Unit 1: Merger Antitrust Law: Introduction to Substance and Process

Merger Antitrust Law

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Topics

- U.S. antitrust law: The institutional setting
- Government organization
- HSR merge review process
- Evolution of merger antitrust goals
- Public policy behind the consumer welfare standard
- Thinking systematically about antitrust risk
  - Substantive risk
  - Inquiry risk
  - Remedies risk

U.S. Antitrust Law:
The Institutional Setting

The institutional setting: Overview

- Four (federal) antitrust statutes
- Five types of enforcement agents
- Four types of sanctions/relief
- Four types of proceedings

Clayton Act § 7

- Provides the U.S. antitrust standard for mergers

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[1]

- *Simple summary*: Prohibits—
  - acquisitions of stock or assets that
  - "may substantially lessen competition or tend to create a monopoly"
  - "in any line of commerce" (product market)
  - "in any part of the country" (geographic market)

Called the *anticompetitive effects test*

Collectively called the *relevant market*

- This summary assumes that the jurisdictional prerequisites are satisfied.
  - Since the reach of Section 7 today is coextensive with that the Commerce Clause, the jurisdictional prerequisites are almost always satisfied

[1] 15 U.S.C. § 18 (remainder of section omitted)

Other antitrust statutes

- The other major provisions that can apply to business combinations
  - Sherman Act § 1
    - Prohibits "contracts, combinations . . . and conspiracies in restraint of trade"
  - Sherman Act § 2
    - Prohibits monopolization, attempted monopolization, and conspiracies to monopolize
  - Federal Trade Commission Act
    - Section 5 prohibits "unfair methods of competition"
    - NB: Unlike other provisions, not included in the definition of "antitrust law" in Clayton Act § 1
      - This will be important when it comes to private actions

These statutes are either coextensive or less restrictive than Clayton Act § 7, so Section 7 provides the antitrust test for all mergers. Consequently, invocation of the Sherman Act or the FTC Act is usually superfluous and plaintiffs rarely allege violations of these statutes.

Five types of enforcement agents

- Department of Justice (DOJ) Antitrust Division
- Federal Trade Commission (FTC)
- State Attorneys General
  - Injunctive relief actions
  - Parens patriae actions
    - Class actions for damages sustained by citizens of the state brought by the state attorney general
- Individual private parties
  - Customers (and sometimes suppliers)
  - Competitors
  - Possibly others
- Private class actions

For reasons that we will discuss, the DOJ and FTC are by far the most active enforcers of the merger antitrust laws. The State AGs and private parties rarely bring merger antitrust actions.

Four types of sanctions/relief

1. Criminal fines/imprisonment
   - In practice, not applicable to mergers
     - Available only for violations of Sherman Act §§ 1-2
     - Clayton Act § 7 can be enforced only through civil actions
     - Only the DOJ can bring a criminal antitrust prosecution and the DOJ criminally prosecutes only "hard core" antitrust violations (i.e., horizontal price fixing, horizontal market divisions, some horizontal group boycotts)

2. Injunctive relief
   - Types of injunctive relief
     - Temporary restraining orders (TROs)
     - Preliminary injunctions
     - Permanent injunctions
   - Can be used to—
     - Prevent the consummation of a merger that has not already been consummated
     - Unwind or force corrective divestitures or other actions of transactions that have been consummated
   - Most merger challenges are preclosing, so that the most common form of adjudicated relief is a "blocking" injunction, which enjoins the consummation of the merger

Four types of sanctions/relief

3. Treble damages
   - Only available to parties injured as a result of antitrust violation
   - Mergers are usually challenged preconsummation, and therefore before they can cause any injuries that could predicate treble damages relief
4. Other equitable relief
   - Most notably disgorgement of ill-gotten gains from an unlawful merger
   - Again, mergers are usually challenged preconsummation, and therefore before the merging parties could obtain any ill-gotten gains that could predicate disgorgement

Four types of proceedings

- Criminal prosecutions in federal district court
  - Only used for “hard core” antitrust violations (e.g., horizontal price fixing)
  - Not used in challenging mergers (as a matter of prosecutorial discretion)
- Civil judicial adjudications in federal district court
- FTC administrative adjudications
- Agency administrative resolutions (consent decrees)

Summary

	Forum	Criminal*	Injunctive Relief	Damages
DOJ	Federal court	X (under federal law) Sherman Act §§ 1-2	X Sherman Act § 4 Clayton Act § 15	X Clayton Act § 4A
FTC	Administrative court		X Clayton Act § 11 FTC Act §§ 5, 13	
State AGs**	Federal court for federal and state claims	X (under state law)	X Clayton Act § 16	X (on behalf of resident natural persons) Clayton Act § 4C
Private**	Federal court for federal and state claims		X Clayton Act § 16	X Clayton Act § 4

* As a matter of prosecutorial discretion, not used in merger antitrust enforcement

** Are considered "private persons" under Clayton Act § 16. Can bring state antitrust claims (but not federal antitrust claims) in state court.

