Antitrust matters in takeovers!!

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Abstract:
The elemental axiomatic truth about jurisprudence and strategic management in takeover settings is that a crucial area that lies at the intersection is a least understood area. Antitrust issues, as they are at the core of most oil and gas takeovers, provide a plethora of complexities. This article aims to provide an overview of the fundamental antitrust issues and their nuances so as to enable the boards of oil and gas entities to strategise perspicaciously whilst effectuating acquisition initiatives. Antitrust issues are elementally driven by a singular motivating factor in that they seek to promote fair competition and whilst doing so, they do everything possible and plausible to stymie anti-competitive business practices. Whilst effectuating acquisition initiatives in the global oil and gas verticals, members of the board would have to deftly handle antitrust issues as their actions cannot be seen to undermine competitive conduct, and given the global issues involved, the boards have to, by definition, strategise adroitly to ensure that the takeovers effectuated do not fall foul of antitrust rules. In effect, antitrust issues are centred on forbidding faulty acquisitions so as to contain monopolisation, ensure that monopoly power is not achieved and sustained surreptitiously and in making sure that any kind of business formation that results from an acquisition initiative does not restrain trade in any way. Stifling competition by market dominance is at the heart of antitrust issues and it is an elemental duty of the board to ensure that antitrust issues are sensibly dealt with in the supreme interests of the stakeholders. The sine qua non being that boards have to pay cognisance to the fact that, whilst acquisitions are being effectuated, they get to address commercial practices in a fair-minded and equitable manner so as to make sure that the new business amalgamation does not threaten and/or exterminate competition.

The principal issues that the boards would have to come to terms with in terms of strategic managerial issues are as following:
The embodiment of the antitrust premise is centred on competition-issues, and in essence, the boards would have to ensure that no erroneous conduct is committed against any competitor, whatever is the compulsion. It would be the managerial responsibility of the board to ensure that product-strategy is an outcome of meritorious underpinnings, and that, should there be a dominant position after the takeover, no undue and surreptitious advantage would be derived, directly or indirectly. In fact, across jurisdictions and geographies, the boards have an elemental duty to subscribe to antitrust regulations in place and any failure to do so would result in the boards being held jointly and severally for the acts of malfeasance – any act that results in wrongdoing or misconduct in handling antitrust issues would invite severe repercussions for the board and these would include penalties and penal servitude. All that is required to establish a case is that the regulators or the antitrust plaintiff must provide for an evidentiary basis that would reveal that the acts of the defendant have severely undermined competition in a distinct market and as a natural corollary of the act of the defendant, the competition has been injured faultily resulting in a loss to the plaintiff in no uncertain terms. Whilst antitrust harm and the resultant injury are evidenced by factual assertions, the defendant entity and the boards of the defendant entity could be hauled up to redress the grievances caused by their harmful and surreptitious acts. In the United States, antitrust is seen as a major issue to tackle and over the years there have been seminal enactments like that of the Sherman Act.
Act, the Clayton Act, the Federal Trade Commission Act, the McCarran-Ferguson Act et al. and likewise there are state enactments that are almost a replica of the federal enactments. Without an iota of doubt, the federal statues adopt a clear, lucid, coherent and consistent usage of the language, and quintessentially, they proscribe all kinds of monopolisation and restraints of trade. The courts whilst articulating on antitrust matters often have the task of interpretation of statutes and at times it could get to be a very complex and complicated task. As an exemplar to the aforementioned, in California, the antitrust statute in effect adopted the federal prohibition of restraint of trade, and in recent years, the federal courts and the California courts have diverged tremendously in their respective analyses of trade restraints. Interestingly, the Californian enactment has not proscribed monopolisation, and for the record, the two most contentious issues in antitrust are monopolisation and conspiracy to restrain trade. Nevertheless, it has to be pointed out here that the glaring omission of US enactments when they are juxtaposed to their European and Canadian counterparts, rests in the realisation that in the United States, ‘abuse of dominant position’ is not entirely banned. As a natural corollary, a complainant in the United States (say California) normally assails the abuse-of-dominant-position by establishing a case under the rubric of misuse of monopoly power and its spinoffs like that of the creation of a new monopoly and/or in the mechanism of an inchoate monopolisation.

The meaning, definition, substance, implication and significance of Monopolisation:

