ANTITRUST

Issue-Spotting Checklist

Alicia L. Downey

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Poll: What is your biggest antitrust pain point?

A. Interactions with competitors in trade groups, benchmarking, standard-setting, and market research activities

B. Vertical restrictions, including minimum resale price maintenance (RPM), minimum advertised price (MAP), and trade channel restrictions

C. Unfair practices by dominant competitors, e.g., refusals to deal, tying, penalties for dealing with rivals

D. Price discrimination, discriminatory promotional payments or services (Robinson-Patman Act)

Legal frameworks for assessing antitrust risk

- Federal statutes, regulations, guidance
  - **THE BIG THREE:** The Sherman Act, 15 USC §§ 1-7, The Clayton Act, 15 USC §§ 12-27, The FTC Act, 15 USC §§ 41-45
    - Hart-Scott-Rodino Antitrust Improvements Act (HSR), 15 USC § 18a, 16 CFR, Parts 801-803
    - The Robinson-Patman Act, 15 USC § 13, 16 CFR, Part 240
  - Agency-issued guidelines, business review letters, and advisory opinions
- State antitrust laws, e.g., Mass. Gen. Laws c. 93 (Massachusetts Antitrust Act)
- Case law
- Competition laws in 120+ other countries

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Key prohibitions and elements: the Sherman Act

- Section 1: Prohibits contracts, combinations, and conspiracies that [unreasonably] restrain trade.
- Section 2: Prohibits monopolization, attempted monopolization, and conspiracy to monopolize.
    - MONOPOLIZATION: (1) Monopoly power and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.
    - ATTEMPTED MONOPOLIZATION:(1) Anticompetitive conduct, (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power.

Key prohibitions and elements: the Clayton Act, Section 3

- Prohibits exclusive dealing and tying agreements in sales of goods that harm competition.
  - EXCLUSIVE DEALING AGREEMENTS: Sherman Act, § 1, § 2: Factors affecting reasonableness include, e.g., defendant's market power, anticompetitive effects (higher prices, reduced output, reduced quality or choice), degree of market foreclosure, barriers to entry, duration of agreement.
  - TYING: Unlawful if: (1) two separate products or services are affected; (2) the agreement to sell one product or service is conditioned on the purchase of another; (3) the seller has sufficient market power in the market for the tying product or service to permit it to restrain trade in the market for the tied product; and (4) the tie affects a "substantial volume of commerce" in the tied product.

What is an agreement for antitrust purposes?

- "Agreement" is a flexible concept that applies equally to written contracts and unwritten understanding: "a wink and a nod" may be enough.
- Independent parties share a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752 (1984).
- Conscious parallel, unilateral behavior does not establish an unlawful agreement.

Per se illegal agreements

- Horizontal agreements (i.e., among competitors) with the effect of directly or indirectly raising, depressing, or stabilizing prices are per se illegal.
  - Price fixing, bid rigging, wage fixing
  - Agreements to reduce output or limit supply
  - Agreements to allocate customers or markets
  - "Naked" agreements not to compete, not to "poach" competitor's employees
- Antitrust conspirators face criminal and civil penalties, large corporate fines, imprisonment of individual defendants, civil liability to injured parties, including class action lawsuits.
- Mandatory treble damages and attorneys' fee awards incentivize private plaintiffs.

All other agreements judged under the rule of reason

- Appropriate factors to take into account include “specific information about the relevant business” and “the restraint's history, nature, and effect” in the relevant market.
- An economist with industry expertise may need to be retained to assess the likely competitive effects of challenged conduct.
- Relevant market definition is key:
  - Whether the businesses involved have market power in the relevant market (both the relevant product market and relevant geographic market) is a significant consideration in rule of reason analysis.
  - The relevant product market consists of products that are reasonably interchangeable as to price, use, and qualities.
  - The relevant geographic market is the “area of effective competition.”

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Information sharing

- Agreements to share competitively sensitive information are not per se unlawful.

BUT

- Competitor data exchanges--even well-managed exchanges—create antitrust risk and open the door to investigations and lawsuits alleging that the real purpose and effect of the exchange was to facilitate collusion in pricing, output, bidding, etc.

