  - However, “a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.” *Socony [Madison Oil]*:
    - [n.59]: a conspiracy to fix prices violates §1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. … Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.
  - Businesses can’t function w/o creating contract in restraint of trade
o If primary purpose of contract facilitated by agreement that restrains trade but is ancillary to the agreement, then contract acceptable.

- Destructive competition theory: incur high fixed costs as companies invest in capital assets w/o knowing other’s investments. Ordinarily would stay in biz as long as their marginal profit exceeded marginal costs, leading to a glut of overproducing firms.
  o Competition would drive prices to variable costs w/o remaining to cover payment for capital investment, thereby ruining efficient firms

- Legalized in some context, ex. Railroads
  o US required:
    ▪ Mandating of “just and reasonable” rate changes
    ▪ No price discrimination in: special rates or rebates
    ▪ No preferences for localities, shippers, products, length of use, etc.
    ▪ No pooling of traffic or markets
    ▪ Establishment of a commission to oversee activities.
  o Courts won’t decide reasonable prices: too hard and changes daily

- Rule of Reason standard: combinations and agreements to regulate prices or competition in business not unlawful per se. Valid if “reasonable,” and if they did not create a monopoly. *Standard Oil*
  o Consider
    ▪ Comparative position of parties with respect to each other before and after the combination
    ▪ Object of combination: regulate trade practices or to fix prices and eliminate competition.
    ▪ Form of combination: loose-knit trade association or corporate integration (horiz or vert)
    ▪ Proof: formal agreements, or conduct of the parties, trade practice, etc.
    ▪ Exemption for “distress industries” where cutthroat competition driving whole industry to financial ruin.
  o test of legality is whether the restraint regulates and perhaps promotes competition or whether it suppresses or destroys competition. *Chicago Board of Trade*
  o A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. *Socony (Madison Oil)*

- Acquiring bankrupt centers and maintaining them rather than allowing them to close down it not a prohibited injury. *Brunswick v Pueblo*

- Indirect purchasers precluded from recovery under antitrust concerns *IL Brick*.

- If an export cartel selling outside US, Sherman Act doesn’t apply to the activity. *FTAIA*
- Refusal to Deal with rivals
  o Problems: enforcement costs more than benefits
  o Look at No Economic Sense and Consumer Welfare test
  o NES Test: integrated firm liable if refusal would be less profitable
    ▪ Pros: May be effectively administered, avoids chilling pro-competitive behavior, and part of normal business planning. Assumptions of logical dealings.
    ▪ Con: not about anticompetition, so false positives and negatives. Also hard to measure in practice.
  o Consumer Welfare Test: rule of reason, only wrong if proven to have the effect of refusal to deal is to raise or maintain supra-competitive prices, either in the output market or input market, or a related market.
    ▪ Pro: accurate when properly applied, may set a higher bar for plaintiffs, doesn’t compromise innovation incentives.
  o Colgate Doctrine: Permits announcement with the terms under which you are willing to deal with others. (antitrust “zombie”)
    ▪ Monsanto: merely cutting off dealer insufficient to show agreement. Must be something more.
  o EXCEPTION to Refusal to Deal
    ▪ Essential facilities: If company possesses exclusive access to a facility that is “essential” to competition and that it could feasibly share, the company may be required to provide access to that facility on a reasonable, nondiscriminatory basis to competitors.
      • (USSC has never recognized doctrine, won’t “recognize or repudiate”: Trinko)
    ▪ Test
      o (1) control of the essential facility by a monopolist;
      o (2) a competitor’s inability practically or reasonably to duplicate the essential facility;
      o (3) the denial of the use of the facility to a competitor; and
      o (4) the feasibility of providing the facility.
  ▪ Canceling existing deals: a firm with monopoly power may violate §2 by forcing its sole rival to accept deep concessions in partnership in return for participation in program.
    • Aspen Skiing: unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Similarly, the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent.”
Monopoly Leveraging: Courts differ on whether using monopoly power in one market to “leverage power in another market violates §2 of Sherman Act.

- Tying: Conditioning the sale of goods on sales of other goods.
  - Threats of Tying
    - Risks foreclosing competition
    - Spillover effects on competition in related products
  - US Remedies: §2 (U. S. v. United Shoe Machinery)
    - terminate the illegal monopoly,
    - deny to the defendant the fruits of its statutory violation, and
    - ensure that there remain no practices likely to result in monopolization in the future.
    - Criticism: disruptive, costly, process consumes resources if scale economies, increase costs of production, distribution, networking effects lost.
  - Rule of Reason - three threshold criteria
    - seller must have power in the tying product market
    - substantial threat that the tying seller will acquire market power in the tied-product market.
    - coherent economic basis for treating the tying and tied products as distinct.
  - Burden of proof
    - Plaintiff must demonstrate that monopolist's conduct has the requisite anticompetitive effect.
    - If plaintiff successfully establishes prima facie case, then monopolist may proffer a "procompetitive justification"
    - If the monopolist's procompetitive justification stands unrebutted, then plaintiff must demonstrate that anticompetitive harm outweighs the procompetitive benefit.
  - 2 products test Jefferson Parish
    - Are the products complements: not enough to make single product
    - separate demand?
      - distinct product market
      - efficient to offer two products separately
    - Rationale: “the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”
    - Support: Northern Pac. R. Co. the Court said “tying agreements serve hardly any purpose beyond the suppression of competition.”
  - Criticism
• If integration has efficiency benefits, these may be ignored by the Jefferson Parish proxies
• chill innovation
• preventing integration of new functionality previously provided by standalone products
• backward-looking
• poor proxies for efficiency of new, innovative integration

