SQUIRE PATTON BOGGS

Local Connections. Global Influence.

Antitrust For Executives

A Business-Friendly Reference Guide

Our US Antitrust & Competition Group provides the solutions demanded by today's rapidly evolving, globalized marketplace.

Antitrust law touches every business. Our top priority is enabling clients to navigate complex legal questions without missing out on strategies and opportunities that will drive success. Practical, understandable guidance from an "inside the DC beltway perspective" is our specialty.

We deploy the expertise gained through our decades of combined experience, paired with our market-leading global network, to bring you the best advice, whether it involves compliance, litigation, merger control or regulatory matters.

We offer this brief reference tool distilling key aspects of our global expertise to provide guidance on issues that commonly arise in day-to-day business decisions.

Michael Wise
Partner, Washington DC
T +1 202 457 5239
E michael.wise@squirepb.com

Martin Mackowski
Partner, Washington DC
T +1 202 457 5287
E martin.mackowski@squirepb.com

Chris Gordon
Partner, Washington DC
T +1 202 626 6284
E christopher.gordon@squirepb.com

Importance of Antitrust Compliance

The purpose of the antitrust laws is to promote full and fair competition. The laws are founded on the belief that competition functions best when each company makes its business decisions independently, free from collusive agreements among competitors on price or service terms.

Antitrust compliance matters because the cost of noncompliance can be massive. Consider, for example:

- Hardcore antitrust violations (such as price fixing or bid rigging schemes) can be prosecuted criminally, and in 2024, the US Department of Justice (DOJ) charged 20 individuals and five companies in criminal antitrust cases
- The average prison sentence for an individual convicted of an antitrust violation is 14 months
- Antitrust misconduct (or even the perception of misconduct) can subject companies to costly civil lawsuits where successful plaintiffs can obtain treble damages, in addition to recovering their costs
- Even in cases where the company is ultimately vindicated, lawsuits can cost millions of dollars and drag on for many years

Against this backdrop, it is critical that companies maintain a culture of antitrust compliance. The DOJ has emphasized that it expects executives to set the tone for the company. This guide is intended to help you do that, by highlighting the key areas where antitrust problems can arise. While it is not intended to make you an antitrust expert, it should help you determine when, in the context of your ordinary course of business, antitrust risk may arise and advice from counsel may be beneficial.

Competitor Interaction 101

The antitrust laws are especially concerned with promoting head-to-head competition between rivals, and the most severe antitrust penalties are reserved for agreements between competitors to restrict price or output.

Such "hardcore" antitrust violations include agreements:

- To fix, stabilize or limit discretion on prices
- To limit output
- To allocate markets or customers
- To manipulate bidding processes
- Not to sell or buy from a specific firm or group

Practical Tip: All "agreements" referenced here include not only formal written or oral agreements, but also informal "understandings" (handshake, wink, nod or innuendo), which must likewise be avoided. Even the appearance of an illegal agreement can put the company at risk.

Because the stakes are high, anything that even looks suspiciously like an agreement with a competitor could subject the company to costly litigation. Companies have been sued even when they simply made independent, but parallel, announcements of pricing decisions. Vigilance is necessary.

Nevertheless, an agreement with a competitor **may** be permissible when the purpose is not simply to restrict competition. For example, if a company buys from or sells products or services to a competitor, discussions about the price of those products or services are permitted as long as they are limited to information necessary for the buying or selling transaction. Similarly, some arrangements may be permissible in the context of a merger or joint venture, even though they would otherwise be illegal. When in doubt, consult with counsel and obtain guidance before proceeding.

Negotiating Supply Relationships

Supply agreements can pose antitrust risk when they are exclusionary, discriminatory or coercive.

- **Exclusionary** agreements have the effect of cutting off competitors from access to a critical input, or accessing an essential sales channel.
- **Discriminatory** agreements treat similarly situated purchasers differently, usually in terms of the price charged, the discounts offered or the promotional support provided. This risk primarily relates to sales of goods, as opposed to services.
- **Coercive** agreements are problematic where a supplier uses its leverage in a particular product to force its customers into arrangements intended to artificially inflate the supplier's profits. For example, a supplier might tie the purchase of one product to the agreement to also purchase a second product, or might only sell a product on the condition that the customer agrees to limit its competitive behavior in some way.

The application of antitrust law in this area is situation-specific, requiring an evaluation of market shares and industry structure. What may be acceptable in one industry may raise risks in another.

Many supply agreement restrictions, including exclusivity provisions, most-favored-nations clauses, volume discounts and similar contractual provisions, are consistent with antitrust principles. However, because these restrictions can raise antitrust risk, they should be vetted with counsel before an agreement is finalized.