Information sharing tips

- Clearly articulate the purpose and procompetitive benefits of the information exchange, and keep it closely focused on those objectives.
- Limit the types of information provided by participants. Only information reasonably necessary for the group to function efficiently should be submitted. Avoid spillover.
- The information should be collected by trade association staff or other independent third party collectors. Participants should not be involved in the collection or compilation of the raw data.
- The third party should treat specific information provided by participating members confidentially and should not disclose it in its raw form to any other participant or a third party.
- Published data should be reported in an aggregated form so that information relating to individual transactions is not disclosed and cannot be determined.

Trade group concerns

- Are detailed written agendas circulated in advance of calls and meetings?
- Are there records of who attended and what was discussed?
- Is antitrust counsel reviewing agendas and materials prior to circulation?
- Are antitrust reminders given before meetings and included in written materials and association or group by-laws?
- Does the group dictate or suggest what are “fair” or “minimum” prices members should charge?
- Are members boycotting customers, suppliers, or competitors that fail to adhere to collectively-dictated buying or selling terms?

Group boycotts and refusals to deal

- ASK: Is the conduct unilateral or joint?
- Unilateral refusals to deal and/or termination of existing commercial agreements normally do NOT violate the antitrust laws.
  - Exception: A dominant competitor's refusal to deal MAY support a monopolization claim, depending on the circumstances.
- Concerted refusals to deal and group boycotts raise serious antitrust concerns; companies should act independently when choosing customers and vendors..

Mergers and acquisitions

- Clayton Act, § 7 prohibits mergers and acquisitions of stock or assets where the effect "may be substantially to lessen competition, or to tend to create a monopoly."
- 2010 DOJ-FTC Horizontal Merger Guidelines detail the U.S. agencies' approach to merger review.
- Antitrust risk assessment looks at many factors, e.g.--
  - Potential market definitions and the parties' combined share in each defined market
  - The level of concentration in the relevant market(s) before and after the transaction
  - Post-transaction restraints on pricing by the combined entity
  - Barriers to entry by new competitors

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M&A antitrust counseling

- Assess the likelihood of a challenge, anticipate potential remedies.
- Work with economist to analyze the potential market definition(s) and likely effects on competition.
- Help manage information-sharing in aid of due diligence.
- Determine whether transaction is reportable and in which jurisdictions.
- File premerger notification forms and disclosures under the Hart-Scott-Rodino Act.
- Manage post-signing, pre-closing integration planning, avoidance of “gun-jumping.”

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Premerger notification

- Regulations (16 CFR, Parts 801-802) specify which deals require premerger notification and clearance, as well as exemptions. Detailed guidance can be found at www.ftc.gov, Premerger Notification Program.
- If notification is required, acquiring and acquired parties file disclosure forms, financial statements, and specified documents related to the deal ("4(c) and 4(d) documents") with DOJ and FTC. *See* 16 CFR, Part 803.
- Unless early clearance is granted, agency has 30 days to clear the deal or request additional information.
- **Compliance does *not* eliminate risk of post-merger challenge; non-reportable deals can be challenged.**

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Deal document DON'Ts

- Don't narrowly define "markets" to show higher market share. Instead, analyze strengths in market "segments."
- Don't minimize or denigrate competitors or competition.
- Don't suggest that the deal will help achieve "price stability" or "block" competition in any way.
- Don't use language such as "crush" or "dominate."
- Don't describe plans to "lock in" customers or "own" a market or trade channel.

Integration planning issues: avoid "gun-jumping"

- Don't exercise direct or indirect control over the target's business decisions.
- Don't exercise veto power over the target's hiring or firing decisions.
- Don't share competitively sensitive information unless required for integration planning.
- Don't jointly negotiate agreements with customers for pre- or post-closing business.

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Joint ventures

- May be governed by Sherman Act, § 1, § 2, Clayton Act, § 7 (whether or not subject to premerger notification), FTC Act, § 5.
- JVs with credible procompetitive benefits are assessed under the rule of reason.
- Assess whether collateral competitive restraints are "ancillary," i.e., necessary to achieve the JV's procompetitive benefits.
  - ASK: Would less restrictive alternatives provide the same or similar benefits without limiting competition?

