

# TARGET

## Intelligence Report

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### ANTITRUST LEGISLATION: TO WHAT EXTENT SHOULD THE INDIVIDUAL BE PROTECTED ... IF AT ALL ?

Antitrust rules with regard to the European Union (EU) are contained in various legal instruments.

The basic (and brief) provisions are contained in The Treaty on the Functioning of the European Union.

A number of regulations have been adopted by the Council or the Commission.

Some of these regulations contain the general rules for the implementation of the Treaty provisions, laying down, amongst others, the investigative powers of the Commission.

Other regulations deal either with particular types of conduct or with specific sectors.

Finally, the European Commission has adopted various non-regulatory documents, which may take various forms (notices, guidelines, etc). Such documents are intended to explain, in more detail, the policy of the Commission on a number of issues, either relating to the interpretation of substantive antitrust rules or to procedural issues, such as access to the file.

The definition of that which has come to be known as '*Antitrust Laws*' in The United States of America are as follows:

- Statutes developed by governments in order to protect consumers from predatory business practices and ensure fair competition;
- Laws that are applied to a wide range of questionable business activities, including market allocation, bid rigging, price fixing, and monopolies; and,
- Core US Antitrust Law was created by three pieces of legislation:
  - The Sherman Anti-Trust Act of 1890;
  - The Federal Trade Commission Act; and,
  - The Clayton Antitrust Act.

#### Notes:

1. The Sherman Anti-Trust was intended to prohibit individuals or business entities from entering into contracts, combinations, or conspiracies that restrain interstate or foreign trade. The Sherman Act also prohibits a person or entity from engaging in monopolisation or attempting to monopolise any part of interstate commerce by anti-competitive means. It does not prohibit natural monopolies, or monopolies, created through effective competition. The Sherman Act is enforced by The Department of Justice. Private individuals and state attorneys general on behalf of their state residents may also bring actions for damages. Violations against the Sherman Anti-Trust Act can have severe consequences, with fines of up to \$US100 million for corporations and \$US1 million for individuals, as well as prison terms up to 10 years.
2. The Federal Trade Commission Act (FTC) bans '*unfair methods of competition*' and '*unfair or deceptive acts or practices*.' According to the US Supreme Court, violations of the Sherman Anti-Trust Act also violate the Federal Trade Commission Act. Therefore, even though the FTC cannot technically enforce the Sherman Anti-Trust Act, it can bring cases under the FTC Act against violations of the Sherman Anti-Trust Act.
3. The Clayton Antitrust Act addresses specific practices that the Sherman Anti-Trust Act may not address. According to the FTC, these include preventing mergers and acquisitions that may substantially lessen competition or tend to create a monopoly, preventing discriminatory prices, services and allowances in dealings between merchants, requiring large firms to notify the government of possible mergers and acquisitions, and imbuing private parties with the right to sue for triple damages when they have been harmed by conduct that violates the Sherman and Clayton acts, as well as allowing the victims to obtain court orders to prohibit further future transgressions.

In brief, US antitrust provisions are designed to maximise consumer welfare.

Supporters of the Sherman Act, the Federal Trade Commission Act and the Clayton Antitrust Act argue that since their inception, these antitrust laws have protected the consumer and competitors against market manipulation, stemming from corporate greed. Through both civil and criminal enforcement, antitrust laws seek to stop price and bid rigging, monopolisation, and anti-competitive mergers and acquisitions.

### **The Case Against Amazon.com Incorporated**

On November 11, 2020, it was reported that the European Commission had charged Amazon.com Incorporated with abusing its dominant position in online retailing in order to gain an unfair advantage over competitors.

Amazon.com Incorporated has rejected the charges.

If it is found that the charges, placed before Amazon.com Incorporated, have sufficient merit to find this multi-billion-dollar corporate entity of breaching competition law, as defined by the European Commission, it faces a potential fine of about \$US19 billion.

In a statement, uttered by the EU's Competition Commissioner, Mrs Margrethe Vestager, she said that it was vital that platforms with 'market power' did not 'distort competition'.