The state of achieving pure monopoly occurs when one entity dominates the entire scene as it is the only entity in existence in the business vertical. Given the iconic power of dominance that the entity will enjoy in the marketplace, it would indeed enthrall itself on a continual basis by increasing its prices regularly, much above costs. As a natural corollary to the aforementioned, the entity would raise its prices to levels at which the extra profits earned from customers willing to pay the higher prices are offset by the profits lost by the diminished sales to other customers who are not willing to pay the higher prices. The net result would be higher prices, lower output and the inevitable happening – though many customers may value the product much more than the costs associated with it, they would not effectuate purchases. In effect, a basic economic issue is at the core of the legal entanglement, and a wily or vile monopolist could even get to accelerate policy initiatives that would serve no other purpose than profiteering. The classic exemplar of monopoly, albeit only till recently, is the case pertaining to Public Sector Oil entities in India, all of whom were Government controlled and owned, and from a dominant position, they drove a hard bargain, much to the detriment of the average consumer. Monopoly is the grossest form of violation of antitrust laws, and to prove monopolisation, it has to be clearly and comprehensively established that the entity’s product and/or service alone dominates the entire market scene. Inherent to the above would be the establishment of perceptive definitional premise with reference to the meaning of the term ‘relevant market’, and thereafter, it would indeed be a logical exercise to establish in no uncertain terms that the alleged monopolist indeed exercises complete dominance in the specified market by using exclusionary and anti-competitive practices, much to the detriment of the customers. A claimant would be a suffering customer and wily and vile actors in the market arena also tend to conspire together in order to monopolise a well-defined market in any one of the industrial verticals, thereby thwarting the very basis of the free market theory. As a logical extrapolation to what has been mentioned above, inchoate attempts at monopolisation occur when an entity indulges in predatory practices that are targeted at destroying competitors, and the courts normally pay cognisance to the same only when there is a menacing possibility that the efforts will fructify into reality – it is then that the courts use the weapons contained in
the antitrust regulations to proscribe monopolistic action in real and comprehensive terms.

**The market realities that exist and Restraint of Trade:**

True monopolists are indeed rare and the fact remains that a more typical situation in so far as the market realities are concerned, is that of a dominant position. A dominant position is gained by certain entities in certain markets under conditions that would stipulate a monumental share at the marketplace, either due to lower costs or a vastly superior product. As a natural corollary, an entity enjoying dominant status would inevitably price the product and/or service much above costs. In effect, an entity that enjoys dominant status would profit from residual demand, and in effect, the term residual demand simply means and denotes the results that are obtained when one deducts from total market demand the output of the other less efficient entities. Quintessentially, the dominant entity faces no major competition from entities that comprise the residual demand component, and just as in the case of monopoly, the dominant entity has incentives to increase prices above costs.

Many a time, a dominant position is obtained when two or more entities act together in a coordinated manner, and such an act is prima facie illegal. Oil and Gas entities, when they get to eventuate on global acquisition initiatives are very often guilty of breaching antitrust regulations and in all such cases the surreptitious element is of a very high order. It ought to be kept in mind that whilst effectuating acquisition initiatives in the oil and gas verticals, dominant positions could emerge in some markets, and as a natural corollary, certain types of trade restraints could emerge. These could be violations per se and in order to prove a violation under Section 1 of the Sherman Act, it would not be necessary to prove the relevant market or any anti-competitive consequence caused by the conduct in question. Whilst the acceptable standard rests in the establishment of the evidence central to the conduct-in-question, a large part of the evidence gathering methodology would depend upon the type of the offense as it could range from horizontal price-fixing, horizontal market allocation, bid-rigging and coordinated refusals to deal (boycotts). The important issue that would be upheld by the legal forums in no uncertain terms rests in what is called the rule-of-reason doctrine, and quintessentially, any claimant in a rule-of-reason case must establish in unequivocal terms that when an acquisition was effectuated in the oil and gas verticals, the resultant combine did not in any way harm the competition in the market under consideration. The standard of proof ought to be an objective exercise in rationality and in effect the resultant combine must proffer competition-enhancing justifications for their conduct under question – however, it would be open to any complainant to establish that the competition-enhancing measures adopted were indeed effete, and in effect, it would be an exercise in rational conduct to seek and establish the fact that the competition-enhancing issues cited are indeed nothing more than perfunctory pretexts for firmly establishing the anticompetitive practice.