Vertical restrictions

- Resale price maintenance (RPM), vertical agreement between a supplier and a reseller as to the price the reseller may charge its customers
- Minimum advertised price (MAP), no-price, and other price advertising restraints
- Customer, trade channel, and territorial restrictions
- Exclusive dealing by agreement or induced by loyalty incentives and/or penalties for dealing with rivals

RPM and the states

- Federal law: RPM (vertical price fixing) agreements are assessed under the rule of reason.

Contrast with:

- New York: State statute makes RPM agreements "unenforceable"
- California: Consent orders entered under the Cartwright Act, enjoining companies from entering into "per se illegal" RPM contracts with online retailers.
- Maryland: 2009 legislation makes minimum RPM per se illegal. Maryland AG has enforced the statute and settled a lawsuit brought against an alleged violator.

- **ANTITRUST RED FLAG**: A group of retailers petition their common supplier to adopt RPM restrictions.

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Colgate policy fundamentals

"In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer ... 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."

–*U.S. v. Colgate & Co.* (U.S. 1919)

- **OK** to announce suggested resale prices and intention not to sell to those who choose to sell below suggested resale price or sell to other resellers who sell below suggested resale price.
- **OK** to urge and persuade resellers to comply with the policy, through periodic, written reminders.
- **OK** to unilaterally monitor compliance with the policy, notify resellers of violations, and terminate noncompliant resellers (subject to contractual and/or state law restrictions on dealer terminations).

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Minimum advertised price (MAP) restraints

- As long as retailers remain free to *sell* below MSRP, MAP agreements are vertical nonprice restraints, subject to the rule of reason.
- A MAP agreement can be enforced by withholding promotional support, coop ad funds for non-complying ads, termination, or by other means.
- MAP agreements may pose antitrust risks where they facilitate horizontal collusion to effectively reduce or eliminate price competition in a relevant market.
- **ANTITRUST RED FLAG**: A group of retailers petition their common supplier to adopt MAP restrictions.

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RPM/MAP counseling suggestions

- Identify client objectives (i.e., whether there is a desire to influence *selling* prices or *advertised* prices) and alternative ways to achieve those objectives.
- Document credible procompetitive rationales.
- Analyze risk of challenge in anti-RPM states (*e.g.,* CA).
- Create a uniform, written policy stating all requirements and consequences for violations.
- Reject reseller entreaties to discuss other resellers' prices.
- All decisions regarding the adoption and enforcement of RPM or MAP restraints should be unilateral.

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Other vertical sales and marketing restraints

- Customer, trade channel and territorial restrictions (including exclusive territories) are all subject to the rule of reason.
- Reducing or eliminating intrabrand competition may have procompetitive benefit of strengthening interbrand competition:
  - Encourages resellers to focus investments on permitted sales, e.g., with specialized services.
  - Prevents resellers from free riding on other resellers' efforts and investments.
  - Channel restrictions (e.g., no-Internet sales) may help promote brand image.

Monopolization

- Define the relevant product and geographic market
- ASK: Does the defendant have “market power” in the relevant market?
- Has the defendant engaged in “exclusionary conduct”?
  - Unfair, oppressive, or predatory methods designed to LOCK IN customers and/or LOCK OUT competitors
  - Resulting harm to competition in the form of higher prices, reduced output, selection, or quality

Exclusive dealing

- Procompetitive benefits may include: assurance of supply or outlets, enhanced ability to plan, reduced transaction costs, creation of dealer loyalty.
- Can be challenged under multiple theories:
  - Unreasonable restraint of trade actionable under Section 1 of the Sherman Act.
  - Exclusionary conduct actionable under Section 2 of the Sherman Act.
  - Where sales of goods are concerned, actionable under Section 3 of the Clayton Act.
  - FTC may enjoin as “unfair method of competition” under Section 5 of the FTC Act.

