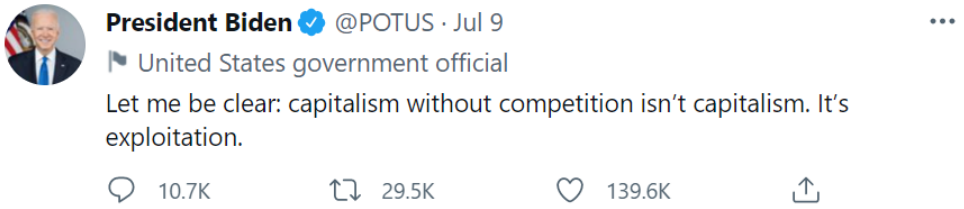
Antitrust in the 21st Century

Course Introduction



In modern America, the organizations we most directly depend on are private corporations. We predominantly live in private housing, travel by private automobiles, work in private firms, and seek healthcare from private hospitals. The products we buy are usually produced by private companies.

Private markets are not inherently good or bad. And decades of study in economics and other fields demonstrate the strengths and flaws of the market system. On the one hand, harnessing private initiative through market institutions has created the most prosperous societies on earth. But markets have also contributed to a host of social problems, from rising inequality to pollution. It is important to recognize that no market exists in a vacuum. Markets are structured and supported by state and social institutions in countless ways. For example, the government regulates weights and measures and bans fraud to ensure that market participants are able to trade safely. Meanwhile, the environmental laws help to solve collective action problems.

This course is about one especially potent body of law regulating markets: antitrust (or competition) law. It introduces students to antitrust law's role in shaping American capitalism, covering what a law student needs to know about antitrust doctrine as well as touching on economics, history, politics, and modern problems in the U.S. economy.

Antitrust in the "Second Gilded Age"

Western democracies are experiencing extreme and rising levels of inequality at both the corporate and household level, not seen in the U.S. since the first "Gilded Age" (roughly 1880–1920). Lessened competition is likely contributing to these trends. But other factors such as technological change, globalization, declining worker power, and new tax rules are probably important causes too, and are also consistent with the data.

Reading

Required Reading

Jason Furman, *Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth*, Searle Center Conference on Antitrust Economics and Competition Policy (September 16, 2016)

Jonathan B. Baker, *Market power in the U.S. economy today*, Washington Center for Equitable Growth (March 2017)

Steven Berry, Martin Gaynor, and Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 Journal of Economic Perspectives—Number 3, Summer 2019, pp. 44–68

Recommended Reading

Robert C. Lieberman, "Why the Rich are Getting Richer—American Politics and the Second Gilded Age," 90 Foreign Aff. 154 (2011).

Background Reading

> *Note*: The background readings are for students interested in researching and writing further about the topics in this syllabus. Otherwise, students should focus on the required and recommended readings.

"Benefits of Competition and Indicators of Market Power," Council of Economic Advisers Issue Brief (April 2016)

Philippon, T. (2019). The Great Reversal: How America Gave Up on Free Markets. Cambridge, MA: Harvard University Press.

Jacob Hacker and Paul Pierson. 2010. "Winner-Take All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States," Politics and Society 38(2): 152–204.

Anna Stansbury and Lawrence Summers, The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy, NBER Working Paper 27193

Autor, David, Dorn, David, Katz, Lawrence F, Patterson, Christina, & Van Reenen, John. (2020). The Fall of the Labor Share and the Rise of Superstar Firms. *The Quarterly Journal of Economics, 135*(2), 645–709

History of Antitrust Thought

Antitrust enforcement arose in the U.S. at the turn of the 20th century as part of a political reaction to the growing wealth and power of industry and banks in the first Gilded Age. After a slow start, antitrust enforcement became more important in the 1930s, thanks in part to Thurman Arnold at the Department of Justice's Antitrust Division. Enforcement remained vigorous through the 1970s, as evidenced by cases like the AT&T breakup.

In the 1980s, however, conservative and anti-interventionist approaches associated with the Chicago school of law and economics substantially reduced antitrust enforcement. Chicago-school theorists and judges often argued that economic theory supported a lack of intervention. But these scholars rarely used the best available economic tools, instead relying on assumptions about markets' ability to self-correct. Yet even after mainstream economists discarded these assumptions (or had never used them in the first place), legal precedents and political lobbying kept them alive in the law.

The most recent intellectual movement in antitrust is the Neo-Brandesian school of thought. This movement stresses the political origins of the antitrust laws and advocates for enforcement that accounts for political and distributive concerns.

The history of antitrust law demonstrates that translating political motivations and economic knowledge into legal structures can be challenging. A key factor is that courts are bound by precedent, and jurisprudence moves very slowly. Thus, antitrust law can lag far behind the political forces, intellectual movements, and economic evidence shaping it.

Reading

Required Reading

Brandeis, Louis D., The Regulation of Competition Versus the Regulation of Monopoly (An address to the Economic Club of New York on November 1, 1912) (1912).

United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 164–65 (D.D.C. 1982) (section A2)

Naomi R. Lamoreaux, "The Problem of Bigness: From Standard Oil to Google," Journal of Economic Perspectives 33 (Summer 2019), 94–117.

Recommended Reading

Hovenkamp, Herbert and Scott Morton, Fiona M., Framing the Chicago School of Antitrust Analysis (June 9, 2020). U of Penn, Inst for Law & Econ Research Paper No. 19–44, University of Pennsylvania Law Review.

United States v. Addyston Pipe & Steel Co., 85 F. 271, 280–82 (6th Cir. 1898)

Background Reading

Lina M. Khan, The End of Antitrust History Revisited, 133 HARV. L. REV. 1655 (2020).

Naomi Lamoreux, The Great Merger Movement in American Business, 1895–1904, Cambridge University Press (1985).

Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age. New York, N.Y: Columbia Global Reports. 2018.

William E. Kovacic and Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, Journal of Economic Perspectives, Vol. 14, Issue 1 (Winter 2000), pp. 43–60.

Phillips Sawyer, Laura. "U.S. Antitrust Law and Policy in Historical Perspective." Harvard Business School Working Paper, No. 19–110, May 2019. (Revised September 2019.)