At this juncture, since a vast number of cases pertain to rule-of-reason offenses, it would be normal for the respective boards of oil and gas entities to know of the matter in unequivocal terms. The essence of the argumentative premise is central to upholding the tenets of rational expectations in an after-event analysis of an acquisition initiative in the oil and gas verticals, and hence, it would be prudent to elementally examine issues relatable to the product-portfolio, geographic markets, and to thereafter, observe whether the acquisition initiative has caused any contract-combination-conspiracy that would serve as an impediment to equitable trading – in essence, whether the acquisition has caused a restraint of trade? Whilst engaging in the above, it would be sensible to decipher any tacit understanding that may be prevalent and any issue present that would be a
restraint of trade. This investigation has to be perceptively and perspicaciously handled. The issues can range from tackling predatory commercial practices that come into being as a result of the acquisition, and as a result cause or could cause a bottom-line multifold augmentation in profit and/or revenue due to the conspiracy. The business combination that evolves out of effectuating an acquisition initiative could result in a conspiracy, and by virtue of the same, the combined entity could establish enormous sales at the expense of competitors or it could even allow them to effectuate sales on terms and conditions that no reasonable customer would accept in a freely competitive market. A characteristic observation that has been made whilst several acquisition initiatives have been gone through is realising the fact that the takeover could afford heightened sales at the expense of the competitors; moreover, there would be a leeway to effectuate sales on terms and conditions that would be reprehensible for the customers, should a free market system have been in vogue. Takeovers should be fair from a market perspective and under no circumstances should the customers be constrained to purchase goods or services that they would not accept, had the conspirators not undermined the competition drastically. Dominant positions tend to undermine markets as they lead to disagreeable outcomes that inevitably make the consumers pay much higher prices or accept inferior services from less responsive and complacent suppliers who only act in reality to ensure that competitors and/or potential competitors are eliminated. The issue gets much complicated as defendants tend to wax eloquent about their pro-competitive stance – nevertheless, a closer and thorough examination of their conduct would inevitably lead to a sordid conclusion that their so-called pro-competitive stance is nothing but a farce and a fraud enacted for public consumption. Oil and Gas verticals, especially in their takeover mode, present the most compelling and challenging cases of antitrust abuse, and the offence of conspiracy to restrain trade as contained in Section 1 of the Sherman Act is a humble legislative attempt at doing away with the menace. As a matter of much scholastic and pragmatic interest, it would be apt to point out that much acquisition activity takes place in California and the Cartwright Act in effect prohibits trade restrains caused by any new business combine and the litmus test is all about figuring out whether the average consumer is affected adversely. The courts in California have sensibly adhered to upholding the letter and spirit of Section 1 interpretations of the federal law, yet it would not be out of sync to state that some of the Californian courts have indeed declined to adopt recent federal precedents.

Further Examination of Antitrust issues as it forms a core area of takeovers in the global oil and gas verticals.

The seminal significance of antitrust matters in global oil and gas acquisition initiatives underscores the need to avoid restraints of any kind and as an antitrust offense is a tort committed against a market more than anything else, it assumes more significance. In global oil and gas acquisition initiatives, it normally takes the shape of any of the following: securing monopoly power surreptitiously or by improper means, the enlargement or maintenance of the domination and the abuse of the power for furtherance of vile objectives like that of indulging in a conspiracy to sabotage competition by means of exclusionary or predatory restraints of trade. There are arguments that have been made for upholding the tenets of a monopoly as well, and as an exemplar, many policy makers and analysts are of the considered opinion that electrical power could be best generated by local monopolies, but with the increasing advancement of technology, the situational dictates could point otherwise. Suffice to state that it is a comprehensive violation of antitrust law to use predatory practices in an effort to establish monopoly power over a defined market and in takeover situations in the global oil and gas industry, it has been found that sometimes the new business combine tends to abuse monopoly power in a market in an concerted move to gain monopoly power in another market. As a matter of
fact, in so far as global takeovers in the oil and gas industry are concerned, the
described practices of monopolisation and trade restraints constitute the bread and
butter of antitrust law. In the United States, the question of an abuse of
monopoly/dominant power is decided by the FTC (“Federal Trade Commission”) and/or
the DOJ (“Department of Justice”) - Antitrust, and as a matter of fact, an advance ruling
could be got with reference to the combined strengths and the possibility of either
monopolisation or a dominant power position. Whilst the adjudicating bodies have every
right to veto an acquisition, the entities concerned have also every right under the rule
book to challenge the basis on which the veto was made. Very often, middle-of-the-road
approaches are adhered to with the adjudicating body making recommendations to the
effect that the acquisition initiative would be allowed to go through under certain clear
conditions that could include the divesting of certain clearly defined assets and/or
operations in order to stay clear of antitrust issues. The bottom line being that it would
always be in the scheme of things to examine a potential acquisition initiative in the
global oil and gas verticals from a well-defined perspective that studies antitrust
repercussions in a clearly delineated market and the DOJ has in fact issued several cogent
guidelines that explain how antitrust markets have to be defined for the purpose of
scrutinising a potential acquisition initiative, be it a horizontal/non-horizontal acquisition
initiative.

Delineating and defining the relevant Antitrust Statutes: a United States
Perspective. The fact of the matter is that the various antitrust enactments in the United
States are set forth in various statutes with the federal statutes addressing issues such as
interstate commerce and the state enactments addressing intrastate commerce. In what
could be argued to be a case wherein the term interstate-commerce was overtly expanded,
almost any commercial transaction could now said to affect interstate commerce, and
hence, as a natural corollary, it would be deemed to become a subject of federal antitrust
enactments and regulations. Nevertheless, the aforementioned have not served to hinder
some players pleading their antitrust claims in state courts, despite the fact that doing so,
means momentous aspects of the case could be comprehensively overlooked. The fact of
the matter remains that state statues and case law incorporate federal standards, and
hence, in almost all cases, it would not be plausible to engage in meaningful antitrust
litigation in state courts devoid of an elemental understanding of federal antitrust law.

Quintessentially, the following federal enactments would serve as a bedrock standard in
so far as antitrust issues are concerned in the United States:

The Sherman Act:
The Sherman Act is THE legislative enactment in the United States that oversees antitrust
issues and this piece of statute law is considered premier from any respect. In effect, the
Sherman Acts sets forth the contours of antitrust reach in the United States and it
provides for broad statutory proscriptions with reference to antitrust issues. Quintessentially, it delineates the boundaries of antitrust reach and it fundamentally
provides for a charter-of-the-marketplace and in effect it could be considered as the
constitution of competition law in so far as American jurisprudence is concerned.