According to Mr Ron Moscona, a Partner of the London-based firm of Solicitors, Dorsey and Whitney LLP:

*'The investigation, launched earlier this year (that is in the 2020 calendar year) by the European Commission into Amazon, concerns the rule against abuse of dominant position which is one of the key principles of EU competition law.*

*'The Commission argues that Amazon has a dominant position in online retail services and as an online marketplace in the EU. This dominance is not against the law, but the Commission found that some of Amazon's practices are abusive of its dominant position in breach of Article 102 of The Treaty on the Functioning of the European Union.*

*'The Commission found, in its initial investigation, that Amazon uses its dominant position to obtain advantages for its retail business, which are unfair to the merchants that use the Amazon marketplace to sell products. Amazon competes with the merchants using its marketplace.*

*'Two charges are made against Amazon. First, it is alleged that the Amazon retail business has free access to valuable non-public data generated from the marketplace business, relating to the businesses of merchants, selling products on the Amazon marketplace. That data allows Amazon's retail business to compete against those same merchants (by selling competing goods) and to limit their ability to grow their businesses.*

*'The second charge is that Amazon gives advantages to merchants that use its fulfilment services and to its own retail business in pushing product offers to Amazon Prime subscribers. It is alleged that the criteria for highlighting product offers through the "Buy box" is skewed unfairly in favour of offers made by Amazon itself or those of merchants using its fulfilment service.*

*'The EU Commission has investigation powers, powers to order enterprises to discontinue unlawful conduct and the power to require enterprises to give binding undertakings to ensure unlawful conduct is discontinued and powers to impose financial penalties not exceeding 10% of the turnover of the enterprise in question in the previous year.*

*'The investigation and findings of the EU Commission is part of a growing trend of antitrust investigations and regulatory enforcement action, being taken in the EU and in other countries, against big tech companies. Cases*

*have been brought in the past against Microsoft Corporation and more recently against Google LLC and Facebook Incorporated, among others.*

*‘The findings of the Commission, at this stage, are interim, and Amazon can still persuade the Commission that its practices do not amount to an abuse of a dominant position.’*

### **The Culpability Of Individuals**

Thus far, the enactment of laws and rules in respect of antitrust initiatives, have focused on corporate entities, only.

**TARGET** (泰達財經) knows of no material incidence whereby an individual has been held responsible for his/her acts, directly or indirectly, acts that are known to have been contrary to part of existing antitrust legislation.

Going back about 23 years, to October 1998, this medium had a rather lengthy conversation with an American lady in the employ of The Consulate General of The United States, Hongkong and Macau, her name, having been given to **TARGET** by the then Consul General with whom this medium was well acquainted.

The gist of the 45-minute conversation with this lady was in respect of the potential damage that an individual, having astronomical sums of money, readily at his/her disposal, had the ability to raise or lower prices to the detriment of the consumer and to the benefit of the manipulator.

In many an Asian and South American country, the importation of crucial goods, especially medical supplies and staples, such as milk, rice, eggs, pork and vegetables, to mention but a few, and the importation of petrol and other petroleum products, required on a daily basis to power buses and engines of all sorts, memory chips, computers, printers, and telephonic equipment, etc, the prices in shops, in open markets, at petrol stations, and at places of businesses of importers may be dictated by an individual or a combine of individuals, who are not, always, easily visible, but, in fact, it is he/they who holds the reins of power over consumers with regard to the price of goods and services.

Without legislative controls over certain individuals, who have the ability to control corporate entities that, in turn, have prices affixed in accordance with the commands of the plutocrat, or the éminence grise, if you will, to whom to animadvert could lead to grave distress for an official in the employ of the corporate entity, economies could be held to ransom.

The American lady at The Consulate General of The United States, Hongkong and Macau – whose name **TARGET** had agreed not ever to divulge her name or position, asked whether or not this medium was suggesting that an individual should be restrained from becoming very wealthy.

She uttered that which strongly suggested grave discountenance:

*‘It is preposterous! In a capitalistic economy, one is free to amass as much wealth as an individual covets. There must never be constraints, placed on an individual just because he is successful in commerce.’*

**TARGET** responded by suggesting that if an individual, or a group of individuals, working in concert, embark on an arcane venture, known only to a very limited number of trusted mermithidae, a venture with the intent to cozen a profit to the detriment, let us say, with regard to a very large number of ignorant and/or innocent people, who are powerless to complain, openly, lest they suffer consequences, such an individual(s) has the ability to cause immoderate harm, in the immediate future – possibly to an entire economy.

One must ask, at this point in respect of the above-mentioned: Should one, or members of democratically elected government, just stand by without even considering, taking action or, at the very least, voicing dissent?

It is well known that there is no end to the voracious appetite of the wealthy to the amassing of gigantic sums of money: Enough is never enough!

At this point, the lady said that she was very busy and bid **TARGET**: ‘*Have a nice day!*’

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