- Also consider
  o Accumulating patents to perpetuate control over an industry.
  o Foreclosure of distribution chains
    ▪ Ex. Microsoft: efforts to prevent long-term competitive threats of Netscape’s browser and Sun’s Java by influencing market, manufacturers, distributors, and creators of internet content, as well as creating and distributing poor versions of a budding program.
  o Bundled rebates:
    ▪ 3rd Cir held illegal monopolization of market by offering rebates requiring customers to buy all tape in one source to receive significant rebates on other company products. LePage v 3M
  o Monopoly buying power
    ▪ Buyer in one geographic area cannot extract film distributor preference over competitors in other areas. US v Griffith

ATTEMPT TO MONOPOLIZE
- Elements: (American Air)
  (1) a relevant geographic and product market;
  (2) specific intent to monopolize the market;
  (3) anticompetitive conduct in furtherance of the attempt; and
  (4) a dangerous probability that the firm will succeed in the attempt.
- Plaintiff Must
  o Define
    ▪ Relevant product market
    ▪ Relevant geographic market
  o Show dangerous probability of the defendant monopolizing the relevant market
  o Show defendant engaged in anticompetitive conduct
    ▪ Ex.
      ▪ Inducement of others to boycott competitors. Klors
      ▪ Discriminatory pricing
      ▪ Refusal by manufacturer with dominant market position to deal with independent dealer. Eastman Kodak
  o Defendant had specific intent to monopolize market (by excluding competitors)
    ▪ May be inferred from conduct.
    ▪ Note: for monopolization: only need to show deliberate and purposeful act. Here, specific intent required.
Defendant has a dangerous probability of achieving monopoly power.

- Employment of methods, means and practices which would, if successful, accomplish monopolization and approaches so close as to create a dangerous probability

European Union and monopoly

- **Article 81 (ex 85)**
  - Prohibits: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
    - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
    - (b) limit or control production, markets, technical development, or investment;
    - (c) share markets or sources of supply;
    - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
    - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
  - Provisions inapplicable if: agreements between undertakings, associations, or concerted practices that improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
    - a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
    - b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

- **Article 82 (ex 86)**
  - Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
  - Such abuse may, in particular, consist in:
    - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
    - (b) limiting production, markets or technical development to the prejudice of consumers;
    - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

- Defenses
  o Efficiency: Net effect of conduct promotes competition
    ▪ Undertakings must show that
      • Efficiencies are realized/likely to be realized as a result of the conduct concerned
      • Conduct concerned is indispensable to realize efficiencies
      • Efficiencies benefit consumers
      • Competition is not eliminated.
  o Justifications
    ▪ Objective Neccessity: conduct justified by objective factors external to the dominant firm
      • Safety/health related
      • Required for products to reach market
    ▪ Community Courts apply strictly the condition of indispensability.
  o Objective justification: Meeting competition defense unduly narrow.
    ▪ Minimize losses in short run is not the only situation that would make economic sense to sell below Average Avoidable Cost
  o NOTE (Microsoft)
    ▪ One who has a dominant position may not abuse it. Says nothing about how position is obtained.
    ▪ Doesn’t look for monopolization so much as abuse of a dominant position.
      • Dominant Position: Defined by ECJ as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”

Microsoft example
- Mkt. Definition: concerning competition conditions in the markets of work group server operating systems and multimedia players
  o all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products, characteristics, their prices and their intended use (demand-side substitutability).
  o Supply-side substitutability may also be taken into account
- SSNIP Test: “small but significant and non-transitory increase of price”
  o US test adopted by Europe: look to see if competitors could readily alter their production to enter the market if the monopolist made such an increase in price. Look at Merger Guidelines, A23-4
  o High barriers to entry for R&D, development, and production. Also low MC for additional copies of software.
    ▪ advertising costs
- technical obstacles to developing user interface
- demand for new client PC OS small if not support large number of applications

- Comparative Systems:
  - EU
    - May be an anti-competitive element to price cutting, regardless of the costs of the business. If acting with intent of eliminating competitors, enough to violate law.
    - Unlike in US, no consideration of likelihood of recoupment. AKZO chemical (two product markets, using monopolized market to sponsor price cutting in other market).
    - Article 86 does not make costs decisive criterion for determining whether price reductions by a dominant undertaking are abusive.
      - Prices below average variable costs regarded as abusive.
      - Prices below average total costs, but above average variable costs, must be regarded as abusive if they are part of a plan for eliminating a competitor. US pressuring to back away from ATC std.
    - US: Inglis approach (discarded): prices below average variable costs produce a presumption of predatory pricing.
      - P<avc \(\Rightarrow\) presumption of predatory pricing
      - If p>avc, <atc \(\Rightarrow\) plaintiff can show exclusionary.
      - P> atc \(\Rightarrow\) plaintiff must show clear and convincing evidence that it is exclusionary
  - PRO:
    - If not covering incremental cost, then not getting enough revenue to compensate for cost of producing the product. In a multi-product firm, there may be non-sunk fixed costs that are avoidable
  - CON
    - Might be normal short term action to promote product, break into a new market, etc. Temporary price to get people to try out product. Meanwhile, implementation would cause chilling effect in cost cutting.
    - Doesn’t permit dominant company to meet competition as justification for pricing below average avoidable cost
  - Average Avoidable Cost: “All costs that can be avoided by not producing the good or service in question. Variable costs and the product-specific fixed costs that are not sunk.” (Air Canada, para. 76)
    - The logic of the avoidable cost approach is the same as AVC, but it is potentially a more meaningful test for predation because it captures more than variable costs
    - Conduct may be reasonable in light of business needs or unreasonable restriction of competition. Grinnell

- EC v US theory on MS
Collaboration Among Competitors

Horizontal Restraints on Trade: price fixing, territorial restraints, quotas.
- Note: price fixing agreements, market allocations, and group boycotts frequently declared per se unlawful. Joint ventures and trade associations more ambiguous effects on market place, usually a rule of reason test.