Engaging with Dealers or Distributors

Relationships between a supplier and its dealers or distributors can raise the following antitrust risks:

- **Horizontal competition restrictions** – If the supplier is active in the downstream market, as in the case of dual distribution models, the dealer or distributor may be both a customer and a competitor. In such cases, the parties should avoid sharing information about prices, strategies, specific customers or other competitively sensitive topics. In some cases, a firewall may be appropriate.
- **Competitive intelligence gathering** – A distributor or dealer may have relationships with multiple suppliers, which could give it access to competitively sensitive information from each. The dealer or distributor should not serve as a mere conduit for exchanging such information and should not use its position to attempt to stabilize pricing or output across its suppliers.
- **Exclusivity** – Exclusive distributorships are common and often consistent with antitrust requirements. However, where exclusivity is used to prevent a disfavored dealer or distributor from competing, it can in some cases raise antitrust concerns. Often, such concerns are most acute when an existing supply relationship is terminated.
- **Pricing restrictions** – Antitrust laws vary by jurisdiction, but certain states prohibit a supplier from dictating the price that an independent distributor or dealer can charge (a practice referred to as vertical price fixing or resale price maintenance). Related polices, such as a minimum advertised pricing requirement, can also raise concerns. Any such requirements should be vetted by counsel to confirm they do not raise unnecessary risk.

Trade Association Functions

Trade associations and similar industry bodies serve legitimate purposes, and participation in them is generally permissible, though such participation should always be cleared with counsel. However, because these organizations bring competitors together, they are a fertile ground for antitrust headaches.

The following topics should never be discussed with competitors at trade association meetings:

- Current or future prices (including intent to increase or decrease prices generally)
- Profit margins, or what constitutes a "fair profit level" for industry participants
- Discounts, credit terms or sales strategy
- Market allocation or refusals to deal with specific companies

Always insist on an agenda ahead of time, and if there are potentially problematic topics listed, consult with counsel. If another attendee raises a risky topic, make a "noisy withdrawal" by both stating you will not participate in the discussion and removing yourself from the conversation. Failure to do so could make you complicit in any theoretical violation.

Practical Tip: It is especially important to remain alert during association social functions, as conversations are more informal, and statements can often be misremembered or taken out of context. In some cases, the government may review private messages between meeting attendees, so do not assume texts or chat messages are safe.

Many associations also develop voluntary standards relating to products or services. Although standards can enhance safety and increase efficiency, they can also raise anticompetitive problems when they restrict entry into a market, inhibit innovation or limit competition.

- If the standards favor some competitors and discriminate against others, the association and its members could be subject to antitrust action. In general, performance standards are better than specific design or product standards.
- Standards should have a rational basis, and they should not go beyond what is necessary to achieve the purpose of the standard.

Competitive Intelligence

Competitive intelligence gathering is appropriate but should be conducted with care. Competitively sensitive information regarding competitors can be problematic if it is obtained improperly.

Such information includes:

- Confidential price information, including the timing or level of price changes
- Terms and conditions of sale (either in general or for a specific customer)
- Information on costs, production, capacity or sales, including planned expansion or reduction of output
- Plans for the design, production, distribution or marketing of particular products

It is permissible to gather this information from publicly available sources, such as published price lists, trade publications or information shared by customers. It is also generally permissible to obtain sensitive information, such as a competitor's quote, from a customer, so long as it is part of a negotiation. Sensitive information should not be obtained directly from competitors, and it is important to avoid any inference that information was improperly obtained.

Practical Tip: When compiling such information, document your sources. Including source information in your records can avoid potential headaches down the road if enforcers or plaintiffs assert that it was obtained improperly.

Use of third-party data aggregators is often permissible, but any data subscription relating to pricing or output should be vetted by counsel in advance. More details on use of third-party data services are included in Section 8.

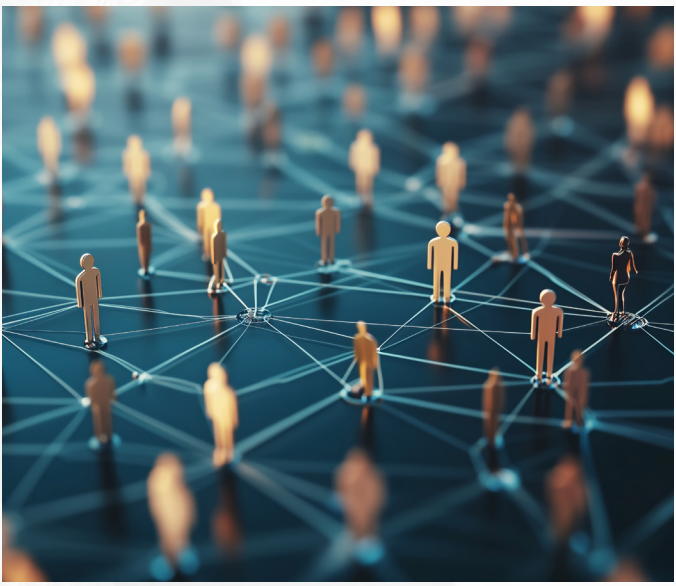
Recruiting Practices

Human Resource practices may present antitrust risk to the extent they reduce an employee's mobility or disadvantage rival companies by preventing them from accessing essential talent necessary to compete.