Shelanski, Howard, Antitrust and Deregulation, The Yale Law Journal, Vol. 127, Issue 7 (May 2018), pp. 1922–1961.

Weber Waller, Spencer, The Antitrust Legacy of Thurman Arnold, St-John's Law Review (2004) 78:3 St John's L. Rev. 569.

John J. Flynn, The Reagan Administration's Antitrust Policy, " Original Intent " and the Legislative History of the Sherman Act, 33 Antitrust Bull. 259, 265–90 (1988).

Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, The Hastings Law Journal, Vol. 34, September 1982, pp. 65–151.

Gene M. Grassley, Thurman Arnold, Antitrust, and the New Deal, The Business History Review, vol. 38, no. 2 (1964), pp. 214–231.

Antitrust Basics #1 — Agreements Among Competitors

The easiest way to eliminate competition is to simply agree not to compete. It is also the most illegal. If the antitrust laws ban anything, they ban companies from price fixing, bid rigging, dividing up the market, agreeing not to compete on quality, and the like—in other words, from forming cartels. In fact, these violations are so clearly anticompetitive, and require so little economic analysis, that they are often "per se" illegal. And in the United States they can result in criminal liability. This module addresses key elements of cartel enforcement actions under §1 of the Sherman Act.

Reading

Required Reading

Sherman Act § 1, 15 U.S.C. § 1

Pleading an antitrust violation

Interstate Circuit v. United States, 306 U.S. 208 (1939)

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954)

What counts as a single firm?

Copperweld Corp. v. Independence Tube Corp., 467 US 752 (1984)

American Needle v. National Football League, 560 U.S. 183 (2010)

Restraints of trade

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)

Chicago Board of Trade v. United States, 246 U.S. 231 (1918)

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)

California Dental Assn. v. FTC, 526 U.S. 756 (1999)

Polygram Holding, Inc. v. Federal Trade Commission, 416 F.3d 29 (D.C. Cir. 2005)

Christopher Leonard, Bloomberg, Is the Chicken Industry Rigged? (2017)

Recommended Reading

United States v. U.S. Gypsum Co., 438 U.S. 422 (1978)

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897)

United States v. American Tobacco Co., 221 U.S. 106 (1911)
Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933)
United States v. Trenton Potteries Co., 273 U.S. 392 (1927)
Palmer et al. v. BRG of Georgia, Inc., et al., 498 U.S. 46 (1990)
United States v. Joyce, 895 F.3d 673, 679 (9th Cir. 2018)
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)
Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979)

Antitrust Basics #2 — Mergers and Acquisitions

In the last module, we saw that while two companies may not agree to fix prices, single companies can do so freely. Thus, if two companies each wish to charge the monopoly price, they will be incentivized to merge. For antitrust enforcement to protect consumers from monopoly power, the law must prohibit anticompetitive mergers.

Merger control arose to stop companies from trying to build market power by acquisition. Originally, § 1 of the Sherman Act was used to address mergers. But in 1914, after *Standard Oil*, Congress passed the Clayton Act. Ever since, this Act has been the primary antitrust law governing American mergers.

In this module, we will discuss the substantive case law governing mergers. Yet the most important actors in deciding whether a merger goes through are not the courts, but the antitrust enforcement agencies. If the Department of Justice or Federal Trade Commission decides to challenge a merger, it can delay the transaction for years, and that alone might be enough to scuttle the deal. Thus, the most important reading in this module is not a case, but the agencies' joint merger guidelines—their internal rules for when they will challenge a merger as anticompetitive.

This module will also discuss antitrust procedure. Once a merger happens, it can be hard to unwind the deal. Therefore, large mergers today must be cleared upfront, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Reading

Required reading

Merger basics

Clayton Act § 7, 15 U.S.C. § 18 (as amended by the Celler-Kefauver Amendment in 1950)

Brown Shoe Co. v. United States, 370 U.S. 294 (1962)

Enforcement guidance

Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission

Merger enforcement in practice

United States v. E.I. Du Pont de Nemours & Co. 351 U.S. 377 (1956)

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)

FTC v. Staples Inc. & Office Depot Inc., 190 F. Supp. 3d 100 (D.D.C. 2016)

Complaint, *U.S. v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V.*

Procedure

Hart-Scott-Rodino Antitrust Improvements Act of 1976

Recommended reading

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001)

United States v. Philadelphia National Bank, 374 U.S. 321 (1963)

Vertical Merger Guidelines, U.S. Department of Justice and Federal Trade Commission

Background reading

Rupprecht Podszun, *The Arbitrariness of Market Definition and an Evolutionary Concept of Markets*, Antitrust Bulletin (2016), 61(1), 121–32.

United States v. Columbia Steel Co., 334 U.S. 495 (1948)

United States v. General Dynamics Corp., 415 U.S. 486 (1974)

United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011)

Steves & Sons Inc. v. Jeld-Wen Inc., 988 F.3d 690 (4th Cir. 2021)

United States v. E.I. Du Pont de Nemours & Co. 353 U.S. 586 (1957)

Antitrust Basics #3 — Monopolization

Even though a monopoly lowers consumer welfare compared to competition, in the United States being a monopolist is not illegal. What is illegal under the antitrust laws is for a firm to monopolize. Monopolization involves engaging in conduct that is not "competition on the merits" in order to obtain market power and reduce competition even further. Section 2 of the Sherman Act therefore bans certain types of unilateral conduct by firms with a large enough share of the market to be successful. Monopoly maintenance is also covered by the Sherman Act. But the conceptual line between legal competition and illegal monopolization can be hard to define. As a result, unilateral-conduct antitrust cases can be challenging for enforcement agencies.

Along with this reading, you may want to view the economics module on predatory pricing.

Reading

Required reading

Monopoly basics

Sherman Act §2, 15 U.S.C. §2

United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945)

Exclusion

United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953)

United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)

Predatory pricing

Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986)

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)

Tying

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984)

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)

(Note: There is an entire module on this essential case! This is just a preview.)