Government Organization

United States Department of Justice

- Overall

U.S. DEPARTMENT OF JUSTICE

ATTORNEY GENERAL

DEPUTY ATTORNEY GENERAL

SOLICITOR GENERAL

OFFICE OF THE SOLICITOR GENERAL

ASSOCIATE ATTORNEY GENERAL

OFFICE OF LEGISLATIVE AFFAIRS

OFFICE OF LEGAL COUNSEL

OFFICE OF LEGAL POLICY

OFFICE OF PUBLIC AFFAIRS

OFFICE OF TRIBAL JUSTICE

OFFICE OF JUSTICE PROGRAMS

COMMUNITY ORIENTED POLICING SERVICES (COPS)

CIVIL RIGHTS DIVISION

CIVIL DIVISION

EXECUTIVE OFFICE FOR U.S. TRUSTEES

OFFICE OF INFORMATION POLICY

ANTITRUST DIVISION

ENVIRONMENT & NATURAL RESOURCES DIVISION

OFFICE ON VIOLENCE AGAINST WOMEN

FOREIGN CLAIMS SETTLEMENT COMMISSION

TAX DIVISION

COMMUNITY RELATIONS SERVICE

FEDERAL BUREAU OF INVESTIGATION

CRIMINAL DIVISION

DRUG ENFORCEMENT ADMINISTRATION

BUREAU OF PRISONS

EXECUTIVE OFFICE FOR U.S. ATTORNEYS

U.S. MARSHALS SERVICE

U.S. ATTORNEYS

INTERPOL WASHINGTON

BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES

NATIONAL SECURITY DIVISION

OFFICE OF PROFESSIONAL RESPONSIBILITY

OFFICE OF THE INSPECTOR GENERAL

OFFICE OF THE PARDON ATTORNEY

JUSTICE MANAGEMENT DIVISION

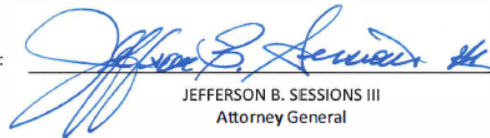
U.S. PAROLE COMMISSION

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

EXECUTIVE OFFICE FOR ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCES

PROFESSIONAL RESPONSIBILITY ADVISORY OFFICE

Approved by:

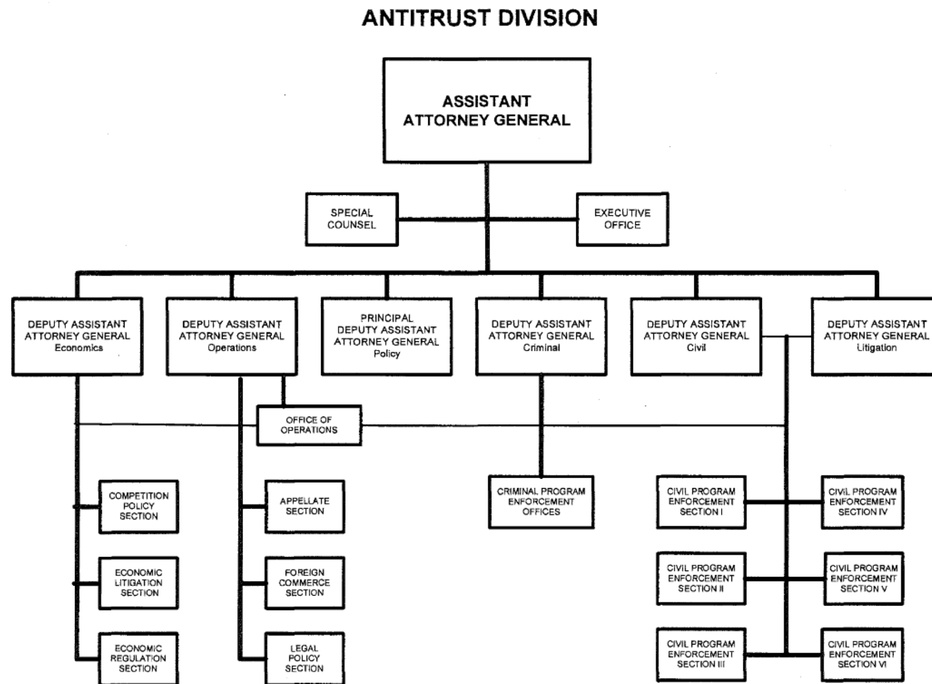


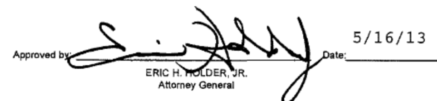
JEFFERSON B. SESSIONS III
Attorney General