**US**
- Plaintiff must prove
  - Agreement or concerted action
    - Must be agreement: unilateral action does not violate §1 of Sherman Act
  - Unreasonably restrains trade
    - Per se or rule of reason
  - Has an effect on interstate commerce
    - Court’s inquiry focuses on EFFECTS of the activity. When it shows the effect, the PURPOSE may be examined to see if it threatens the proper operation of our predominantly free-market economy. *BMI*
- Per se vs. Rule of reason
  - Rule of Reason: only agreements that unreasonably restrain trade are unlawful. *Standard Oil.*
    - Encourages case-by-case determination of reasonableness: promotes competition or suppresses competition?
    - Factors
      - Structure of industry, fact peculiar to firm’s operation in that industry (including power and position), history and duration of restraint, reasons why restraint adopted, effects on the competitive market including price and output.
\begin{itemize}
\item Rat: all-inclusive condemnation of every restraint would condemn much business behavior that is beneficial since all contracts between firms restrain trade. (Brandeis)
\item Per Se: certain types of business agreements among competitors unreasonable as a matter of law
  \begin{itemize}
  \item Naked restraint: Look at whether procompetitive effects outweigh anticompetitive. \textit{PolyGram Holding v FTC}
  \item Ex: horizontal price fixing, horizontal market division, tie-ins, boycotts, resale price maintenance
  \item Rat: certain agreements almost always result in substantial restraint of trade, w/o any redeeming procompetitive benefits, so no reason to make case-specific inquiry.
  \item Pro: Simplifies and shortens trials, gives bright-line standards to businesses
  \end{itemize}
\item Test: Whether conduct or effect fits within a recognized per se category: whether the likely purpose or effect of an agreement is to raise prices.
  \begin{itemize}
  \item Rule of reason: If purpose or effect unclear or defendant able to make plausible argument that agreement or conduct \textit{(BMI)}
    \begin{itemize}
    \item Enhances market by making it more competitive
    \item Increases efficiency through integration
    \end{itemize}
  \end{itemize}
\end{itemize}

- Price-fixing agreements: Any combination or agreement between competitors, formed for the purpose and with the effects of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal \textit{per se.} \textit{US v Socony, Dagher v Saudi Refining}
  \begin{itemize}
  \item BUT: If agreement’s purpose and effect of making a market function more competitively or creating integrative efficiencies, then effect on prices may be viewed as ancillary restraint and \textit{rule of reason} applied. \textit{BMI}.
  \item Types of price fixing: minimum prices, maximum prices, production limits, purchase price limits, elimination of competitive bidding.
    \begin{itemize}
    \item Ex. Attorneys attempting to increase fees for representing indigents through price fixing boycott illegal per se. \textit{FTC v Superior Ct. Trial Lawyers}
    \end{itemize}
  \end{itemize}

- Group Boycotts: Group of competitors agree not to deal with a person or firm outside the group, deal only on certain terms, or coerce suppliers or customers not to deal with the boycotted competitor, combination in restraint of trade, violates Sherman Act §1.
  \begin{itemize}
  \item individual free to choose who deal with, except when refusal mounts to monopolization or attempt to monopolize. Sherman Act §2.
  \item Illegal \textit{per se} when their effect is inherently anticompetitive.
    \begin{itemize}
    \item Consider whether refusal to deal is ancillary or directly related to the avowed purpose of the organization. Also consider whether access to the group agreement is indispensable.
    \item An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, regardless of its success. \textit{AP v US}.
    \end{itemize}
  \end{itemize}
• See, Klors, FTC v Superior Ct. Trial Lawyers.
- Group boycotts forbidden, not saved by allegations of reasonability nor failure to show fixed/regular prices. But if action shown to have been independently developed, no antitrust violation. Klors’s v Broadway-Hale
  o Creating an organized boycott take away freedom of action, purpose and effect to directly suppress competition from the sale of unregistered textiles. Fashion Originators’ Guild v FTC
  o When power of combination great, competition and demand of public made it necessary for most dealers to stock some of the products, then illegal. Fashion Originators’ Guild v FTC (contrasts w. BMI, since fashion designers can’t get together to protect non-IP related designs from knockoffs.)
  o Proposed per se standard (Toys R Us, 7th Cir):
    ▪ Boycotting firm cut off access to supply facility, or market necessary for the boycotted firm to compete
    ▪ Boycotting firm possesses a dominant position in market
    ▪ Boycott cannot be justified by plausible arguments that it was designed to enhance overall efficiency.
  o Problem: per se rule created to avoid such inquiry.
  o Industry-wide self regulation per se unlawful when operating as a boycott or unreasonable restraint is per se unlawful. Fashion Originators’ Guild v FTC; FTC v Indiana Federation of Dentists
    • BUT: Heavily regulated industries may succeed Silver
  o Rule of reason
    ▪ Unless plaintiff could show probability of an anticompetitive effect, challenged practice could not be classified as per se illegal. No anticompetitive effect unless market power. Pacific Stationery.

- Purchasing Cooperatives
  o QUALIFIED PER SE RULE (Like Jefferson Parish): plaintiff seeking application of per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects.
    ▪ Not all concerted refusals to deal mandated are per se unlawful. Klohrs, AP.
  o Rule of Reason: Dentist association refusing service to insurers found anticompetitive under the rule of reason because they acted to prevent customers from accessing requested information preempting market forces. FTC v Indiana Federation of Dentists
    ▪ Should define relevant market and then see if have power to dominate the market. Here, Ct. just enquired whether they had power to dominate the market.
    • Commission’s failure to engage in detailed market analysis is not fatal to its finding of violation of rule of reason. Found actual, sustained adverse effects on competition to
find restraint unreasonable even in absence of elaborate market analysis
  o Robinson-Patman Act §4 creates exception
  o Cooperative arrangement permits participating retailers to achieve economies of scale in purchasing and warehousing not otherwise available. *Northwest Wholesale Stationers v Pacific Stationary*
  o No naked restraints on price or quantity: per se violation as to horizontal arrangements among competitors. *FTC v Superior Court Trial Lawyers*
    ▪ Obtaining justice not a procompetitive effect, but may seek to influence govt. action through collective bargaining.
  o Expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect. *Northwest Wholesale Stationers v Pacific Stationary*
  o Self-regulation mandate-partial repeal of Sherman Act §1, but absent due process, exceeds self regulation authority. *Silver*