Refusing to deal

Otter Tail Power v. United States, 410 U.S. 366 (1973)

Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 472 U.S. 585 (1985)

Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004)

Price Squeezes

Pacific Bell Telephone Co. v. LinkLine Communications, Inc., 555 U.S. 438 (2009)

Loyalty Rebates

Le Page's Inc. v. 3M Co., 324 F.3d 141 (3rd Cir. 2003)

Recommended reading

Deutsche Telekom AG v. Commission, Case T-271/03 (2008)

United States v. American Telephone and Telegraph Co., 524 F. Supp. 1336 (D.D.C. 1981)

United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 1982 (D.D.C. 1982)

Background reading

Robinson-Patman Act, 15 U.S.C. § 13(a)

United States v. Grinnell Corp., 384 U.S. 563 (1966)

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967)

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312 (2007)

Illinois Toolworks Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006)

United States v. Colgate & Co., 250 U.S. 300 (1919)

Cascade Health Solutions v. Peacehealth, 515 F.3d 883 (9th Cir. 2008)

Intel litigation saga on loyalty rebates in the EU: Cleary Gottleib Summary (2017)

Fiona M. Scott Morton & Zachary Abrahamson, Zachary, *A Unifying Analytical Framework for Loyalty Rebates*, Antitrust L.J. 777–836. (2017)

Monopsony

Almost all antitrust cases target firms that possess power on the seller side of markets. But antitrust law also targets monopsony power—consolidated power on the buyer side. For this reason, antitrust law protects all 'sides' of, or trading parties in, a market. Recent research has demonstrated that labor markets in particular have significant competition problems, and wages often exhibit substantial markdowns due to monopsony power. Furthermore, employers engage in practices (like no-poaching agreements and non-compete provisions) that hurt wages, working conditions, benefits, and job mobility. This module explores monopsonies and the way that courts have treated them in the United States, with a focus on labor.

The economic analysis of monopolies and monopsonies is symmetric. Why, then, have courts and regulators been so much more concerned with monopolies? Is it an economic reason, or is it something else?

Reading

Required Reading

NCAA v. Alston, 141 S. Ct. 2141 (2021)

Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312 (2007)

Toys R Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000)

In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1178 (N.D. Cal. 2015)

Clayton Act § 6, 15 U.S.C. § 17 (stating that "[t]he labor of a human being is not a commodity or article of commerce" and exempting labor organizations from certain antitrust laws)

Suresh Naidu, Eric Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537 (2018) (read section I; sections II–III are interesting but optional)

Recommended Reading

United States v. Topco Associates, Inc., 405 U.S. 596 (1972)

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) (in which John D. Rockefeller used buyer power to squeeze competitors)

Marshall Steinbaum, Antitrust, the Gig Economy, and Labor Market Power, 82 L. & Contemp. Probs. 45 (2019)

Background Reading

C. Scott Hemphill & Nancy L. Rose, Mergers that Harm Sellers, 127 Yale L. J. 2078 (2018)

Jonathan B. Baker, Joseph Farrell & Carl Shapiro, *Merger to Monopoly to Serve a Single Buyer: Comment*, 75 ANTITRUST L. J. 637 (2008)

Marius Schwartz, Buyer Power Concerns And The Aetna-Prudential Merger, 5th Annual Health Care Antitrust Forum (October 1999)

FTC/DOJ Joint Guidance for Human Resources Professionals (2016)

United States v. Adobe Systems, Inc., Case No. 1:10-cv-01629 (D.D.C. September 24, 2010) (Competitive Impact Statement)

Marina Lao, Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption, 51 U. CALIF., DAVIS L. REV. 1543 (2018)

Sanjukta Paul & Nathan Tankus, The Firm Exemption and the Hierarchy of Finance in the Gig Economy, 16 U. ST. THOMAS L. J. 45 (2019)

Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Non-Compete Agreements (October 19, 2020)

Regulation

Traditionally, antitrust regulation is reactive. It is done through litigation and involves interpreting broadly worded laws after the fact. But governments can also pursue competition policy through prospective economic regulation. Although the FTC can make prospective rules, many regulations that affect competition come from industry-specific bodies, like the Federal Communications Commission and Securities and Exchange Commission. These regulations may still be enforced through litigation, or the threat of litigation, but they offer more specific ex ante guidance to the industry that can be taken into account before companies act. Given current competitive conditions and the slow pace of antitrust enforcement, policy makers are showing increased interest in pro-competitive regulation in the technology sector.

In this module, you will learn how the antitrust laws interact with economic regulation. Consider the strengths and weaknesses of each method, when each is appropriate, and whether they are substitutes or complements. Consider how regulation can be designed to lower entry barriers and intensity competition; consider also how regulation might be used to *thwart* competition.

Reading

Required Reading

Review *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)

Credit Suisse Securities LLC v. Billing, 551 U.S. 264 (2007)

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975)

U.S. Futures Exchange v. Board of Trade of the City of Chicago, 953 F.3d 955 (7th Cir. 2020)

Howard A. Shelanski, *The Case for Rebalancing Antitrust Regulation*, 109 Michigan L. Rev. 683, 687 (2011).

Recommended Reading

Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 Colo. Tech. L.J. 33 (2017)

Andrea Coscelli, CEO of the CMA, "Regulation and competition enforcement – a combined approach" (Fordham Annual Conference, 2018)

European Commission Digital Markets Act ("Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector") (15 December 2020)

Background Reading

Silver v. New York Stock Exchange, 373 U.S. 341 (1963)

Electric Trading Group, LLC v. Banc of America Secs., 588 F.3d 128 (2d Cir. 2009)

Howard Shelanski, Antitrust and Deregulation, The Yale Law Journal, Vol. 127, Issue 7 (May 2018), pp. 1922–1961.

Robert J. Jackson, Jr., Speech: “Competition: The Forgotten Fourth Pillar of the SEC’s Mission”, Washington D.C., Oct. 11, 2018.

Jacob A. Kling, Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine (2011) 120:4 Yale L J 910.

Samuel N. Weinstein, Financial Regulation in the (Receding) Shadow of Antitrust, Temple Law Review, Vol, 91 No.3, pp. 447–512.