Date: 2-5-18

United States Department of Justice

- Antitrust Division



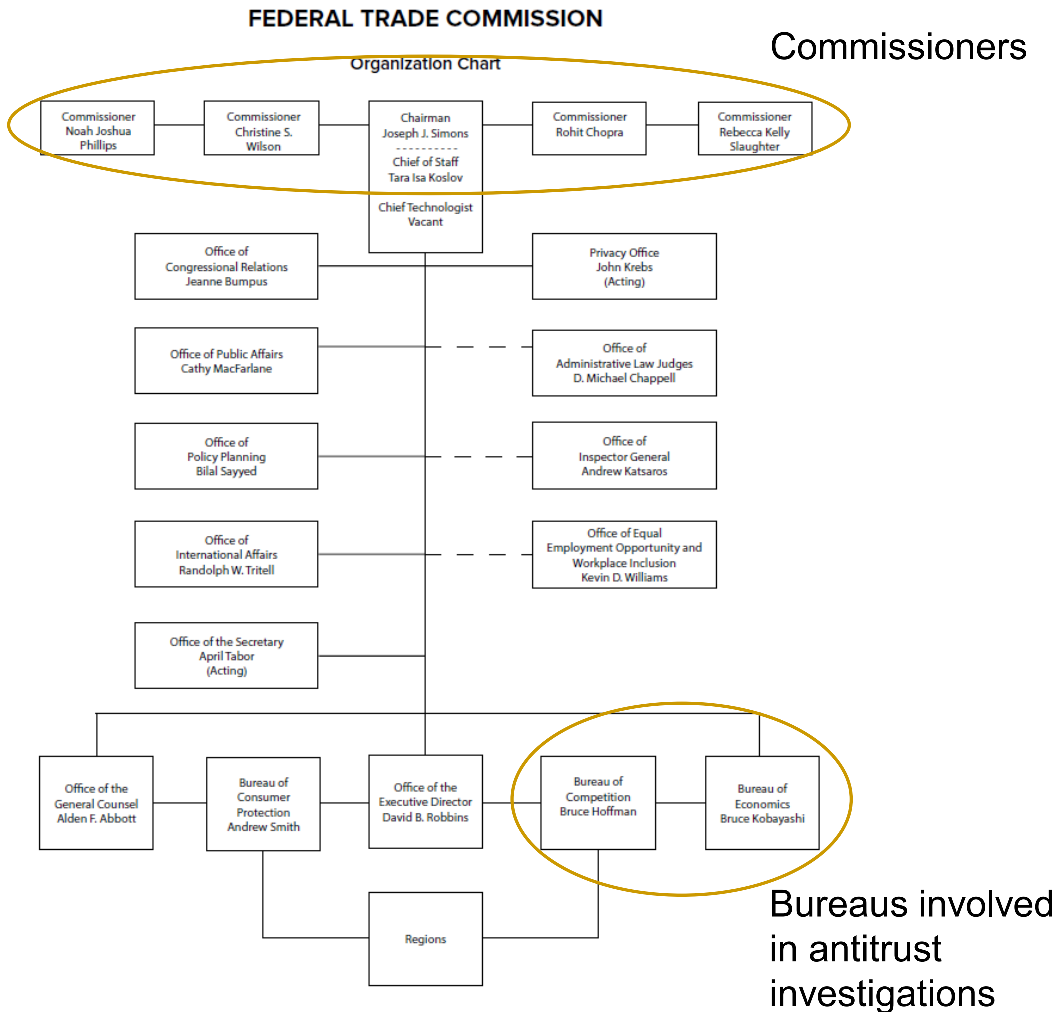


Notes:

1. The ATD has a hierarchical structure.
2. The Assistant Attorney General (AAG) has “complaint authority” to file a complaint without seeking the approval of anyone else. No one else in the Division has complaint authority. As a result, the AAG is the ultimate and sole decision-maker on legal challenges brought by the ATD.
3. The AAG is nominated by the President and subject to confirmation by the Senate. No one else in the ATD requires Senate confirmation.
4. The AAG serves at the pleasure of the President and the Attorney General and may be removed by them without cause.