Agreements that present antitrust issues generally fall into three categories:

- **Wage-fixing agreements** are agreements between two or more competitors to set the wages of their employees. The government has argued that these agreements are illegal in several recent cases.
- **No-poach agreements** are agreements between two or more companies not to compete to hire each other's employees. Agreements not to solicit another company's employees pose antitrust risks but may be permissible in connection with the sale of a business or a legitimate business collaboration.
- **Non-compete agreements** restrict an employee from competing within a certain industry or geographic area for a set duration of time after leaving the company. Such agreements have been challenged as antitrust violations where they are overbroad in terms of the employees covered or the scope of the restrictions, but they are also common in connection with the sale of a business.

Practical Tip: Antitrust rules in this area vary by jurisdiction. It is thus advisable to contact counsel before entering any non-compete agreement to account for the latest developments.



AI and Tech

The proliferation of artificial intelligence (AI) and other technology tools is fundamentally changing the way many companies compete across nearly all sectors of the economy. At the same time, antitrust regulators are racing to ensure that companies do not use these tools to gain an unfair advantage or distort competitive markets.

Antitrust issues can arise in three primary areas:

- **Data aggregators** – Antitrust enforcers are scrutinizing companies' use of third-parties that aggregate and distribute industry data regarding sensitive issues like price and output. In light of new technologies, this data can better facilitate pricing parity and similar terms.
- **Pricing algorithms** – Use of algorithms that recommend prices based on confidential competitive data is likewise facing scrutiny. Some regulators have taken the position that certain pricing algorithms are inconsistent with antitrust requirements.
- **AI partnerships** – Antitrust enforcers are also scrutinizing partnerships and investments related to AI development, which can present competitive concerns to the extent they:
  - Limit access to inputs required to build AI tools, including specialized chips, compute resources and engineering talent
  - Increase switching costs by contractually restricting developers' use of multiple service providers or creating technical lock-in to specialized services
  - Facilitate information sharing, including sensitive technical and business information that is unavailable to other market participants

As this space is rapidly evolving, it is advisable to consult counsel if questions in this area arise.

Smart Writing

The existence of an antitrust violation can often be inferred from a minimal amount of circumstantial evidence, such as a discussion between employees of competitors, or a few carelessly written words or a few carelessly spoken sentences to a customer or supplier.

These communications may, in fact, be innocent or innocuous, but were written in such a way as to create suspicion, particularly when taken out of context. Always assume that a company document could one day be read by a skeptical government regulator or an enterprising opposing counsel.

- This includes use of informal communications channels such as text, chat and ephemeral messaging tools, which are increasingly a focus of antitrust enforcers.
- Communications or correspondence should never be conducted in a concealed, or surreptitious manner or contain language which is ambiguous or could be misunderstood.
- The sources of competitive information and the basis of business decisions should be documented consistently.

Practical Tip: Avoid exaggeration, hyperbole and other statements that can be misinterpreted, particularly if taken out of context (e.g., "kill the competition," "dominate the market"). Ask yourself if you would be comfortable having the statement read by a scrutinizing antitrust enforcer, or printed on the front page of the New York Times.

Troublesome statements by others should not simply be ignored, which can later be construed as acquiescence or assumed to be confirmed in separate communications.

Cheat Sheet – Do's and Don'ts

Antitrust Do's

- Compete vigorously at all times
- Set prices independently of your competitors
- Make independent decisions in dealing with distributors and customers
- Avoid colorful language in documents relating to competition or competitors
- Make a "noisy withdrawal" from any improper conversation (and report it internally)
- Mark source and date on competitor price information received from customers
- Consult with counsel before entering agreements that restrict employee mobility
- Report suspected violations to counsel so appropriate remedial steps can be taken

Antitrust Don'ts

- Discuss prices or other sensitive terms with competitors
- Share information with competitors regarding costs, margins or marketing strategies
- Exchange information with competitors regarding customers, territories or product development
- Discuss refusing to do business with (boycotting) any customer, or doing business only on certain terms
- Meet privately with a competitor except as required for job duties and pre-approved by counsel
- Offer prices or terms more favorable than those offered to competing customers without first consulting with counsel

Local Connections. Global Influence.