The Sherman Act in its present form essentially provides for civil remedies as well as
criminal penalties in cases of antitrust violations. Issues such as conspiracies to restrain
free trade, monopolization, inchoate attempts at monopolization, surreptitious
cartelization and covert initiatives that prevent free market mechanisms are important
matters that come under that rubric of the Sherman Act. The enactment is very broadly
worded and as a matter of fact the language is certainly open ended. This accounts for the
reason why “clever competitors” just tend to by-pass its provisions by lawyerly evasions,
obfuscation, deceit, duplicity and stark viciousness. Critiques of the Sherman Act
wantonly place much emphasis on the open-endedness of the enactment and they go on to perfunctorily state that the courts have much leeway and discretion in interpreting and applying the provisions of the enactment. Hence, they argue that antitrust law has indeed become highly arbitrary and utterly unpredictable. Supporters of the Sherman Act however emphasize its central aspects which provide for fundamental standards, and as a natural corollary, it would be for the courts to decide, depending on the facts presented by the cases in front of them, how it applies. The fundamental question will always hover around the main issue as to whether the challenged conduct constitutes monopolization of a line of economic activity or in the alternative whether there was any improper restraint of a line of commerce. Numerous case law studies have helped provide clarity in a complex world and thereby the meaning of the enactment with reference to how it is supposed to be applied in order to forbid and sanction illegal trade and monopolization. These cases have very often been the outcome of much contumaciousness and as a logical consequence everyone ought to realize and understand that demystifying the complexities should be given a top priority. This is the precisely what the US Supreme Court has done and several landmark pronouncements have perceptively provided for much-needed clarity.

The Clayton Act: this enactment is yet another federal statute that elementally provides restrictions for mergers, acquisitions, consolidation and new business combines. The fundamental purpose of this enactment is to serve as a much-needed add-on to the Sherman Act and as a logical extrapolation it prohibits certain types of economic activities and commercial practices that work excessively to stifle and inhibit competition. Basically, the Clayton Act sets forth the areas where civil remedies can be effectively provided for. As a matter of historical interest it was the Clayton Act that established a private right of redress for civil relief (at 15 U.S.C. § 15) under the Sherman Act. A core and significant feature of the enactment is that it efficaciously allows for the courts to enjoin anti-competitive conduct even before it actually gets to cause any kind of harm whatsoever.

The Robinson-Patman Act: this is a federal statute, and in effect, it proscribes certain specific business practices that are detrimental to the economy. It deals with grave issues like those of price-fixing and price-discrimination (all of which are crucial in any M & A exercise in the global oil and gas verticals) and the way in which it deals with such serious issues is certainly perceptive - it uses highly technical and very specific language unlike the Sherman Act. This enactment serves as an addendum to both the Sherman and Clayton Acts and perspicacious civil litigants by definition invoke the Robinson-Patman Act whilst they bring claims under the other two Acts. Critiques both in the courts and outside have opposed the enactment on the grounds of problematic issues caused by the technical and specific language.

The Federal Trade Commission Act: this federal enactment provided for the establishment of the Federal Trade Commission and it is the Federal Trade Commission that has regulatory authority to enforce the Sherman Act, the Clayton Act, and the Robinson-Patman Act. Very significantly, the Federal Trade Commission Act, by virtue of Section 5, confers additional authority on Federal Trade Commission to test the limits of antitrust policy. An entity that is aggrieved and which believes that it has absolutely no civil remedy whatsoever under either the Sherman Act or the Clayton Act could decide that it’s best course of action would be to make a complaint to the Federal Trade Commission in effect asking the FTC to invoke its authority under section 5. This will enable the FTC to investigate the matter and to thereafter commence administrative proceedings in order to enjoin challenged conduct.
**The Heart-Scott-Rodino Act:** this federal statute imposes disclosure-requirements in cases of mergers, acquisitions, consolidations and other business combines. The members of the board of oil and gas entities would have a fundamental duty to make the appropriate disclosures and whilst doing so they would have to ensure that the details of the transaction sizes are revealed in no uncertain terms. When an entity conducts a transaction that is covered by this enactment the first thing that it ought to be doing is to make the right disclosures to the Federal Trade Commission and the Department of Justice-Antitrust Division. The aforementioned institutions have the prerogative to object to the transactions or to provide for a conditional approval. There is however a statutory deadline to be complied with and sometimes it could be possible to obtain a waiver of the obligatory waiting period. Of course any objections can be challenged; the M & A transactions can be abandoned or the proposals can even be modified and resubmitted thereafter.

**The enactments at the state level:** apart from the various federal statutes enunciated above, each State has its own antitrust enactment and such State enactments preside over intrastate commerce by providing for statutory proscriptions and case-law interpretations of the Sherman Act. In effect, the aforementioned becomes the statute of reference and the premier literature on antitrust legislation in the United States.