Federal Trade Commission

- Overall

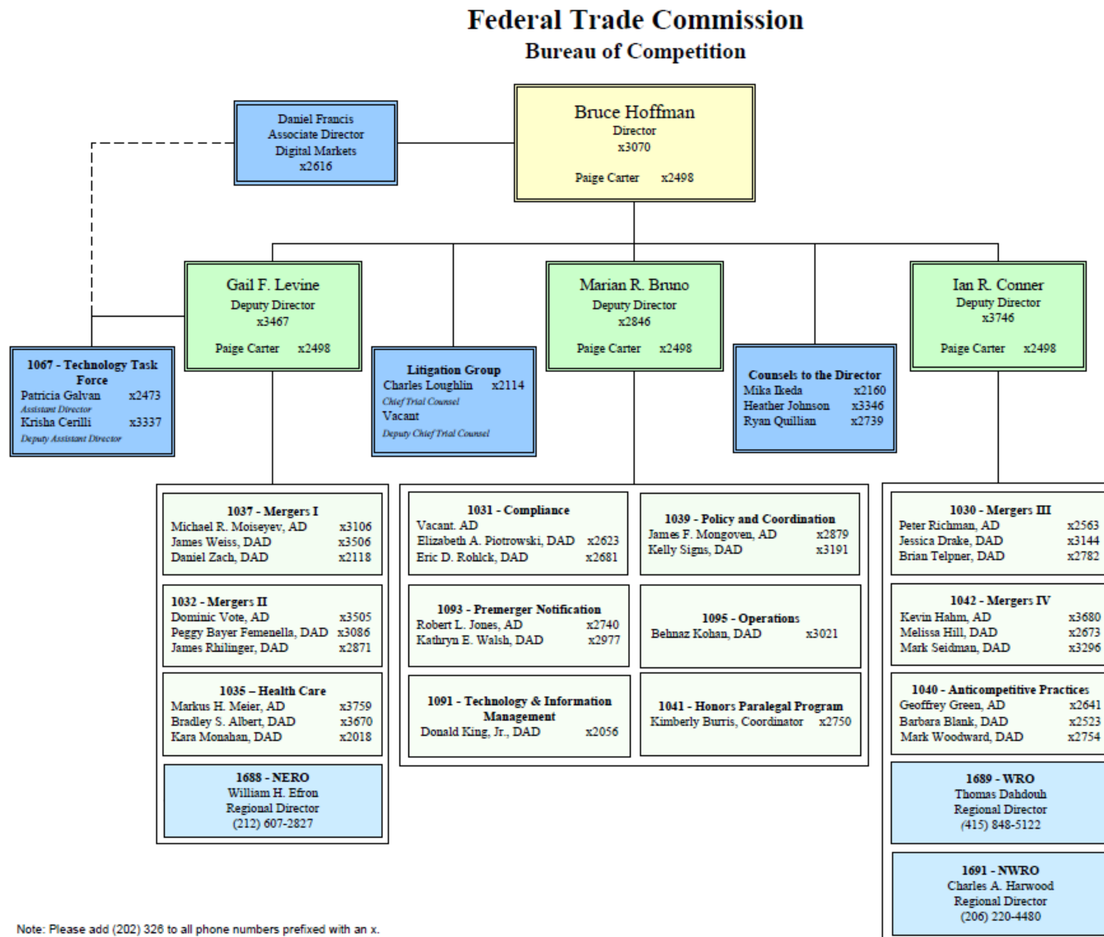


Notes:

1. The FTC has a "collegial" structure, that is, the Commission cannot take enforcement action unless a majority of the Commissioners vote to do so. No single person can make an enforcement decision for the FTC.
2. The FTC Act provides for five Commissioners. Each Commissioner serves for a term of seven years (or fills out the remaining term of his or her predecessor). By law, no more than three Commissioners can be a member of the same political party.
3. Each Commissioner is nominated by the President and subject to confirmation by the Senate. No one else in the FTC is subject to Senate confirmation.
4. The President appoints the chairman of the Commission, who is responsible for chairing Commission meetings and for administering the staff of the FTC.
5. The FTC is an "independent agency," so that Commissioners do not serve at the pleasure of the President and can only be removed for cause.