- Joint ventures: undertaking by two or more business entities for some limited purpose (short of complete merger or combination)
  o Test: If purpose of combination illegal per se, then joint venture likewise illegal. Otherwise apply rule of reason.
    ▪ Rule of reason: whether restraint on competition really necessary to achieve lawful purpose, or are other means to achieve the purpose that are less restrictive of competition.
      • Court balances anticompetitive effects of combination against any legitimate interest served.
  o NOTE:
    ▪ Exclusionary clause a substantial barrier to entry of new firms to newspaper business. *US v AP.*
  o Consider industry structure
    ▪ Joint activity by large firms in oligopolistic market might be viewed as unreasonable restraint of trade because they aggregate significant market power and raise barriers to entry.
    ▪ If industry competitive and joint venturers comprised small share of overall market, then acceptable.
      • Joint ventures regarded as a single firm competing with other sellers in the market. Fact that two oil companies did not compete with one another in the sale of gasoline to service stations and participated in that market jointly through their investments. *Dagher v Saudi Refining*

- Exchange of information: consider whether the exchange helps perfect the market or creates efficiencies, or whether it facilitates cartelization and lessens competition.
  o Price information exchange likely violate §1
    ▪ Current or future prices
    ▪ Identification of parties in sales transactions
    ▪ Highly concentrated or oligopolistic market structure with relatively few sellers.
Ex. Manufacturers controlling 90% of market shared information on recent price charges or quoted to customers stabilized prices, violating §1.

No per se analysis used. *US v. Container Corp.*

Proof of exchange
- Conscious parallelism: firms in concentrated market might share monopoly power by setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests. *Brooke Group.*
- Need to show conduct stemmed from agreement, tacit or expressed. Parallel business behavior not enough to conclusively establish agreement. *Theatre Enterprises.*
  - Helps to show communication among defendants, economic motive for concerted action, defendants’ acting in contravention of individual economic interest, simultaneous action, radical departure from previous business practices
- Note: conspiracies must make economic sense and evidence must establish defendants not acting independently. *Matsushita.*

EU
- Art 81, formerly 85
  - ALL agreements.. and concerted practices which may affect trade… and which have as their OBJECT OR EFFECT the PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION with the common market are illegal and void.
    - Examples: fixing purchase/selling prices, limit/control production, share markets.
    - Per se rule? The language ‘have as their object or effect” indicates rule of reason.
- Rule of Reason: defendant can claim market benefit from actions.
  - Art. 81 (3): exceptions for agreements otherwise condemned where they
    - “contribute… to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit,” and
    - do not embody restrictions “not indispensable to the attainment of these objectives” or
    - allow the elimination of “competition in respect of a substantial part of the products in question.”
- block exemptions: agreements meeting specified conditions exempted from scrutiny, not required to be filed.
  - Small-medium biz enterprises that had only insignificant effects on the market.
  - No negative clearance procedures now, so no more guidance by the commission.
- More power and responsibility given to enforcement authorities in the member states
- sharing out of domestic markets has as its object the restriction of competition and trade within the Common Market. *ACF Chemiefarma v Commission*
- Uniform prices not alone sufficient to show agreement. *Dyestuffs*
- Oligopoly concerns: Concerted Practice
- Art 81: form of coordination between undertakings which, w/o having been taken to the stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them.
  - Parallel behavior may not be itself be identified with a concerted practice. May be evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market. *Dyestuffs*
  - Parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. *Woodpulp*
- ECJ looking at whether horizontal cartel formed when agreement created but not signed. Look at whether the companies acted as if the agreement was in force *ACF Chemiefarma v Commission*

Vertical Restraints: relationships between various levels of production and distribution chains.
- §1&2 of Sherman Act, Clayton Act §3.
- Analysis
  - Per se: Agreements and restraints designed to set minimum resale prices are illegal per se, with exceptions
    - a vertical restraint is not illegal per se unless it includes some agreement on price or price levels. *Business Electornics v Sharpe Electronics*
  - Rule of Reason: most others: exclusive distributorship arrangements, customer and territorial restrictions, tying arrangements, and exclusive dealing agreements.
- Resale price maintenance
  - Minimum resale price maintenance per se violation. *Monsanto*
    - However, manufacturers may wish to have retailers advertise product and would like to provide incentive.
  - Resale price maintenance through distributors/retailers is illegal. *Dr. Miles.*
  - *Leegin Leather Prods v. PSKS, Inc. (2006)*
    - Court granted emergency stay of 5TH Cir. mandate in case directly challenging *per se* treatment of RPM, so may still recognize.
  - BUT
    - Consignment arrangements ACCEPTABLE: If retail through own employees, vertically integrated arrangement and may set price at
which product sold w/o complaint. Concern is that risk of loss or price decline was on producer and not seller. General Electric

- Where manufacturer retains title, dominion and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is ‘unreasonably’ restrictive of competition. Sylvania

- But Retail price maintenance using consignment system held unlawful. Simpson v Union Oil.
  - Distinguished since: risk of loss due to nonsale passed to retailers, and this was not a patent case like General Electric.
  - Brennan dissent: creating incentive for dealers to vertically integrate and limit competition.

  ▪ Maximum resale price restrictions now rule of reason Khan, although formerly per se illegal Albrecht.
  ▪ insufficient economic justification for per se invalidation of vertical maximum price fixing Khan.
  ▪ Concern price will be seen as a minimum, distorts resource allocation and reduces likelihood of market entry.