**Common Law Law-Making and antitrust matters of seminal importance:** It is very important to understand and realize that as these antitrust statutes are couched in very general language, they have absolutely not much practical meaning unless and until the courts actually enforce them against the enterprises accused of violating them. As a need-based approach towards handling this in a highly complex world, it would be utterly necessary to get to the root of the matter and understand the cases. Thoroughly-reasoned approaches are of crucial significance just as it is absolutely necessary to have a thorough grasp of the theoretical underpinnings of antitrust matters and this would include a holistic study based on the economic, jurisprudential and the strategic managerial facets.

Some seminal cognitive issues with reference to the Courts and the theoretical quotient of Antitrust - as antitrust enactments are couched in very general language, it would be very hard to decipher any meaning at all unless and until the courts actually get to enforce them against the enterprises accused of violating them; as a natural corollary and a logical upshot, it would be very necessary to ensure that there is a high level of understanding with reference to the cases and more importantly the reasoning underlying the cases. Whilst every attempt ought to be made to try and understand the complexities of antitrust jurisprudence it is of paramount necessity to have a thorough understanding of antitrust theory in all its hues - from perspectives in economics, jurisprudence and strategic management.

Providing for clarity in a complex world would have to be the catchphrase of the exercise, and jurists all over, across jurisdictions, need to be sensitized to the finer cognitive nuances that govern the complicated jurisprudence of antitrust matters as in the ultimate analysis, in antitrust matters common law law-making rules the roost.

**The signification, importance and substance of antitrust law in takeovers:** crucially it ought to be understood and recognized that antitrust law does signify a very important and vital facet in the realm of takeovers. A fundamental feature of antitrust jurisprudence is promoting robust competition in the market place and whilst doing so it has to proscribe anti-competitive monopolists, cartels and controversies caused by conspiracies – all of which are at the core of mergers and acquisitions in the oil and gas verticals.

**Civil and criminal sanctions in antitrust:** normally, in the antitrust world, an offender is sued under the rubric of civil proceedings, and once the case is established the offender
ends up paying an amount that corresponds to three times the value of proven harm caused by the offense. Any antitrust defendant, even if he had established his innocence in the court proceedings cannot recover the fees paid out to attorneys unless and until it is established comprehensively that the case was indeed frivolous. Courts are empowered to enjoin an antitrust offender and as a logical upshot certain business practices would be curtailed whilst the suit is in subsistence. At the end of the proceedings, should it be established that the violations were established the curtailment would be of a permanent nature. As enterprises are indeed tempted to monopolize the market so as to ensure that they get an insurmountable advantage over customers or rivals, their respective boards would act in the interests of their stakeholders by realizing the perils of following a surreptitious course of action. At all points in time, the boards have to be aware of the fact that viciousness today could lead them to facing a future that involves antitrust litigation. Members of the board have to realize that antitrust plaintiffs can indeed obtain substantial judgments that could prove to be very costly indeed. Furthermore in really contumacious cases the alleged offenders could be subjected to criminal prosecutions and that would in essence mean that the members of the board would be personally indicted, tried and convicted. Such prosecutions are complex and are typically conducted by the Antitrust Division of the United States Department of Justice as well as state prosecutors. Given that the Federal Trade Commission has enormous powers to regulate, any antitrust matter can be easily referred to the Department of Justice or they can even act in unison. In essence, the Department of Justice takes both civil and criminal antitrust actions and the Federal Trade Commission pursues civil and administrative claims. Members of the boards of oil and gas entities will have to work in such a way that they help their respective entities to keep away from being criminally convicted as a criminal violation could result in the payment of enormous fines. Restitution will certainly be ordered by the court and the members of the board can also find themselves in a federal prison for several years. The fact is that in many instances it has been found that a criminal conviction in antitrust matters results in the demise of the entity itself. Given the range of antitrust wrongdoing, courts have been very dexterous in pronouncing cogent judgments that provide for remedial measures with reference to the wrongs committed. It has been observed in United States that criminal prosecutions are mainly concerned with bid-rigging, horizontal market allocations, and price-fixing. The members of the board of have to realize that the government will do all it can to establish each element of the alleged offense beyond any reasonable doubt in an effort to establish criminal intent. Criminal intent in cases of antitrust violations is established by the commitment of an act in furtherance of a common plan and in essence it establishes a per se violation.

Appellate Courts
The historical perspective of antitrust jurisprudence: the first principles-antitrust jurisprudence is really purely all about the jurisprudence of competition. It has its historical origins in the various “trusts” that were in existence more than 200 years ago and in effect these “trusts” were the brainchild of sleazy entrepreneurs. As a matter of historical interest, these trusts in effect controlled the entire markets of various essential commodities ranging from railroad transport to banking, steel production and petroleum and various related industries and services. Given that these trusts very easily established dominant positions in the markets, they were able to easily abuse their position, much to the detriment of the consumer. Eventually, it led to the realisation that such reprehensible conduct undermined the principles of the free market model. Thankfully with this realisation, policymakers and jurists started to work perceptively in order to save society from living at the mercy of a handful of monopolies and oligopolies. Since the immense concentration of monopoly and oligopoly power had raised prices, restricted output and excluded competitors, these policymakers and jurists brought antitrust laws into force in
the United States. This history led to the establishment of the law of competition in the United States.