Federal Trade Commission

- Bureau of Competition

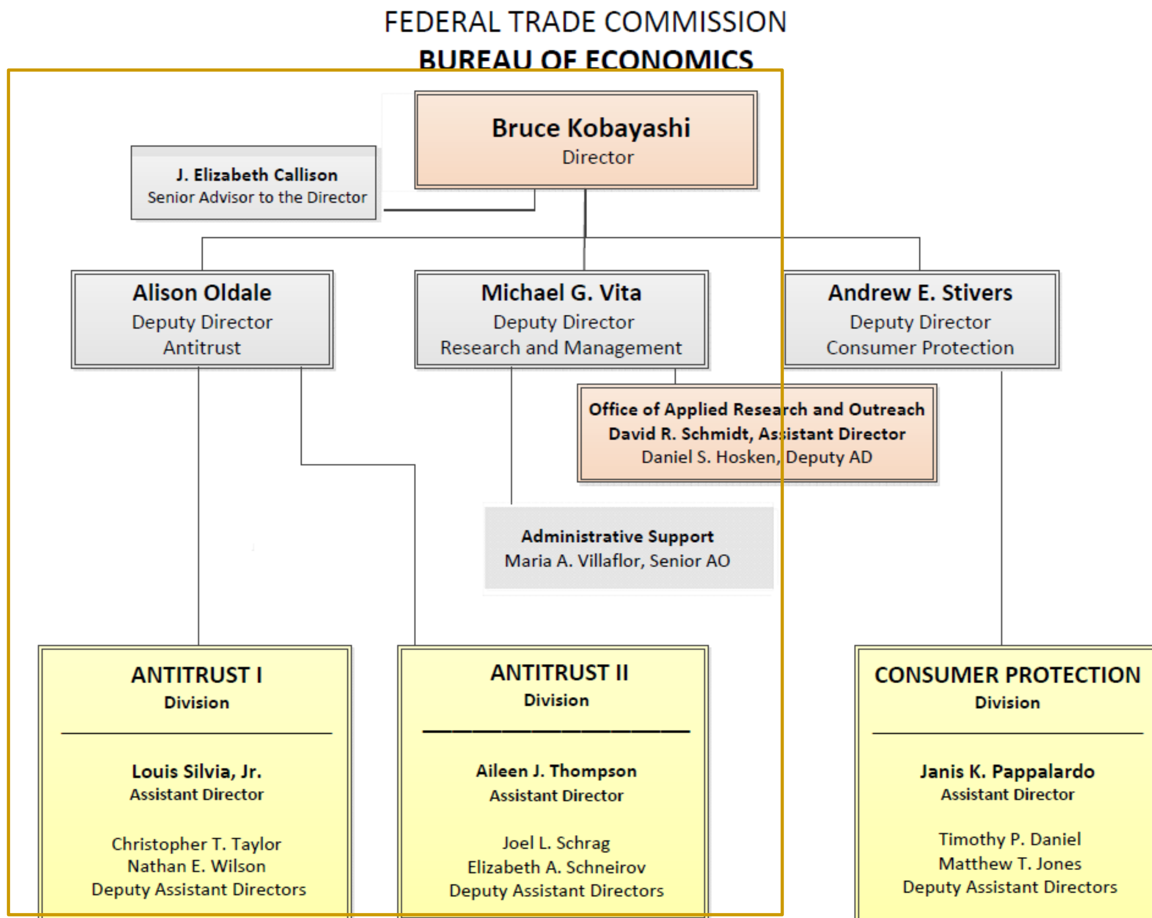


Notes:

1. The Bureau of Competition (BC) is the competition legal arm of the FTC and conducts antitrust investigations and legal challenges.
2. BC has a hierarchical structure.
3. The Director of the Bureau of Competition is appointed by the Commission and is the Commission's chief antitrust enforcement staff official.
4. The BC Director makes recommendations to the Commission on enforcement actions. As a matter of practice, the recommendations of other BC officials also go to the Commission.

Federal Trade Commission

- Bureau of Economics



Notes:

1. The Bureau of Economics (BE) the economics arm of the FTC and participates in investigations conducted by BC.
2. BE has a hierarchical structure.
3. The Director of the Bureau of Economics is appointed by the Commission and is the Commission's chief economics staff official.
4. The BE Director makes recommendations to the Commission on antitrust enforcement actions. As a matter of practice, the recommendations of other BE officials also go to the Commission.

HSR Merger Review Process

Hart-Scott-Rodino Act[1]

- Enacted in 1976 and implemented in 1978
  - Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge—a transaction prior to closing
  - *Idea*: Much more effective and efficient to block or fix anticompetitive deal prior to closing than to try to remediate it after closing
- Applies to large mergers, acquisitions and joint ventures
  - In 2019, the threshold for prima facie reportability is $90.0 million
- Imposes reporting and waiting period requirements
  1. Each transacting party must file a premerger notification report with both DOJ and FTC
  2. The parties must wait a statutorily prescribed period after filing before they can consummate their transaction
     - The (initial) waiting period for most types of transaction is 30 calendar days
- Authorizes investigating agency to obtain additional information and documents from reporting parties through a "second request"
  - Also suspends the waiting period for most transactions for 30 days after all parties have responded to their respective second requests

[1] Clayton Act § 7A, 15 U.S.C. § 18a.