Airlines and Pricing Abuses

The American airline industry is a wonderful laboratory for students interested in regulation and competition. Until the late 1970s, airlines were regulated by the Civil Aeronautics Board. The Board directly regulated competition by setting minimum fares and controlling routes. But then the industry was deregulated by congress and airlines could make choices over fares and routes. Soon there was an influx of entry and competition. Prices (and wages) went down, and the industry adopted the hub-and-spoke route model that is still in use.

More recently, however, competition has again diminished—but for different reasons. The Department of Justice allowed a wave of mergers while the Department of Transportation has permitted code-sharing that often achieves the same goal as a merger, and at the same time failed to protect consumers' shopping environment from drip pricing, opaque prices, and high search costs. Combined with two drastic drops in demand (the financial crisis and covid-19), these have reduced competition in airlines through fewer competitors, capacity reductions and tacit collusion. Airlines have also been accused of predatory pricing to exclude low-cost carriers. The airline industry is a laboratory for studying antitrust; over the decades airlines have provided examples of many anticompetitive tactics prohibited by the antitrust laws.

Reading

You may wish to review the readings on predatory pricing from the monopolization module.

Required reading

James B. Stewart, Discipline for Airlines, Pain for Fliers, *The New York Times* (June 11, 2015)

United States v. AMR Corp., 335 F. 3d 1109 (10th Cir. 2003)

Complaint, *United States of America v. U.S. Airways Group, Inc. and AMR Corp.* (Aug. 13, 2013)

Severin Borenstein, Rapid Price Communication and Coordination: The Airline Tariff Publishing case (1994), in *The Antitrust Revolution: Economics, Competition, and Policy* 4 (2004)

Recommended reading

Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917 (6th Cir. 2005)

Background reading

Deregulation

> Gale Moore, Thomas. "U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor." The Journal of Law and Economics, vol. 29, no. 1, Apr., 1986, p. 1-29. HeinOnline.

Tacit collusion

Posner, Richard A. (1969). Oligopoly and the Antitrust Laws: A Suggested Approach. *Stanford Law Review, 21*(6), 1562-1606.

Mergers

Carlton, Dennis, Mark Israel, Ian MacSwain, and Eugene Orlov, "Are legacy airline mergers pro- or anti-competitive? Evidence from recent U.S. airline mergers," *International Journal of Industrial Organization* 62 (2019): 58–95.

On predatory pricing:

Areeda, Philip E. and Donald F. Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," *Harvard Law Review* 88 (February 1975): 697–733.

Bolton, Patric, Joseph F. Brodley and Michard Riordan, "Predatory Pricing: Strategic Theory and Legal Policy," *Georgetown Law Journal* 88 (August 2000): 2239–2330.

Borenstein, Severin, "The Evolution of U.S. Airline Competition," *Journal of Economic Perspectives* 6 (Spring 1992): 45–73.

Elzinga, Kenneth G. and David E. Mills, "Predatory Pricing and Strategic Theory," *Georgetown Law Journal* 89 (August 2001): 2475–2494.

Microsoft: Tying and Exclusive Dealing

In 1998, the Department of Justice and 20 state attorneys general sued Microsoft for antitrust violations. They alleged that Microsoft had bundled its programs (especially its browser, internet explorer) with its operating system, resulting in illegal monopolization. The lawsuit became one of the highest-profile antitrust enforcement actions in U.S. history. *Microsoft* is a foundational monopolization case and shows how courts have approached network effects and nascent competition. But it did not start a trend; *Microsoft* remained the most recent federal antitrust case involving digital platforms until the DOJ's lawsuit over Google search in 2020.

Reading

Required Reading

You may wish to review the readings on tying and exclusion (*Dentsply*) from the monopolization module.

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (Section VI on Judicial Misconduct is optional)

W. Page & J. Lopatka, The Microsoft Case: Antitrust, High Technology, and Consumer Welfare ix–xiii (2007).

Andrew I. Gavil & Harry First, The Microsoft Antitrust Cases 309–330 (2014).

C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Penn. L. Rev. 1879, 2020; New York University Law & Economics Research Paper No. 20–50 (2020)

Recommended Reading

Daniel L. Rubinfeld, *Maintenance of Monopoly:* U.S. v. Microsoft (2001), *in* The Antitrust Revolution (John E. Kwoka, Jr. & Lawrence J. White eds., 17th ed.) (pp. 514–34).

McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015)

Feng Zhu and Marco Iansiti, *Why Some Platforms Thrive and Others Don't*, Harvard Business Review (2019).

Healthcare

The U.S. healthcare system is primarily composed of private entities, many of which are for-profit businesses. By international standards, it has inferior performance: extremely high prices, limited access, variable quality, and deficient outcomes for many patients. The poor performance is due in part to substantial consolidation and a lack of competition in local markets for care and insurance. This is partly driven by captured political actors who design regulations that favor firms. However, antitrust enforcement has a key role to play in limiting consolidation and market power, and thereby reducing prices and improving quality.

Reading

Required reading

In re Evanston Northwestern Healthcare Corp. & ENH Medical Group, Inc., FTC Matter No. 0110234, Dkt. No. 9315

- Initial Decision of Chief Administrative Law Judge Stephen McGuire (Skim introduction: p 1–5, Analysis and conclusions of law, 128–211)
- Brief Amicus Curiae of Economics Professors
- Opinion of the Commission on Remedy

FTC v. Phoebe Putney Health Sys., 568 U.S. 216 (2013)

United States v. Anthem, Inc., 855 F.3d 345 (D.C Cir. 2017) (note Judge Kavanaugh's dissent)

Thomas G. Wollmann, *How to Get Away with Merger: Stealth Consolidation and Its Effects on U.S. Healthcare*, NBER Working Paper 27274.