The catchphrase of antitrust legislation in the United States is defending competition on merits and in effect the legislative enactments were targeted towards efficaciously handling the following scenarios: a proposed merger, acquisition, new business combine or exclusive supplier arrangement which threatens to lessen competition unacceptably in a properly defined market; predatory competitors, colluding with one another in order to undermine 'the competition on merits'; entities trying to establish and preserve a monopoly and oligopoly provisions over a defined period of time. The aforementioned cases can be redressed only by protecting 'competition on merits' and getting to stop predictable abuses by apposite antitrust jurisprudence. Quintessentially, antitrust jurisprudence aims to accomplish the purposes mentioned above - one of the core reasons why the language of these enactments is so open-ended is because policymakers and lawmakers anticipated that a lot of vileness would be at play. Therefore in anticipation of the sophistication and subtle viciousness of the predatory entities, the language seems to be made open-ended so that there will hardly be any room at all for ambiguity. It would be very much in the scheme of things to mention here that any ambiguity will provide the entities much room to indulge in surreptitiousness. But it also allows latitude for courts to cater for unanticipated scenarios of antitrust abuse.

**Jurisprudential difficulties:** for a very long time courts have tried very hard to provide for clarity in a complex world - they have tried to provide for the meaning in lucid terms - broad standards enunciated by principal antitrust statutes have actually led to court pronouncements that have been contradictory. Experience shows that some courts have been inclined to find antitrust violations in every nook and corner, while some others have plainly refused to see any kind of antitrust violation even in the most bizarre cases, wherein anti-competitive conspiracies are easily observable. Very often, it seems as though the many decisions have been the outcome of an incoherent exercise in jurisprudential thought, and as a natural corollary, the pronouncements, are seen to be clumsy, reflecting non-application of mind. In one way it could be articulated that antitrust laws have been failures as their meaning and practical effect become clear only after the courts get to develop very specific applications to broad standards that have been enunciated by the enactments. It ought to be realized that the courts get to effectuate pronouncements only when they are petitioned by either the aggrieved private litigant or a government appointed prosecutor. Realistically, it’s often been found that business rivalry sets off one of the competitors against its more successful rival, and as a natural and logical extrapolation, an antitrust suit is initiated. Sometimes, the process could be kick-started by complaining to the Department of Justice. The application can be for launching a civil antitrust case or criminal proceedings. Thereafter, it becomes the duty of the court of appropriate jurisdiction to decide whether the claimant has chosen the appropriate antitrust violation or not. The simple way in which the court decides this is by resorting to an application of the general tenets of the statute to the specific business practices that have been challenged. The determination of the validity/invalidity of the business practices under question would be a function of the court pronouncements in the case; more often than not the losing party always challenges the pronouncements in the appellate courts. The central issue is that the entire process can last for years on end and this singular fact makes this brand of jurisprudence very curious indeed.

**Antitrust Matters!**

There is a very real chance for entities to destroy competition and as a natural corollary antitrust jurisprudence is the need of the hour across geographies. In order to achieve any kind of meaningful rectification, antitrust jurisprudence provides private litigants
sufficient incentives to put into effect the laws of competition and by doing so they end up being a real deterrent to those entities that would otherwise be inclined to surreptitiously profiteer in the markets they operate in. Lawmakers today have very sensibly ensured that the language used in antitrust jurisprudence is of a general nature because long experience has made them realize that sophistication in the use of words almost always ensured that entities successfully eluded antitrust legislation itself. The fact of the matter remains that it is indeed implausible to foresee all kinds of business arrangements much in advance, especially those that would result in iniquitous practices! Therefore, one would have to certainly empathise with the lawmakers when a comprehensive enumeration of every kind of unfair practice is not made out right at the beginning itself. The use of general language although it leads to incertitude, helps the judges and regulators to do what is necessary to restrain unfairness. It could even be stated with a high degree of authenticity that antitrust jurisprudence is the constitution of the market place as it sets forth the broad principles under which the markets have to operate. It could be argued in a similar vein that treble damages are an inherently necessary feature for the prevention of antitrust conduct as it would deter anti-competitive behaviour to a very large extent. Victimisation should be handled with aplomb and when general words are used in an antitrust statue, the fact remains that it is necessary to provide for an astute mechanism that allows for the victim to come forward and make a complaint as it would be a Herculean task to only look up to the Department of Justice, the Federal Trade Commission or the state prosecutors for policing and bringing wrongdoers to book. A complaint signals the active cooperation of the aggrieved competitors and/or customers and when the aggrieved parties come forward it is indeed signalling an assumption that the offender has indulged in highly detrimental conduct leading towards monopolisation.