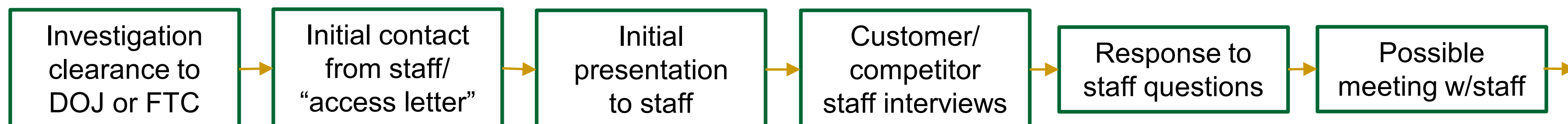
Hart-Scott-Rodino Act

- Not jurisdictional: DOJ and FTC can review and challenge transactions that—
  - Fall below reporting thresholds
  - Are exempt from HSR reporting requirements
  - Were "cleared" in an HSR merger review
    - No immunity attaches to a transaction that has successfully gone through an HSR merger review
    - The DOJ/FTC are note estopped from challenging a transaction after the waiting period has expired even if the agency reviewed the transaction and "cleared" it
- Administration
  - The FTC Premerger Notification Office (PNO) is responsible for the procedural administration of the premerger notification program under the HSR Act
  - There is a "clearance process" to allocate HSR filings to the DOJ and FTC for substantive review
  - Once a filing has been "cleared" to an agency for review, the filing is sent to the appropriate investigating section for review, investigation, and possible challenge

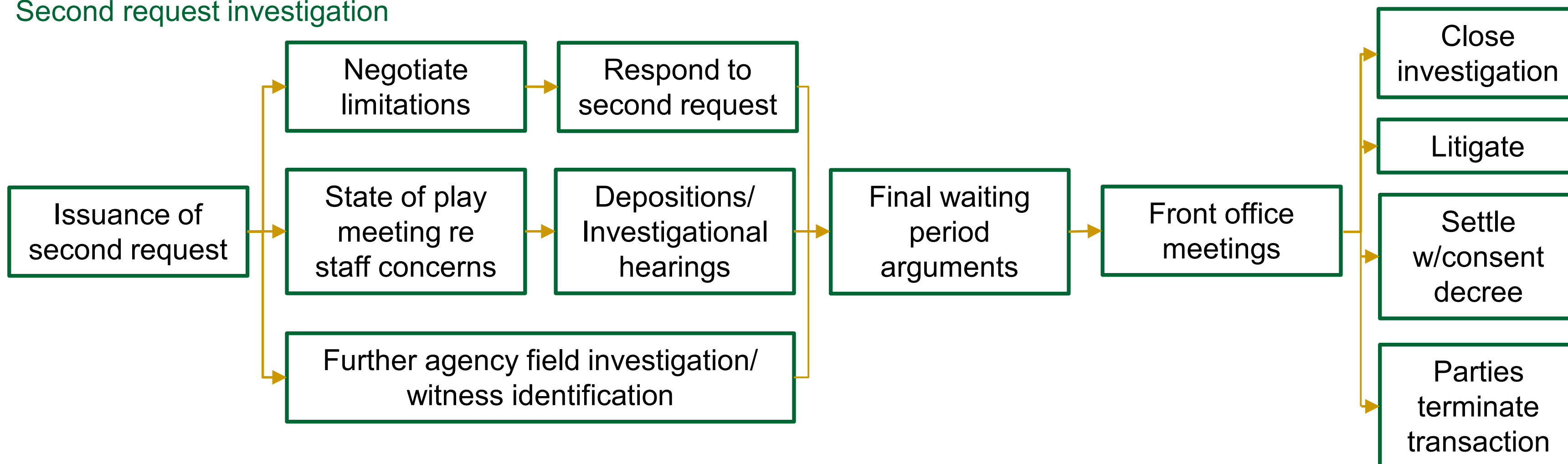
Overview of HSR merger review process

Prefiling/filing

Initial investigation



Second request investigation



Evolution of Merger Antitrust Goals

Merger antitrust goals

- Political value judgment
  - Almost uniquely in American jurisprudence, the broad and largely uninformative language of the antitrust statutes means that the courts rather than congress determine how the antitrust laws will be applied
    - This is an intentional part of the design of U.S. antitrust law[1]
    - Framers of the Sherman Act used common law terms of art—for example, "contracts in restraint of trade," conspiracies in restraint of trade," monopolization—to enable the federal courts to continue to develop antitrust rules through the common law process
  - How to operationalize merger antitrust law is a political value judgment
  - As a result, merger antitrust enforcement has varied dramatically since the Sherman Act was passed in 1890

[1] *See* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661 (1982).