Recommended reading

United States v. CVS Health Corp., 407 F. Supp. 3d 45 (D.D.C. 2019)

United States v. Blue Cross Blue Shield, 809 F. Supp. 2d 665 (E.D. Mich. 2011)

Background reading

Dafny Leemore, Kate Ho & Robin S. Lee, The Price Effects of Cross-Market Hospital Mergers, NBER Working Paper No. 22106 (Issued in March 2016, Revised in October 2018)

Statement of the Federal Trade Commission In the Matter of Cabell Huntington Hospital, Inc., Docket No. 9366, July 6, 2016

This Tactic Helps Hospitals Ease Merger Scrutiny — Antitrust regulators eye "certificates of public advantage" (MedPage Today April 1, 2021)

David Dranove & Andrew Sfekas, *The Revolution in Health Care Antitrust: New Methods and Provocative Implications*, Milbank Quarterly (2009)

Pharmaceuticals

Pharmaceutical companies are recurrent antitrust offenders. A lack of competition in the pharmaceutical industry has led to higher prices and has stifled innovation that otherwise would benefit consumers. Some of the antitrust issues are typical of the ones you've seen so far. But pharmaceutical companies are subject to significant regulation—though usually not price regulation—and are distinctively reliant on intellectual property. This combination has created antitrust issues of its own, as you will learn when reading about the "pay for delay" cases in this module.

Reading

Required reading

FTC v. Actavis, Inc., 570 U.S. 136 (2013) (read 1–9, 14–20 of the slip opinion)

New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 653 (2d Cir. 2015)

Pfizer Inc. v. Johnson & Johnson, 333 F. Supp. 3d 494 (E.D. Pa. 2018) (read II and III.B)

Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. Political Economy, 649–702 (2021) (read the Introduction, Table 2, and Figure 5)

DOJ Antitrust Division Spring Update 2021, Generic Drugs Investigation Targets Anticompetitive Schemes

Fed. Trade Comm'n v. Shire ViroPharma, Inc., 917 F.3d 147 (3d Cir. 2019) (read Part I on the use of repeated citizen's petitions to delay generic entry)

FTC Amicus Brief, *Mylan v. Celgene*, June 17, 2014, (on the restriction of generic entry through the use of Risk Evaluation and Mitigation Strategies (REMs))

Recommended reading

Congressional Research Service, The CREATES Act of 2019 and Lowering Drug Prices: Legal Background & Overview

Aaron S. Edlin, C. Scott Hemphill, Herbert Hovenkamp, and Carl Shapiro, Activating Actavis, Antitrust Mag. 16 (2013)

Background reading

Abbott Lab'ys v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 420 (D. Del. 2006)

Carrier, Michael A, & Shadowen, Steve D. (2016). Product hopping: A new framework. *The Notre Dame Law Review, 92*(1), 167.

AbbVie Wins First Round in Humira Antitrust Lawsuit, (Jan. 6, 2021)

Agriculture

Farmers were critical to passing America's first antitrust laws—in 1888, Iowa became the first state to pass an antitrust act. But today, farmers are again facing competition problems. As recent cases have revealed, many farmers face competitive threats both from their upstream suppliers and their downstream purchasers. This is because both the upstream and downstream markets have become concentrated, largely due to mergers. As a result, end consumers can face higher prices while farmers are paid less for farm output and pay more for farm inputs. Recent antitrust actions have uncovered collusion, information sharing, and other anticompetitive practices in agricultural markets.

Reading

Required reading

Complaint, *United States v. Bayer AG & Monsanto*, 18-cv-124 (D.D.C. 2018)

Christopher Leonard, *Keynote Address, Big Ag and Antitrust Conference*, Yale Thurman Arnold Project & Law, Ethics, and Animals Program at Yale (2021)

Plea Agreement, *United States v. Pilgrim's Pride Corp.*, 20-cr-330 (D. Col. 2021) (pages 1–5)

Dave Dickey, Courts need to end Big Meat data sharing, Investigate Midwest, June 9, 2021

Complaint, *United States v. Dow Chemical Co.*, (D.D.C. 2017)

Recommended reading

Jesse Hirsch, As Farmers Fight for the Right to Repair Their Tractors, an Antitrust Movement Gains Steam, (Apr. 8, 2019) (Note also the Biden Administration Executive Order on Competition, which directs the FTC to consider rulemaking to support a right to repair, available here)

Background reading

Christopher Leonard, Bloomberg, Is the Chicken Industry Rigged? (2017)

Leonard, Christopher. (2014). The Meat Racket. Riverside: Simon & Schuster.

"Farm Bureau," 60 Minutes (April 9, 2000)

Part 1: https://www.youtube.com/watch?v=c4iiV8e0Y6A

Part 2: https://www.youtube.com/watch?v=ehDfBl_VKEQ

Anthony Pahnke, Antitrust Legislation Is Essential to Racial and Economic Justice in Agriculture, Truthout (Feb. 14, 2021)

Farm, Consumer and Competition Groups Oppose JBS-Cargill Pork Merger Deal Would Concentrate Buyer and Seller Power in Pork Industry (July 30, 2015)

Max Miller, CPI Podcast, America Needs Farmers and Farmers Need Better Antitrust Law, Competition Policy International

Joint Ventures

The formation of joint ventures by independent companies is long-standing. These collaborations can help consumers by, for example, setting a common product standard or allowing the creation of a product that neither party could produce alone. But joint ventures can also lessen competition through coordination or less entry or choice. Antitrust decisions have tried to balance these effects.

The stakes of this issue have increased in the last decade, when investors have become increasingly concerned with whether the companies they own promote environmental, social, and governance goals. In Europe, for example, there is a desire to allow companies to coordinate on "green" standards with their competitors. But these agreements carry the risk of being anticompetitive.

Reading

Required reading

Texaco Inc. v. Dagher, 547 US 1 (2006)

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)

Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Novartis AG*, File No. 141-0141, Docket No. C-4498 (describes a challenge of a recent proposed joint venture involving joint ownership by the only two branded nicotine patch producers, and the divestiture remedy)

An Open Letter to the Global Legal Community, various bank General Counsels, September 30, 2020

OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper

Background reading

Business Review Letters

DOJ Response to the Clearing House Payments Company (September 21, 2017)

DOJ Response to Eli Lilly Business Review Letter (July 23, 2020)

Antitrust Guidelines for Collaborations Among Competitors (FTC & DOJ) (April 2000)

Common Ownership

Under the merger statutes, a single investor could not buy every company in a market. But what if overlapping sets of investors buy individually small, but collectively large, stakes of every company in a market? In many sectors, that is the status quo: a few large investment firms—companies like Fidelity, BlackRock, and Vanguard—collectively own large portions of the publicly traded firms that comprise most of an industry. In these industries, the common owners should not rationally want their companies to compete hard against each other. Instead, their interest is for the companies to soften competition, whether through changes in prices, R&D, capacity, entry decisions, or some other dimension of competition.