- Unilateral refusal to deal: May announce “suggested retail price.” But if want to stop dealing with non-adhering customer
  o Formerly lawful as long as there is no agreement obligating customer to resell at a specified price. US v Colgate.
    ▪ In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.
  o Now, Colgate limited by finding de facto agreement.
    ▪ Sufficient evidence of agreement regarding price between manufacturer and complaining retailers to find a de facto agreement when manufacturer addressed complaints of retailers about price cutting activities of one retailer. Monsanto.

- Note:
  o Procompetitive effects generated by optimum monopoly pricing and unique nature of revenues not outweighed by minimal anticompetitive effect of eliminating potential competition. Paschall v Kansas City Star (8th cir)
  o Vertical restrictions reduce intrabrand competition by limiting number of sellers of a particular product competing for the business of a given group of buyers.
- Vertical restrictions promote interbrand competition by allowing manufacturer to achieve certain efficiencies in the distribution of his products.

- Exclusive Distributorships
  - Analyze under Rule of Reason
    - Although an agreement between manufacturer and retailer to terminate another retailer for price cutting, agreement not illegal per se unless it included specific agreement on prices to charge retailer. *Business Electronics* (not sure if covered)
  - Customer/Territorial restrictions: manufacturer may not impose restrictions on how buyer can resell goods. **VERTICAL NONPRICE RESTRANTS**
    - Rule of reason to evaluate all restrictions *Biz Electronics*, overruling *Schwinn’s* illegal per se rule.
    - Rat: certain nonprice vertical restrictions may foster interbrand competition and thereby have redeeming competitive virtues, even though they reduce or eliminate intrabrand competition.

- Tying Arrangements (see p10)
  - Contractual or technological.
  - Usually illegal per se under Clayton or Sherman Acts. *Jefferson Parish*
  - Illegal tie requirements
    - Separate tying and tied products
    - Sale must be conditioned on the arrangement or due to coercion or force by the seller
    - Seller must have sufficient economic power in the tying product market to restrain competition appreciably in the tied product
    - Tying arrangement must affect more than an insubstantial dollar amount of commerce.
  - Clayton Act §3: unlawful to lease or sell commodities or fix a price therfor “on the condition or agreement that the lessee or purchaser shall not use or deal in the commodities of a competitor where the effect may be to substantially lessen competition.
  - Court looks to power of defendants to force consumers to make choices they would not make in a competitive environment. *Jefferson Parish*.

**EU**
- Article 81 [85]
  - 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
    - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
    - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
    - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- Rule of reason: anti-competitive practice falls outside the scope of the prohibition in Art 85(1) of the Treaty if it has more positive than negative effects on competition on a given market. *Metropole TV v EC Commission*
  - *Promptita*: concern 85(3) would lose much effectiveness if rule of reason examination had to be carried out already under Article 85(1) of the Treaty.

- Modern rules:
  - Focus on econ rather than mechanical applications
  - Broad, general application of EC competition principles
  - New Member state authority distributes authority and unifies community law
  - Abolished precautionary notification system
  - Small firms with low market share exempted
  - Big firms: self-evaluation required, increased need for pre-deal analysis.

- Block Exemption
  - Define Relevant Market Share
    - Market share considered as supplier’s share of market w/in relevant geographic market
    - Geo. Mkt: where conditions of competition are the same.
  - Does Vert. Agreement restrict competition
  - If so, exempt under Block Exemption
    - De minimis if less than 10% mkt share
    - Allocation of risk determines whether agents considered a true agent
  - Will Vertical agreement receive an individual exemption under
  - Scope of Block exemption: vertical arrangements, no presumption of illegality, no need for precautionary notification, severability, portfolio of products, same distribution system.
  - Consider
    - Supplier’s mkt share: higher decreases exemption
    - Position of competitors in market
    - Barriers to entry
    - Level of trade: intermediate v finished product
    - Nature of product: suitable for monopolization?

- Art. 81(1), page A-64: agreement between undertakings that may affect trade between member states that may destroy competition within the market.

- 81(3) allows for exemption of agreements which confer sufficient benefit to outweigh anti-competitive effects
  - 81(1) voids arrangements
Agreements excluded: Improves production, benefits to consumers…

- Exemption of 85(3) for agreements or concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not

- 85(1) CFI selective distribution systems valid if four conditions met:
  - Characteristics of the product require selective distribution
  - Resellers chosen on objective and uniform criteria
    - Colgate problem: US courts allow merchants to freely choose who to deal with.
    - Europe more willing to regulate: Determines right criteria rather than leaving it to the business’ judgment like US.
  - Enhances competition: counterbalances restriction of competition of selective distribution systems
  - Only objective benefits sufficient to invoke exemption to rule. Grundig.
    - Rat: An agreement… which might tend to restore the national divisions in trade between member-States could thwart object of the Community to break down national barriers. Treaty aims at suppressing barriers between States and which gives evidence of a stern attitude with regard to their reapperarance, could not allow undertakings to restore such barriers.
  - Luxury commodities may protect their value by controlling the places where their products are sold to maintain an air of superior quality and desirability. Lecerc v Commission of EC
  - Circular stating dealers should refer purchasers to defer to purchaser’s territory found to be an agreement under Art 81[85](1). Leasing companies which do not offer an option to purchase cannot be regarded as resellers. BMW v ALD
    - If US, Colgate: may announce conditions under which you will sell, and if they violate the agreement can terminate it.
  - EU favoring interbrand competition and not paying as much attention to intrabrand competition. Recognize intrabrand competition may need to be restricted. Grundig to GlaxoSmithKlien
  - Franchises NOT a violation of 85(1): rationale: can’t apply unless franchise agreements involve restrictions on the freedom of the contracting parties which go beyond those demanded by the nature of the franchise system. Pronuptia de Paris
    - Here, a franchise, great amount of value contributed by franchisor: TM, biz know how, goodwill, etc.