In so far as antitrust suits/cases are concerned, the emphasis ought to be on paying very close attention to detail entailing a close scrutiny of all the communication. The raison d'être of examining the communication ought to hover around the central principle of developing a well-formed and logically supportive theory with reference to the case in hand. This is a crucial step in antitrust litigation and when the underpinnings of the theory rest on sound principles and are backed up by hard core evidence, a solid case could be made out, resulting in penalties being levied against the offender. Hard work and astute diligence alone can see the aggrieved party through and it involves much perseverance, great determination and unflagging attention to detail.

**Why does antitrust matter at all?**

The science of economics has made a solid case for the promotion and protection of competition, and as a natural corollary, the field of jurisprudence, in its antitrust hues, metamorphoses the precept of economic theory into legal concept. Rather unfortunately, random observations have over-emphasised the objective as being to punish big entities, and this misconception ought to be corrected as the proper objective is always only to promote and protect competition. Further, on misconceptions, another popular one is antitrust laws being 'surrogate consumer protection laws'; whilst it is true that consumers are indeed protected, the scope of antitrust laws are encircling by nature in that the vast gamut of competition and unfair practices are covered. Quintessentially, antitrust jurisprudence is meant to promote and protect competition, and as a natural corollary and logical extrapolation, they would never be geared up to uphold any anti-market stance so it has to be recognised that their underlying goal is never to be anti-businesses. In reality and by the very intention of ushering in the enactments, the plethora of antitrust laws has a common objective of healthily promoting free market economics whilst checking the rampant and widespread abuses that can and could crop up.. The very idea behind
antitrust jurisprudence is one of establishing a pristine and healthy market order – one that would not be dominated by a few players and in essence one that would, without a doubt, establish as a central feature healthy and robust competition. The premise behind the aforementioned rests in the understanding of a particular thematic structure that has at its very heart the solemn objective of ensuring that every market is dominated by many sellers, each competing against one another and in a way wherein no one seller or group of sellers would be able to take unfair advantage; the proper structure of the market would ensure that each seller would, by definition, be obliged to offer its goods or services on very attractive terms, and each will be responsive and highly efficient in dealing with its buyers, as simply because, should they not be likewise, the buyers would have a ready opportunity to patronise another seller. But the bottom line is very clear: that vigorous competition in any market would achieve the results of keeping sellers honest and when sellers play a veracious role, the quality of goods and services will be of a very high order. It would also be the end of companies which are poorly run and the market forces would determine and ensure that only honest ones prosper and as a natural corollary society as a whole would stand to benefit much. Quintessentially, the elemental features of market place economics would be at work when antitrust jurisprudence is efficacious. The fundamental thrust of antitrust jurisprudence upholds the tenets of the law of competition and hover around the centrality of checking market abuses. From the trusts of the 19th century to the transnational corporations of this century, men and women at the helm have always tried to take advantage of their dominant positions to drive hard bargains, and it is precisely in this area that effective antitrust jurisprudence stymies reprehensible strategies. Antitrust jurisprudence essentially serves to promote market economics and the underlying premise is centred on the bold postulate that states society as a whole would flourish only when its foundations are based on vigorous competition. As a logical extrapolation to the aforementioned, and entirely in practical terms, it would be perfectly in sync to state that competition brings forth the best in each one of us; it could be dubbed as harsh logic - nevertheless, it reflects the reality of the situation in exactitude. The laws of competition certainly provide for upholding meritocracy, and to paraphrase the aforementioned, it would be erudite to point out here that antitrust laws are meant to ensure excellence – one that would integrally mean that the abuses in the markets would cease to exist. The very objective of antitrust jurisprudence is to provide for a redress-mechanism, and incertitude, it is not meant to dismantle prosperous entities. Tempering the fundamental flaw that seems inherent in unrestrained competition is a fundamental duty of antitrust governance. Antitrust jurisprudence in essence provide for a correction with reference to the inherent contradictions of market economies, and across geographies, as there is a huge tendency for a large entity or a group of entities dominate the entire market, it is only the tenets of antitrust jurisprudence that enables and fosters healthy competition. Given the dynamics of the markets, especially with reference to entities trying to get to a dominant position, antitrust jurisprudence proscribes conduct that leads to enlarging monopolistic power as well as to stymie activity that works to suppress competition on merits. Practices such as bid-rigging, horizontal market allocation and price-fixing are some of the surreptitious actions that antitrust
jurisprudence effectively stymies. Subverting competition on merits is a fundamentally improper practice, and as a natural corollary, both lawmakers and policymakers must ensure that such reprehensible activity is effectively and efficaciously blocked. Effectively, antitrust jurisprudence provides for a series of general propositions that would be enabling with reference to efficaciously implementing the elemental nuances of the competition laws in place. To put it succinctly the charter principles of market place economics are best explicated as under:

A. **Monopolization:** When business practices assume, or are made to assume gargantuan proportions, they end up becoming monopolies, and by virtue of their powers, they tend to drive hard bargains in the marketplace. A dominant position can lead to much uncertainty and it could, in certitude, destroy business rivals. As an exemplar, should a very low-cost car also be a great performer, then over a period of time, it would have numerous customers, and as a natural and logical extrapolation, the car would be a huge winner in the marketplace and the company would inevitably have become a monopoly. If the game is played scrupulously, then it is an above-board exercise, and it would be enabling with reference to the creation of a healthy market, devoid of any kind of abuse. However, business methods employed could be illegitimate or if there should be any infirmity in the processes, then an abuse of monopoly powers can be easily be established, leading to antitrust penalties.