Recent empirical scholarship suggests that large investors are succeeding in their goal—although it is not clear exactly how. This scholarship suggests that "common ownership" is a pressing modern antitrust issue.

Reading

Required reading

Azar, Schmaltz & Tecu, *The Anticompetitive Effects of Common Ownership* (2018) (Introduction and Section 6, table 1)

Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—and Why Antitrust Law Can Fix It*, 10 Harv. Bus L. Rev. 207, 209–268 (2020) (read Parts III and IV)

Fiona Scott Morton & Herbert Hovenkamp, Horizontal Shareholding and Antitrust Policy, 127 Yale L. J. (2018) (read 2026–2047).

Recommended reading

Eric A. Posner, Fiona M. Scott Morton, & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, Antitrust L.J. (2017).

Backus, Colon, & Sikinson, The Common Ownership Hypothesis: Theory and Evidence, Economic Studies at Brookings (January 2019)

Speech by FTC Commissioner Noah Joshua Phillips, "Taking Stock: Assessing Common Ownership," Concurrences Review and NYU Stern: The Global Antitrust Economics Conference, June 1, 2018

Background reading

"Common Ownership, Competition, and Top Management Incentives" with Miguel Antón, Mireia Giné, and Martin Schmalz,.

"Innovation: The Bright Side of Common Ownership?" with Miguel Antón, Mireia Giné, and Martin Schmalz

Vertical Restraints

Vertical restraints are agreements between firms at different levels of production or distribution. These agreements can raise competitive concerns, for example foreclosing a direct competitor by withholding a product or customer in the related market. Foreclosure causes higher prices, weaker competition, or exclusion in that part of the supply chain. But many other vertical agreements are justifiable business practices. For example, they can prevent distributors from free-riding on others' promotional efforts. Thus, vertical restraints are not per se illegal, but must be analyzed under the rule of reason. Antitrust practitioners report that vertical restraints are harder to challenge in the U.S. than in Europe.

Reading

Required reading

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007)

Monsanto Co. v. Spray-Rite Svc. Corp., 465 U.S. 752 (1984)

EU Commission complaint against Expedia and Booking.com (2019)

Recommended reading

United States v. Sealy, Inc., 388 U.S. 350 (1967)

Background reading

"Antitrust Guidelines for Collaborations Among Competitors" issued by the FTC and DOJ (available at https://www.justice.gov/atr/page/file/1098461/download)

ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012)

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)

Comparative law

- *Tooltechnic Systems (Aust) Pty Ltd* - Authorisation - A91433 (Australian Competition and Consumer Commission 2014)
- Case C-306/96 Javico International and Javico AG v Yves Saint Laurent Parfums SA (YSLP) (28 April 1998)
- Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie* (General Court, 13 October 2011)
- Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH (General Court, 6 December 2017)

Most-Favored Nation Clauses

When a company signs a most-favored nation clause, it promises that it will give a trading partner the best possible price. It either does not offer a lower price to a competitor, or must compensate the original partner if it does. These clauses can harm competition due to their impact on equilibrium prices and entry.

MFNs are a type of Contract that References Rivals because a buyer's price depends on the prices paid by its head to head rivals. This means an MFN is formally a vertical contract but it has horizontal effects, making it more dangerous to competition. A buyer with MFN protection, for example, mandates that the seller (e.g. a hotel or ebook publisher) charge the same price to its rivals (other buyers) as to it. This type of provision reduces price competition, can exclude entrants with different business models, and can entrench the power of certain platforms. As a result, MFN clauses have become an important area of antitrust enforcement. This module will focus on the use of these clauses in the digital economy.

Reading

Required Reading

U.S. v. Apple, 791 F. 3d. 290 (2015)

Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust 20.

Steven C. Salop & Fiona Scott Morton, *Developing an administrable MFN enforcement policy.* 27 Antitrust 15 (2013).

Cartels and Leniency

Leniency programs are key tools of enforcement agencies for tackling cartels. Under leniency programs, cartel participants that report anticompetitive agreements to enforcers can avoid fines and criminal sanctions. These programs help destabilize cartels by incentivizing participants to inform enforcers about the cartel.

Reading

Required Reading

US DOJ Leniency FAQ pp. 1–5, 14–19, 32–35

Deputy Assistant Attorney General Richard A. Powers Delivers Remarks at the 13th International Cartel Workshop (February 19, 2020)

Strategic Leniency and Cartel Enforcement, *American Economic Review*, Vol. 99, No. 3, 750-68 (2009).

Recommended Reading

International Competition Network: Guidance on Enhancing Cross-Border Leniency Cooperation (June 2020)

Behavioral Economics and Consumer Protection

Neoclassical economic theory assumes that people perfectly optimize each decision as if they had perfect information, ideal incentives, and plenty of time. But countless studies have proven that assumption false. Consumers have systematic biases that lead them to act in different ways than this perfect economic model predicts. Firms can exploit these behavioral biases to gain more market power than what would be possible if consumers were not impatient, incompletely informed, and susceptible to defaults, among others. For example, technology companies often argue that they are constrained in raising prices, because customers can easily switch providers: "competition is only a click away." But this claim ignores a large empirical literature showing how customers really act. While reading this module, consider how behavioral economics should affect antitrust issues such as market definition, switching costs, and tying.

Reading

Required reading

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)

Complaint, *United States v. Google LLC*, 20-cv-3010 (D.D.C. Oct. 20, 2020)

Google Paid Apple Billions to Dominate Search On iPhones, NPR, October 22, 2020

Office of Fair Trading, "What Does Behavioral Economics Mean for Competition Policy?" (March 2010)

Competition & Markets Authority, "Modernising the Energy Market," June 24, 2016.