Mergers
- Horizontal merger: directly reduces the number of competitors in the market in which the parties are engaged. Look at whether merger raises the concentration of firms in the industry to a level or in a manner that increases the likelihood of anticompetitive conduct by the remaining participants.
- Vertical mergers: concern the foreclosure of part of a market to potential competitors. If the share of the market foreclosed is significant and other economic factors indicate the merger will have anticompetitive effects, the merger may be struck down.
- Conglomerate merger may eliminate an actual or perceived potential competitor since threat of new entry to a market is a disincentive to firms already in the market to raise prices to or near monopoly levels.
- Clayton Act: No person . . . shall acquire, directly or indirectly, the whole or any part of the stock or . . . the assets of another person . . ., where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
  o Scope: any acquisition by one firm of structural control over all or a significant part of another
  o Ex. Merger of two firms to form a third, Merger of one firm into another, Acquisition by one firm of all or significant part of assets of another, Formation of joint venture by two firms
  o Purpose: ensure better market performance to prevent less competitive market structures, encourage internal growth and expansion, preserve local control over industry by discouraging absentee corporate ownership of local business and to protect small business.
- Tests:
  o Determine product market
    ▪ Emphasis on interchangeability of products, although less may be required. *Continental Can.*
    ▪ Guidelines: SSNIP: small but significant and nontransitory increase in price: if monopolist could raise prices by 5% w/o a competitive response, the market has been defined correctly. But if consumers would turn to substitute products, or if new competitors would enter the market in response to price increase, products or competitors must be included in the market definition.
  o Determine geo mkt
    ▪ Relevant geographic market: area where the effect of the merger on competition will be both immediate and direct. *US v Philly Natn’l Bank*
    ▪ Ability to compete with companies in other reasons not a compelling justification for a merger. *PA Natn’l Bank.*
    ▪ Courts arrest anti-competitive tendencies in their incipiency. (not widely used; “zombie” case) *Von’s Grocery*
    ▪ Boundaries of a product market are determined by the reasonable interchangeability of use or cross-elasticity. *Brown Shoe*
      ▪ well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes
      ▪ Mkt determination:
        o Product or group of products… likely to impose a small but significant and nontransitory increase in price
        o “SSNIP” test
• Practical indicia:
  o industry or public recognition of the submarket as a separate economic entity.
  o Submarkets as separate econ entity
  o Products peculiar characteristics and uses
  o Unique production facilities
  o Distinct customers
  o Distinct prices
  o Sensitivity to price change.
  o Specialized vendors
  o Entry: Look at contestability: barriers to entry, or will new entrants enter the market if firm began to exercise mkt power.

  o Mkt participants
    ▪ A more significant indicator of a company’s power to effectively compete lies in the state of a company’s uncommitted resources. *US General Dynamics* (Coal mine)
  o Classify mkt by HHI index
    ▪ Herfindahl-Hirschman Index HHI: Sum squares of the individual market shares of all participants. Reflects distribution of the market shares of the top four firms and the composition of the market outside the top four firms. It also gives proportionately greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions
      • Post merger HHI below 1000: agencies view markets in this region to be *unconcentrated*, so unlikely to be contested. Mkt unlikely to have adverse competitive effects and *ordinarily* require no further analysis.
      • Post merger between 1000 and 1800
        o Look at concentration and increase in concentration. *Philly bank*
        o If increase of more than 100 points, potentially raises significant competitive concerns
      • Post Merger exceeds 1800: market highly concentrated.
        o If produces an increase in the HHI of less than 50 points, unlikely to have adverse competitive points. If greater, may have.
        o If HHI exceeds 1800, will be presumed mergers producing an increase in the HHI of more than 100 points. Presumption may be overcome by showing of factors making it unlikely that the merger will create or enhance mkt power in light of mkt concentration and mkt shares.

  o Apply HHI Filter test (above or below 1000, etc.)
    ▪ May approve w/o further analysis at this pt.
  o Analyze non structural factors
- Adverse consequences
- Efficiencies
- Entry
- Failure: Whether the company is likely to fail. Cts. have recognized an exception to merger preclusion if company is failing. However, need to show certain conditions. If would exit mkt in absence of merger, merger would be approved since wouldn’t have increased the concentration of the mkt. p840-1.

  o Exceptions
    - Small company doctrine: small companies may merge to compete more effectively with larger, dominant firms in relevant market. *Brown Shoe*.
    - Failing company doctrine: merger between a failing company and a competitor should be allowed, in the absence of any other purchases. NOTE: burden of proof on defendant
  
  o Analysis of Competitive Concerns: nonstructural factors
    - Substantially lessen competition: attacking potential anticompetitive effects before they happen. Concerned with probabilities, so Act to have preventative, not merely corrective effect. *FTC v P&G*.
    - Adverse unilateral, coordination effects
    - If fail this step, FTC will oppose merger.
      * All this means is that the company will need to make some concessions:
        o Spin off some of the facilities: sell to another going concern, set them up as separate entities
    - From structure may infer conduct and from conduct, may infer performance
  
  o Defendant may argue
    - Lack of competitive harm *US v General Dynamics*.
    - Subsequent events may show defendant unable to maintain market share
    - Private plaintiff does not have standing to challenge a merger if that plaintiff’s injury stems from an increase in competition from the merged entity. *Brunswick*.
    - Economic efficiencies, if efficiencies would ultimately benefit competition and consumers.
    - Post-Acquisition Evidence: unfavored, since self-serving and usually w/in control of merged companies. *US v Continental Can*
      * If not w/in control of merged companies and demonstrates fundamental changes in pattern and structure of industry which are probative of whether the merger lessened competition acceptable. *US v General Dynamics*.  