Exclusive dealing antitrust concerns

- One or both parties to contract (alone or collectively) possess significant market power in the relevant market.
- Defendant's exclusive dealing effectively bars one or more significant rivals from competing or forecloses them from a substantial percentage of the relevant market (i.e., above 30%- 40%).
- Exclusive dealing enables defendant to raise prices, restrict output, reduce quality or consumer choice.
- The exclusive dealing has no procompetitive benefits, or its procompetitive benefits are outweighed by its anticompetitive harm.

Price discrimination & the Robinson-Patman Act

- Prohibits predatory pricing, overlapping with Sherman Act, § 2.
- Prohibits sellers from engaging in price discrimination that may lessen competition.
- Prohibits sellers from providing resellers with discriminatory promotional allowances, facilities, and services.
- Makes buyers liable for inducing unlawful price discrimination, if buyers knows the discrimination was unlawful.
- Prohibits disguised discounts or “kickbacks” in the form of sham brokerage payments to buyer or buyer’s agent.
- State and federal agencies have little interest in enforcing RPA and state analogues; the risk of noncompliance is private litigation.

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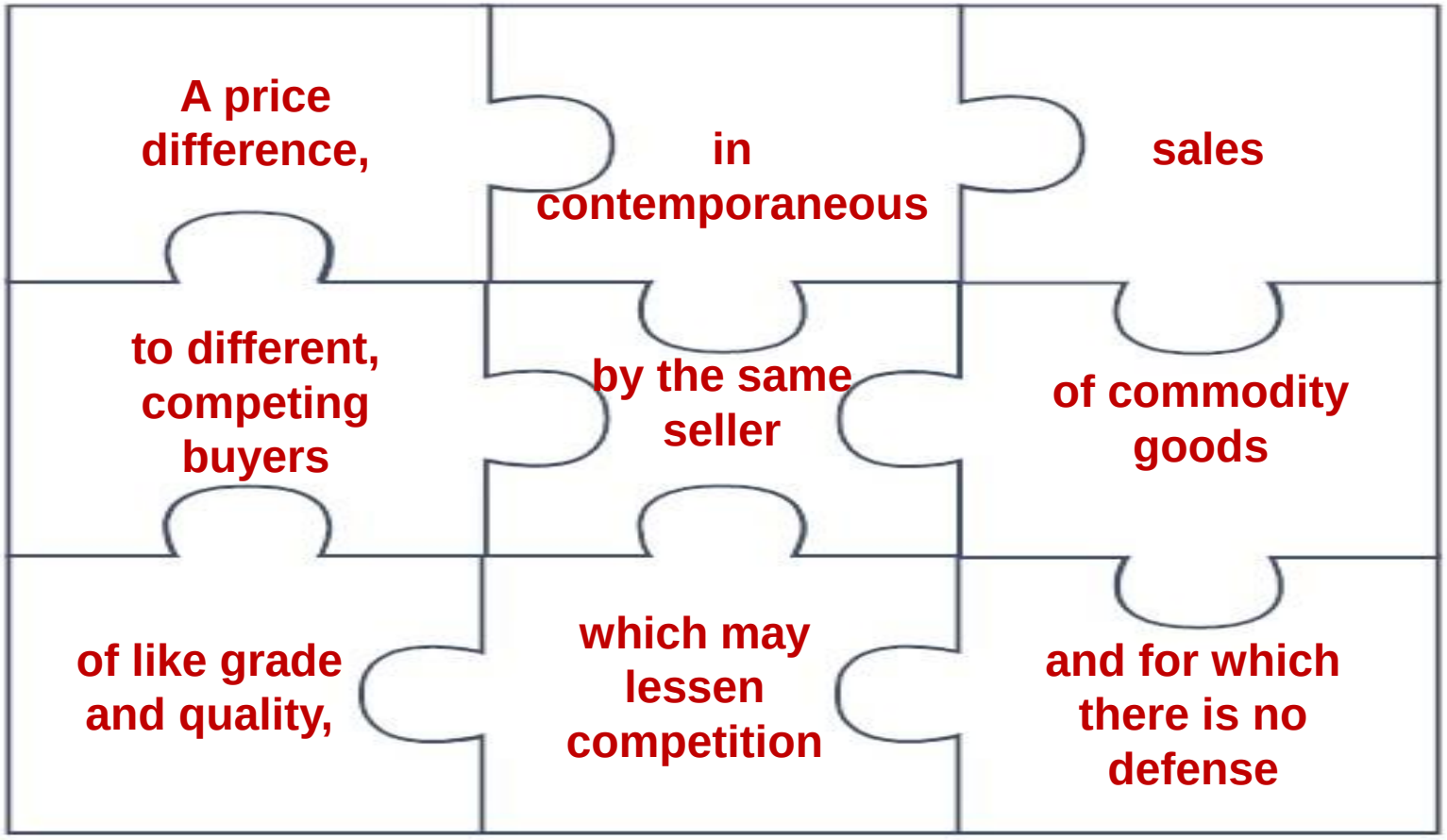
Price discrimination elements