Evolution of merger antitrust law

- The first decade (1890-1902)
  - Sherman Act[1] enacted in 1890

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[1]

  - In *United States v. E.C. Knight*,[2] the Supreme Court in its first decision under the Sherman Act, rejected a challenge to the Sugar Trust's acquisition of its last four major competitors for lack of subject matter jurisdiction
    - Manufacturing is not "commerce" within the meaning of the Commerce Clause (later overruled)
    - Effectively halted the use of the Sherman Act against acquisitions

[1] Act of July 2, 1890, ch. 647, 26 Stat. 209 (1890).
[2] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

Evolution of merger antitrust law

- The Roosevelt/Taft era (1902-1912)
  - Sherman Act used to dismantle some (but not all) of the major trusts that had been created though acquisitions (e.g., Standard Oil, American Tobacco)
  - *Roosevelt*: Aggressive against "bad" trusts, acceptant of "good" trusts
    - *Northern Securities* (1904)[2]
      - Five months into his presidency, Roosevelt ordered his attorney general to bring suit against J.P. Morgan's attempt to consolidate the only two railroad trunk lines serving the northern part of the United States
        - This was the second antitrust case against an ownership consolidation
        - Shocked business community, since from the beginning presidents had been largely hostile to enforcing the Sherman Act (at least in non-labor cases)
      - Made Theodore Roosevelt's reputation as a "trust buster"
      - Plurality opinion (Harlan): "*[E]very* combination or conspiracy which would extinguish competition between otherwise [competitors] . . . engaged *in interstate trade or commerce*, and which *in that way* restrain *such* trade or commerce, is made illegal by the act."[3]
        - Could be read as a per se rule against horizontal ownership combinations
  - *Taft*: Aggressive against all "trusts"
    - Rejected Roosevelt's distinction between "good" and "bad" trusts
    - Employed *Northern Securities* rule to the fullest extent
    - But did not challenge ownership consolidations on their own

[1] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[2] Northern Securities Co. v. United States, 193 U.S. 197 (1904).
[3] *Id*. at 331 (emphasis in original).

Evolution of merger antitrust law

- Wilson reforms (1913-1914)
  - Clayton Act of 1914 enacted in reaction to *Standard Oil*[1]
    - Supreme Court found Standard Oil violated Section 1 and ordered it to be broken up
      - Perhaps the most important of all antitrust cases
      - Challenged, among other things, acquisitions by the Standard Oil Trust
      - But held that Section 1 only prohibited only *unreasonable* restraints (creating the "rule of reason")
      - Prior Supreme Court cases had held that *all* restraints of trade were prohibited by Section 1
      - Congress, uncertain of how the courts would apply the new "rule of reason" used the Clayton Act to identify certain business activities as illegal
    - Clayton Act § 7 was directed specifically at prohibiting mergers and acquisitions that were likely to be anticompetitive
      - *Concern*: Congress feared that the courts would not find anticompetitive mergers violated Section 1 of the Sherman Act under the new judicial "rule of reason"

[1] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[2] This interpretation of the original act was ultimately but belatedly rejected by the Supreme Court in United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

Evolution of merger antitrust law

- Wilson reforms (1913-1914)
  - Clayton Act of 1914 enacted in reaction to *Standard Oil*[1]
    - As originally enacted, Section 7 read in relevant part:

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.[1]

    - The narrow drafting of Section 7 severely constrained its application
      - Limited to "corporations" that are "in commerce" (to ensure subject matter jurisdiction)
      - Limited to stock acquisitions
        - Limitation to corporate stock acquisitions was probably intentional: Congress' principal concern was with the activities of holding companies, and specifically with the practice whereby corporations secretly acquired control of their competitors by purchasing the stock of those companies.
      - Widely viewed as limited to horizontal acquisitions[2]

[1] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[2] This interpretation of the original act was ultimately but belatedly rejected by the Supreme Court in United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

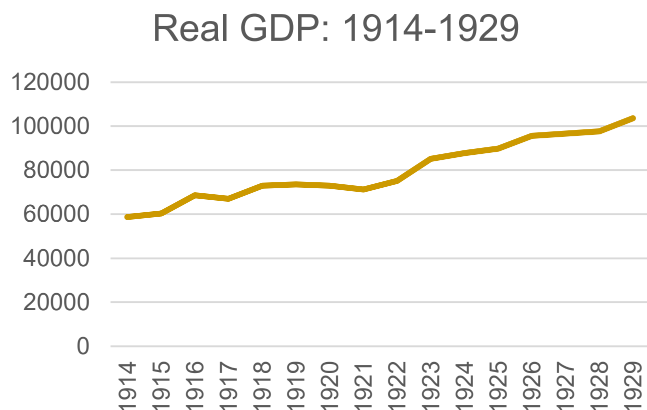
Evolution of merger antitrust law

- Wilson reforms (1913-1914)
  - The FTC Act was also passed as part of the Wilson reforms
  - Portended a more aggressive enforcement attitude towards acquisitions
    - But then World War I happened