- Horizontal- merger of competitors
  o Factors
    - Determine relevant geographic and product markets
Examine market share and market concentration
- If merger produces a firm with an undue percentage share of the market and results in a significant increase in concentration of firms in that market, it is presumptively illegal
- Look at totality of circumstances to see if in addition to the above there is other evidence of an anticompetitive effect
- Consider whether defendant can reut a prima facie case or prove a defense.
  - Sylvania-like model: only care about what happens w. firms competing w. each other
  - More attention given to effects
  - PNB [horizontal]: “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”
  - Guidelines rather than regulations (different than EU)
  - Show
    - Acquiring firm had the necessary means to enter the market
    - Existing firms in the market were influenced by potential entry
    - Number of potential entrants not so many that the elimination of the acquired firm would be insignificant. FTC v Proctor Gamble.
  - Presumptive illegality: a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. US v Philly Natl Bank
    - 30% of market constituted undue percent, but not by law.
    - Acquisition of even a very small coptitor by a dominant competitor in a concentrated industry may violate §7. Alcoa.
    - Von’s Grocery: combined mkt. share of two merged companies only 7.5% of local grocery market.
    - Firm with 11% of market. General Dynamics.
- Vertical – merger of firms at different levels of distribution: have the potential of foreclosing or squeezing unintegrated competitors, increasing entry barriers, and limiting future competition
  - Factors:
    - Relevant geographic and product markets
    - Probable effect of merger by measuring share of market that may be foreclosed
    - If a significant share of the market is foreclosed or potential competition is eliminated, the court must then consider any economic and historical factors peculiar to the case, including any trend toward
concentration in the industry, barriers to new entry created by the merger, and the nature and purpose of the merger.

- De minimis foreclosure from Brown Shoe left, to a rule of reason analysis, asking whether the merger will have significant anticompetitive effects in either the upstream or downstream markets.
  
  - Defenses: May produce efficiency gains.

- Conglomerate – merger of firms in separate (product or geographic) markets
- Joint Ventures: create efficiencies, but when entered into between actual or potential competitors, joint ventures create anticompetitive risks.
  
  - BUT, Blanket license permitted because it created a new product. BMI.

- Guidelines Discussion
  
  - Criticism of pre-HHI Guidelines:
    
    o four-firm concentration ratios
    o evaluate only the top firms’ concentration
    o ignore concentration or deconcentration in overall market
    o Role of ease of entry inappropriately slighted.
    o Efficiencies (“economies”) not a justification for a merger or acquisition “unless there are exceptional circumstances.”

  - Guidelines redone
    
    o 0.1 …The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.
    o …the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.

- Firms participating in the market:
  
  o 1.2: all firms that currently produce or sell in the relevant market
  o 1.3: other firms not currently producing or selling the relevant product in the relevant area as participating in the relevant market if their inclusion would more accurately reflect probable supply responses.

- Anticompetitive effects:
  
  o 2.1: A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers.
  o 2.2: merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output.

- Entry:
  
  o 3.0: A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels.
  o 3.2: to deter or counteract the competitive effects of concern, entrants quickly must achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact. [Firms which have committed to entering the
market prior to the merger generally will be included in the measurement of the market.]

- **Efficiencies**
  - 4.0: mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction.
  - Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.

- **Book notes**
  - Horizontal Merger Guidelines (burden on govt. to prove anticompetitive effect of a merger by demonstrating both an objectionable market structure and independent evidence of a negative impact on competition.
    ▪ Consider: ease of entry into relevant market, adequacy of irreplaceable raw materials, excess capacity of firms in the market, trends toward increased concentration, efficiencies created by the merger.
  - Vertical Guidelines: looks at barriers to entry, dangers of collusion, opportunities to avoid rate regulation.
    ▪ Consider
      - Will new entrants be forced to enter two markets (ex. Production and distribution) to compete effectively
      - Forcing potential competitors to enter two levels rather than one increases the costs of entry
      - Subject market not competitive.

**EC Merger Guidelines**

- E Comission rigidly applies horizontal effects
- Art 85(81) and 86(82): do not expressly include mergers in their scope.
  - Continental Can: commission concluded acquisition of rival undertaking by an undertaking in a dominant position may constitute an abusive exploitation of that position in violation of Art 86.
    ▪ ECJ (European court of justice) accepted Commission’s interpretation of Art. 86, but annulled decision on this case.
- CFI (Court of First Instance) annulled Commission decision declaring concentration incompatible with the common market. *Tetra Laval*
- Art 1: thresholds – must be a community dimension to the merger.
  - Usually across member state lines. However, domestic companies may supply the common market, giving some effects to competition in the common market.
  - Still subject to regulation by member states even if threshold not reached by EC.
- Art 2: Appraisal of Concentration
  - Factors
    ▪ Structure of all markets
    ▪ Undertakings economic and financial power
- Alternatives available to suppliers and users
- Access to suppliers or mkt
- Barriers to entry
- Supply and demand trends
- Interests of intermediate and consumers
- Development of technical and economic progress, if to consumers advantage and does not form an obstacle to competition.
  o Concentration impeding effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.
  o Commission must look not only to incentives for such conduct
  o Also looked to factors liable to reduce or eliminate those incentives
    ▪ Eg: probability of legal action/penalties.
    ▪ Look at probability that, if engaged in activity, there would be legal action and penalties.
- GE Honeywell
  o US: creates compatible unit that would sell compatible products at a lower cost: Combination of products would increase consumer benefit.
  o EC: merger would be detrimental to competition since it would put individual suppliers at a competitive disadvantage
- Leveraging concerns considered more in EC than US
- Different types of tying: Sales of complementary products through packaged deals
  o Mixed bundling: complementary products sold together at a price which, owing to the discounts that apply across the product range, is lower than the price charged when they are sold separately.
  o Pure bundling: the entity sets only the bundle but does not make the individual components available on a stand alone basis
  o Technical bundling: individual components only function effectively as apart of bundled system and cannot be used alongside components from other suppliers. Technical integration: incompatible with latter components.
- SSNIP test: merger guidelines
  o P A23-4
  o Relevant market geographic and product area no broader than necessary
  o Iterative process: create a hypothetical market, test it for monopolist action: to determine whether monopolist could implement a small but significant increase in price where consumer would not switch to another product.
  o Taken by the EC. Statement of mkt definition.