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Price discrimination defenses

- Statutory defenses
  - Meeting competition: seller may meet but not beat competitor offer on a customer-specific or market area basis (but do not verify directly with competitor).
  - Cost justification: price difference must correspond to actual difference in cost of making sales to favored buyer.
  - Changing market conditions: actual or imminent deterioration of perishable goods, obsolescence, distress sales under court process, or bona fide going-out-of-business sales.

More price discrimination defenses

- Judicial defenses
  - Practical availability: no actionable claim if buyers were informed of and could feasibly qualify for favorable price.
  - Functional discounts: permits charging different prices to buyers at different levels of the distribution chain, or where discount reasonably relates to the value of services provided by the buyer.

- Claims have been dismissed where plaintiffs failed to allege that different prices were charged in "reasonably comparable transactions"

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Discriminatory promotional support

- RPA prohibits discriminatory provisions of payments, services and facilities to resellers “in connection with” the resale of the seller’s product. 15 U.S.C. § 13(d), § 13(e)
- FTC Guides for Advertising Allowances and Other Merchandising Payments and Services (2014), 16 C.F.R., Part 240
- Different forms of promotional support may be provided to different resellers on a “proportionally equal” basis.
- Practical availability negates discrimination.

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ROW competition laws: key areas of convergence

- Prohibitions against cartel behavior expose violators to significant fines, consent decrees, and other remedies.
- “Abuse of dominance” addresses anticompetitive conduct designed to raise barriers to entry, lock customers in and/or lock competitors out.
- Merger notification and clearance processes give government agencies a chance to object to potentially anticompetitive transactions before closing.
- Use of economic analysis to define the relevant market and assess competitive effects of challenged conduct on prices, output, innovation, and consumer choice in that market.

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ROW competition laws: key areas of potential divergence

- EU regulatory regime includes bright-line market share thresholds that create safe harbors against the default presumption that trade-restraining agreements are unlawful.
- Regardless of market share, some vertical restrictions assessed in the U.S. under the rule of reason (RPM, territorial restraints, and trade channel restrictions) may be absolutely prohibited.
- Information exchanges among competitors may be more likely to trigger enforcement action.
- Wider scope of review may include non-economic factors such as promotion of political and social welfare goals.

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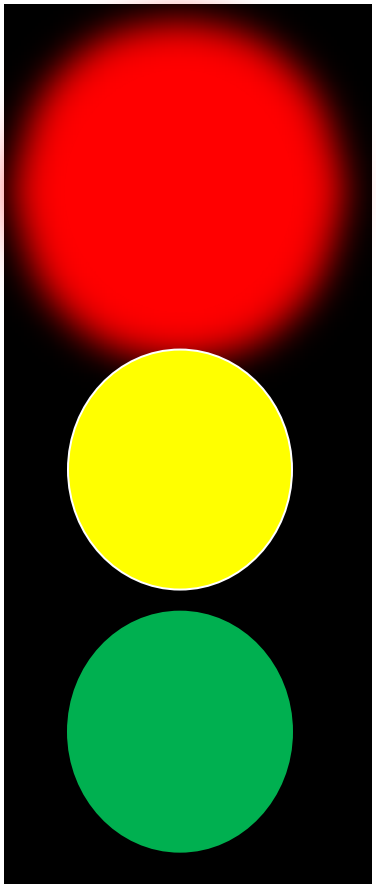
Antitrust Takeaways