James C. Cooper and William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J. LAW, ECONOMICS & POLICY (2012)

Recommended Reading

Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 — Microsoft)

Alan Devlin & Michael Jacobs, *The Empty Promise of Behavioral Antitrust*, HARVARD J. OF L. & PUB. POLICY 1009 (2013)

Niels J. Rosenquist, Fiona M. Scott Morton, and Samuel Weinstein, *Addictive Technology and Its Implications for Antitrust Enforcement* (February 22, 2021)

Background Reading

Maurice Stucke (2014). *How Can Competition Agencies Use Behavioral Economics?* 59 Antitrust Bulletin 695–742.

Max Huffman. Marrying Neo-Chicago with Behavioral Antitrust (June 6, 2012). Antitrust Law Journal, Vol. 78, 2012.

Avishalom Tor, Illustrating a Behaviorally Informed Approach to Antitrust Law: The Case of Predatory Pricing, 18 Antitrust 52 (2003–2004)

Roger Van den Bergh. Behavioral Antitrust: Not Ready for the Main Stage, Journal of Competition Law & Economics, 9(1), 203–229.

Joshua D. Wright, "The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other," The Yale Law Journal, Vol. 121, p. 2217 (2012)

Competition & Markets Authority, "Market Studies and Market Investigations: Supplemental guidance on the CMA's approach", January 2014 (revised July 2017).

Essential Facilities and Refusals to Deal

Sometimes a company controls a resource that other companies also need in order to access a market and create effective competition. The incumbent could have created the resource through its investments, have purchased it, or have control over it by historical accident. Antitrust law has struggled to create clear rules around when companies have a "duty to deal," or share access or resources, with rivals. In principle the law aims to protect the incentive to invest in a business while still ensuring that markets remain competitive. In practice, in the U.S., courts have shied away from imposing on companies a duty to deal with each other (*Colgate*), especially following *Trinko*. European competition law is more willing to entertain essential facilities arguments because, under EU law, dominant firms have an affirmative duty to enable competition. *See IMS Health*. Today, some tech platforms have monopolies on data and are important gatekeepers to information. Should this cause American courts to rethink the doctrine?

Reading

Required Reading

United States v. Colgate & Co., 250 U.S. 300 (1919)

Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 472 U.S. 585 (1985)

Verizon Commc'ns Inc. v. L. Offs. Of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004)

AREEDA AND HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 770–774.

Recommended Reading

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)

Case C-418/01 *IMS Health* [2004] 4 CMLR 28

Background Reading

Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989)

Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021)

United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912)

Donna Patterson, Robert Pitofsky & Jonathan Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 Antitrust L.J. 443 § II (2002)

Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 Wis. L. Rev. 359, 359–60 (2008)

Digital Platforms

This module contains several submodules on antitrust issues with digital platforms.

Intro: American Express

Concern around digital platforms is driving calls for greater antitrust enforcement. But digital platforms present numerous tricky problems for antitrust law, and the law is still developing its response to these business models. A particularly challenging question in digital platforms is how to analyze two-sided markets, both in terms of market definition and conduct. The Supreme Court's decision in *Amex* provides U.S. antitrust law's current approach to this question, but this decision has been widely criticized by the antitrust community

Required Reading

Ohio v. American Express Co., 138 S. Ct. 2274 (2018)

American Antitrust Institute, *We've Seen Enough: It Is Time to Abandon AmEx and Start Over on Two-Sided Markets* (2020).

Recommended Reading

A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. IND. ORG. 741 (2019) (25–33)

Background Reading

Stigler Center Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee Report (57–79 and 87–92 on platforms) (2019)

J. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 125–38 (2019).

Google

Many of Google's business practices have come under antitrust scrutiny. This module explores challenges related to Google Search and Advertising.

Required Reading

Amended Complaint, *United States v. Google LLC*, 20-cv-2010 (Jan. 15, 2021)

Statement of the Federal Trade Commission Regarding Google's Search Practices In the Matter of Google Inc. (No. 111-0163, 2013)

Makan Delrahim, Assistant Attorney General, *"I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy, Remarks at Silicon Flatiron*s, Univ. of Colo. Law School (Feb. 11, 2019)

Recommended Reading

Complaint, *Texas v. Google LLC,* 20-cv-957 (E.D. Tex. Dec. 16, 2020)

Fiona Scott Morton & David Dinelli, *Roadmap for a Monopolization Case Against Google Regarding the Search Market*, Omidyar Network (2020)

Fiona Scott Morton & David Dinelli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, Omidyar Network (2020)

Case AT.39740 — *Google Search (Shopping)* Summary Decision

Background Reading

Statement of Federal Trade Commission Concerning Google/DoubleClick FTC File No. 071-0170, December 20, 2007

In the matter of Google/DoubleClick F.T.C. File No. 071-0170 Dissenting Statement of Commissioner Pamela Jones Harbour, December 20, 2007

Competitive Impact Statement, *U.S. v. Google Inc.*, No. 1:11-cv-00688 (filed April 8, 2011) (Google acquisition of ITA software)

Facebook

Antitrust enforcement around Facebook concerns its acquisition of competitors, self-preferencing, and erosion of users' privacy.

Required Reading

Amended Complaint, *FTC v. Facebook, Inc.*, 20-cv-3590 (D.D.C. Aug. 19, 2021)

Complaint, *New York et al. v. Facebook, Inc.*, 20-cv-3589 (D.D.C. Dec. 9, 2020)Fiona Scott Morton & David Dinelli, *Roadmap for an Antitrust Case Against Facebook*, Omidyar Network (June 2020)

Background Reading

FTC v. Facebook, Inc., 2021 U.S. Dist. LEXIS 119540 (D.D.C. June 28, 2021)

Rosenquist, Niels J. and Scott Morton, Fiona M. and Weinstein, Samuel, Addictive Technology and Its Implications for Antitrust Enforcement (February 22, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787822

Dina Srinivasan The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy, 16 Berk. Bus. L. J. 39 (February 2019)

Amazon and Apple

Private litigation has alleged that Amazon foreclosed competition between ecommerce platforms through MFN clauses (*Frame-Wilson v. Amazon*). In the media, Amazon is described as excluding competitors (Diapers.com) and steering customers to its own products.