Multiple Goods and Services
- 2 different standards: §1 requires actual rather than probable restraint on trade, §7 designed to stop restrictions of trade in their incipiency.
  o Brown Shoe, Von Grocery, Philly Natn’l Bank.
- CF Merger Guidelines Concernse 0.1, paragraph 4, pA-21
- Merger may give firm sufficient mkt power allowing it to act independent of potential competitors OR
- Merger will result in a level of concentration making it easy for a few firms to coordinate activities implicitly that would run contrary to §1 by creating an oligopoly.

Health Patents
- Patent Act § 101: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore."
- Patent owner may exclude others from making, using, or selling the patented invention for 20 years from the date of application
- FDCA requires party seeking to market a new drug, a “pioneer” applicant, to first obtain FDA approval by filing a New Drug Application (“NDA”).
- HWA sought to balance between two competing policy interests:
  - inducing pioneering research and development of new drugs, and
  - enabling competitors to bring to market low-cost, generic copies of those drugs once patent expired – or was declared invalid
  - Pioneer can extend life of patent by “re-capturing” up to 5 years of time used for FDA approval
    ▪ Limited to total of 14 years from FDA approval
  - Abbreviated New Drug Application (“ANDA”) for follow-on drugs
    ▪ Applicant may rely on the safety and efficacy tests performed by the pioneer drug applicant
    ▪ First firm to file ANDA is protected from competition from other generics for 180 days after approval
- FTC Settlement “red flags”
  - Payments from patent holder to alleged infringer [“reverse payments”]
  - Restrictions on generic’s entry with non-infringing products
  - Restrictions on generic’s ability to relinquish 180-day exclusivity
- rejects a rule that automatically invalidates any settlement agreement where patentee settles by negotiating generic’s entry date, and in an ancillary transaction, pays for other products licensed by the generic Schering-Plough 11th Cir.
  - analysis of the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects.”
  - Reverse hold that settlements where generic receives anything of value and agrees to defer its own research, development, production or sales activities are prohibited;
    ▪ Exception: litigation expense not exceeding $2 mill
- 2nd Cir findings (Tamoxifen)
  - that settlement of litigation is generally encouraged;
  - that outcome of litigation, especially patent litigation, is uncertain;
  - that appellants frequently prevail on appeal;
that fact settlement came after finding of invalidity is thus not *ipso facto*
determinative of unlawfulness under antitrust laws
- Court rejects idea that such payments are per se unlawful – as have other courts
  o Scholars have noted patentee’s incentive to postpone entry of generic may
    suggest anticompetitive motive behind payments
  o *Asahi Glass.*

**EC**
- In Europe both patents and supplementary protection certificates (“SPC”) are
  granted by the national patent offices (national patents).
- Patents, but not SPCs, are also granted by the Munich-based European Patent
- Application date is starting point of the patent protection period of 20 years
  o SPCs to offer supplementary compensation for R&D investments, by
    extending life of patent for difference between period from first
    authorization to patent expiry,

**Remedies**
- **Criminal**
  o Sherman Act §1&2: criminal felonies
    ▪ Individual: Fine up to $350,000, three years in prison, or both
    ▪ Corporations fined up to $10 million.
    ▪ OR govt. may recover twice the pecuniary gain received by a
      convicted defendant OR twice the loss imposed on its victims.
    ▪ Note: criminal conviction requires proof of criminal intent and an
      anticompetitive effect. Specific intent not required.
  o FTC Act or Clayton Act: no criminal sanctions
  o R-P Act: intentional price discrimination (ex. Rebates, discounts, or
    advertising service charges) are criminal under §3.
- **Equitable**
  o Govt may
    ▪ Restrain acts or conduct
    ▪ Compel divestiture of subsidiaries
    ▪ Divide a company’s assets to create a competing entity
    ▪ Compel a company to license patents on a reasonable royalty basis
    ▪ Cancel contracts
    ▪ Compel dealings with third parties.
- **Private individual**
  o §4 Clayton Act: any person injured in business or property by reasons of
    anything forbidden in the antitrust laws to recover threefold the damages,
    costs, and attorney’s fees.
    ▪ Only direct purchasers, being those who purchase price-fixed
      goods directly from the alleged fixer, may sue for damages under
      §4. *IL Brick.*
      ▪ People buying the resold product are indirect purchasers.
- **Applicable parties**
Must be able to prove antitrust injury: Cannot recover for alleged injury due to competitor remaining in business because of an allegedly illegal merger. *Brunswick Corp.*

Only Direct
SHERMAN ACT
1890

Single Firm

Monopolization

Relevant Market
Monopoly Power
Exclusionary Conduct

Attempted Monopolization

Relevant Market
Specific Intent
Dangerous Probability Success

Conspiracy to Monopolize

Horizonal Restraint
Vertical Restraint

Naked Restraint
Ancillary Restraint
Rule of Reason

Per se Violation
Agreement

Relevant Market
Market Power
Anticompetitive Effects

No Procompetitive Effects

Multiple Firms

RP M
Merger Guidelines

Approvable Without Further

YES

NO

§2 - Adverse
§3 - Entry
§4 - Efficiencies
§5 - Failure

Determine Product Market
Determine Geographic Market
Determine Market “Participants”
Classify Market By HHI Index
Apply HHI Filter Tests

Analyze Non-structural Factors

Analysis Satisfies Competitive

YES

NO

Oppose
Hatch-Waxman Act

Notice to NDA

45 days

Infringement Suit?

No

FDA may approve

ANDA

180 day exclusivity

Yes

30 month stay

30 month stay

NDA Wins Infringement Suit?

No

FDA may approve

ANDA

180 day exclusivity

Yes

FDA not approve

ANDA

30 months expire

No ANDA entry until patents expire