RED LIGHT situations are potentially high risk and should be reviewed with antitrust counsel:

- Reported horizontal price fixing, bid rigging, market division, customer allocation, group boycotts
- Unmonitored/unauthorized data exchanges among competitors in industry groups, trade associations, joint ventures, group purchasing organizations
- Proposed transactions involving one or more dominant competitors, including stock and asset acquisitions joint ventures, licensing deals, distribution and supply agreements

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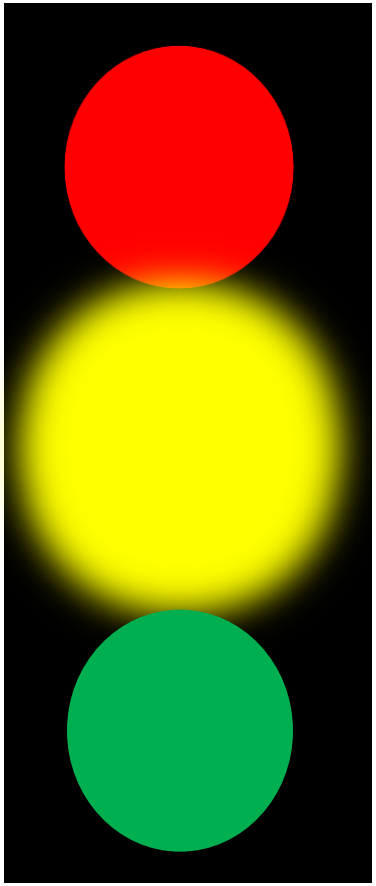
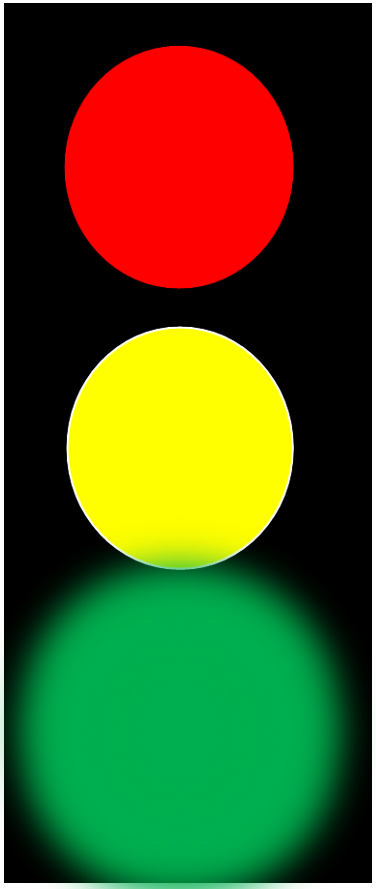
Antitrust Takeaways



YELLOW LIGHT situations may benefit from antitrust counsel review:

- Markets in which dominant competitors, acting alone or together, appear to be coercing customers and unfairly preventing others from competing or entering the market
- Suspected price discrimination and/or provision of discriminatory promotional support to competing resellers
- Agreements imposing restrictions on resale prices charged by resellers for the supplier's product

Antitrust Takeaways



GREEN LIGHT situations reduce antitrust risk and may even mitigate penalties:

- Robust antitrust compliance programs include mechanisms for preventing, detecting, and reporting antitrust violations
- Antitrust training for all personnel engaged in any formal or informal interactions with competitors
- A "culture of compliance" that starts at the top and includes awareness of antitrust pitfalls and company-wide commitment to seeking counsel in case of doubt

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For more information about any of the topics presented in this program, please contact:

Alicia L. Downey
Downey Law LLC
155 Federal Street, Suite 300
Boston, MA 02110
Tel. 617-444-9811
Email: alicia@downeylawllc.com
Website: www.downeylawllc.com

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