Apple's recent antitrust violations involve forming anticompetitive agreements with publishers around the distribution of e-books and forming no-poach agreements with competitors over employees. Alleged antitrust violations include squeezing app developers over app store fees.

Required Reading

Apple v. Pepper, 139 S. Ct. 1514 (2019) (Section I).

U.S. v. Apple, 791 F.3d. 290 (2d. Cir. 2015)

Complaint, *Frame-Wilson et al v. Amazon.com Inc.*, 20-cv-00424 (W.D. Wash.)

Commission Opens Investigations into Apple's App Store Rules (European Commission Press release, June 2020)

Epic Games v. Apple complaint (August 2020)

European Commission, *Statement of Objections to Apple over Practices Regarding Apple Pay* (2022).

Background Reading

Lina M. Khan, *Amazon's Antitrust Paradox*. 126 YALE L.J. 710, 746–780

Remedies

Antitrust remedies come in many forms, including fines or damages for injured parties as well as structural or behavioral remedies designed to maintain or restore competitive conditions. This module will analyze the efficacy of various antitrust remedies, from "breaking up" large corporations to more modest regulations designed to modify the conduct of corporations. Students should note the downside of behavioral remedies which are ultimately instructions to the firm to take actions that are not in the firm's financial or strategic interest. In an environment of asymmetric information and slow-moving enforcers, it is an open question how well behavioral remedies can perform in many settings. Moreover, behavioral remedies require ongoing oversight by both the enforcement agency and the courts. Structural remedies do not exhibit these flaws but are more disruptive.

Reading

Required Reading

Steves & Sons, Inc. v. Jeld-Wen, Inc., 988 F.3d 690 (4th Cir. 2021) (divestiture remedy)

United States v. Microsoft Corp., 253 F.3d 34, 105 (D.C. Cir. 2001) (Section V only).

Competitive Impact Statement, *U.S. v. AB In-Bev/Grupo Modelo*, 13-cv-127 (D.D.C.)

Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks*, Washington Center for Equitable Growth (2020)

Recommended Reading

Competitive Impact Statement, *U.S. v. Google Inc.*, 11cv688 (D.D.C.)

Federalism

Most states have their own antitrust laws, and states can also enforce federal antitrust laws. State-level antitrust enforcement has been praised for addressing local antitrust problems overlooked by federal enforcement agencies, but has also been accused of parochialism. State attorneys general may bring their own case when they disagree with federal enforcement (as in Valero), and they can also collaborate with one another to bring cases affecting multiple states (as in the T-*Mobile/Sprint* merger and the Google search case). This has been common in antitrust litigation against technology platforms. States sometimes have their own, stricter, antitrust laws and also have the ability to protect local conduct from federal enforcement. In this module, we will look at state-level antitrust enforcement.

Reading

Required Reading

FTC v. Phoebe Putney Health Sys., 568 U.S. 216 (2013)

Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991)

Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J. L. & PUB. POL'Y 5, 8–9 (2004).

Renata B. Hesse, *Protecting Competition Across 50 United States: Advocacy and Cooperation in Antitrust Enforcement* (2016)

New York v. Actavis, 787 F.3d 638 (2d Cir. 2015)

Recommended Reading

Statement of the Federal Trade Commission *In the Matter of Cabell Huntington Hospital, Inc.*, Docket No. 9366, July 6, 2016

Comments of Stephen D. Houck and Kevin J. O'Connor on the States' Role in the Microsoft Case Re: Working Group on Enforcement Institutions (2019).

Big Tech's Unlikely Next Battleground: North Dakota, N.Y. TIMES (Feb. 14, 2021)

Background Reading

United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997)

Antitrust and Political Economy

The theoretical foundations of antitrust law are contested. In the 1970s, legal scholars and economists at the University of Chicago attempted to use economic principles to reduce government intervention in markets and reduce the level of antitrust enforcement. That movement was very successful in the United States and greatly impacted judges and jurisprudence.

But advancements in legal and economic theory long ago led most antitrust academics to abandon the conclusions (less enforcement is better) of the Chicago School. Modern economics can explain and measure a far broader set of competition problems than in the past. Today, many argue the need for well-founded enforcement to tackle a range of competition problems that have grown up in the last decades. Neoliberal approaches have nonetheless stayed alive in policy and judicial circles, often propped up by the firms that stand to gain from keeping their market power.

More recently, political economists and critical legal theorists have started to reexamine the theoretical foundations of antitrust. These approaches emphasize the political nature of antitrust law and build on a broader literature in comparative political economy and economic history. This work features a few core themes:

1) Questions of private power and freedom from private coercion are fundamental to antitrust and market regulation.
2) Legal institutions construct markets through a political process. These institutions shape market competition in ways that favor certain groups. Legal structures are often more important determinants of market structures than economic forces.
3) Economic approaches pay insufficient attention to the normative foundations of markets.
4) Markets rely on a balance between cooperation and competition. Institutions can structure cooperation and competition in different ways, with different distributional implications.
5) Insufficient attention to the distributional implications of market activity can threaten democracy and social cohesion.

Reading

Required Reading

Lina Khan, *The New Brandeis Movement: American's Antimonopoly Debate*, 9 J. EURO. COMPETITION L. & PRAC. (2018).

Jonathan Baker, *Finding Common Ground Among Antitrust Reformers* (2022).

Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381 (2020)

Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2019)

Robert Pitofsky, *Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979)

Background Reading

J Kirkwood and R Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers not Increasing Efficiency' (2008) 84 Notre Dame L. Rev 191

Louis B. Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979),

Lina Khan, The Ideological Roots of America's Market Power Problem, 127 Yale Law Journal Forum 960 (June 4, 2018)

Carl Shapiro, Antitrust in a Time of Populism, Int'l J. indus. Org. (2018).

Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551, 563–64 (2012).

Lina Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, Harvard Law and Policy Review 11 (2017)