B. **Inchoate monopolization, conspiracies and surreptitious business combinations:** Undoubtedly, it would be highly inappropriate and utterly improper to endeavour to effect an acquisition of a monopoly by predatory or other vicious means. If an entities’ vile intentions are absolutely clear and should the probability of it succeeding in its devious motives be really high, the said conduct is without a doubt proscribed by antitrust jurisprudence. And similarly, it would be really illegal under antitrust jurisprudence for two or more entities to collude in order to get to monopoly power.

C. **Restraints of trade:** subverting competition on merits is a heinous crime in so far as antitrust jurisprudence goes; any arrangement or methodology by which a joint exercise is indulged in so that significant power can be wielded is indeed an act of restraining trade. It would be appropriate to mention here that the litany of such reprehensible conduct is indeed a sad commentary of the wry imagination of devious managerial personnel, and without a doubt, it would be comprehensively illegal for a few firms to act in concert. The overriding objective is always to protect consumers from paying higher prices in the market and the offending practice can be stymied on the grounds of abject necessity. However, there exists a certain exception, and the exception is upholding a compelling business purpose; furthermore, for the exception to prevail, it has to be clearly established that the business focus cannot be accomplished by any lesser kind of restrictive measure.

D. **Per se restraints of trade:** manipulation of pricing, price-fixing, prearranged bids at competitive auctions, bids solicitations or bid-rigging and horizontal market allocation are a few of the main examples that get to illustrate activity that define per se restraints of trade. Additionally, one could find group action that is networked to ensure and establish coordinated approaches that in effect make a group abstain from dealing with certain suppliers, sellers or other tradesmen. Coordinated horizontal group boycotts are anathema to the markets and lead to antitrust violations of a vile kind. Furthermore, there could be situations wherein a commercially indispensable product would be sold only on
the condition that the buyer can purchase the indispensable product, only if he or she were to buy another product or avail of a service - in every sense, the entity is indulging in an unlawful act by resorting to the act of tying up the purchase of an indispensable product by making the customer buy another product compulsorily. Prime facie, it would constitute an illegal act and a serious antitrust violation, even if it is not necessarily brought under the rubric of a per se violation.

E. **Examples of other, more technical wrongs**: it is indeed an antitrust offense when two entities work in an agreed-upon pattern – should they provide for an equal consent with reference to either an exclusive supplier or exclusive dealer arrangement, then it is a clear case of antitrust violation. Furthermore, should the arrangement unreasonably harm competition or should it give rise to a monopoly, then it is a straightforward case of antitrust violation. Another seminal exemplar is that of mergers that are anti-competitive and that this is an area wherein, the boards of oil and gas entities must be very careful for any wrong move could cost the stakeholders very dearly. Hence, in the United States it would be prudent, perceptive, perspicacious and practical for the boards of oil and gas entities to obtain advance clearance from the Federal Trade Commission of the proposed merger.

The above covers the core concepts of antitrust jurisprudence. As already mentioned the two major antitrust enactments in the United States are the Sherman Act and the Clayton Act, and these are buttressed by various state legislation - state enactments also incorporate federal law and apply it to intrastate activities. **It is vitally important for the members of the boards to pay critical attention to these enactments in takeover settings which impact the US market.**

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**Dr. Kishore Vaangal** is an internationally acclaimed entrepreneur, management evangelist and ethicist and has several advanced accreditations to his credit from some of the most prestigious global academic institutions. In addition, he is a Fellow Member of the Institute of Professional Accountants (Australia), the Chartered Management Institute (UK) and the Royal Institute of Chartered Surveyors even whilst being an academic member of the European Corporate Governance Institute. His exposure as a strategic entrepreneur, business analyst and governance professional spans more than two decades and over the years he has also astutely advised entities globally in the areas of private equity funding, the dynamics of emerging markets and in evolving perspicacious methods of risk-management. The industry verticals that he specializes in are that of infrastructure, oil and gas, high-technology and investment banking. A recent publishing initiative in a highly complex area of corporate governance law titled “Effectuating Acquisition Initiatives” has received worldwide adulation and the work is considered to be a seminal piece of literature in so far as mergers and acquisitions in the global oil and gas industry is concerned. Presently he is also engaged in a high-level jurisprudential cognitive exercise at the International Maritime Law Institute at Malta and the seminal work being done is centered on elementally examining the contours of civil liability in the aftermath of sub-aquatic terrorism – maritime terrorism affecting the planet, people and profits.

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