[1] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[2] This interpretation of the original act was ultimately but belatedly rejected by the Supreme Court in United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

Evolution of merger antitrust law

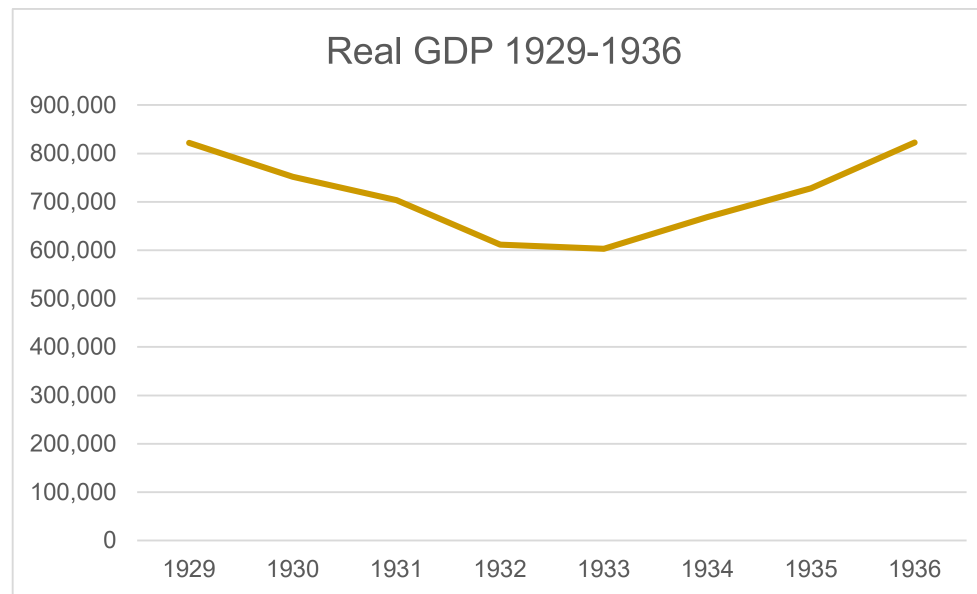
- World War I through the Roaring Twenties (1914-1929)
  - Antitrust enforcement generally, and merger antitrust enforcement in particular, took a hiatus
  - WWI mobilization, much of which required extensive coordination among companies, increased real GDP by 23% between 1914 and 1920[1]
    - Compound average growth rate (CAGR) = 3.5%
    - Suggested business coordination was a good thing
  - Real GNP increased by 46.6% between 1921 and 1929 (CAGR = 4.9%)
  - *Attitude*: The economy is not broken so don't try to fix it by enforcing the antitrust laws



[1] *See* U.S. Bureau of Census, Historical Statistics of the United States, Earliest Times to the Present: Millennial Edition 3-59 Ser. Ca191 (2006) (for real GDP statistics by year in 1996 dollars).

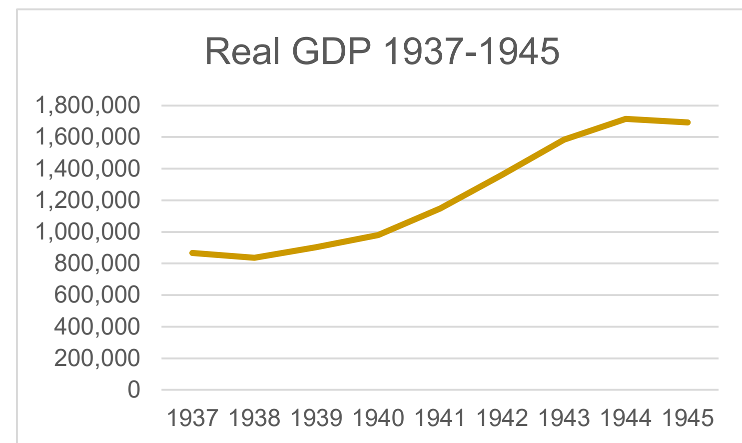
Evolution of merger antitrust law

- The Great Depression Era (1929-1936)
  - The hiatus continues
  - Real GDP fell by 18.7% between 1929 and 1934 (CAGR = -4.1%)
    - Attitude: Firms need to cooperate in order to survive
  - Real GDP increased by 12.9% between 1935 and 1936 (CAGR = 12.9%)
    - Attitude: The economy is improving; don’t break it



Evolution of merger antitrust law

- World War II (1937-1945)
  - Recession of 1937-1938
    - Lasted from May 1937 through June 1938
    - Third worst recession in the twentieth century
    - Industrial production declined by 32%
    - Unemployment rate jumped from 12.2% in May 1937 to 20.0% in June 1938
  - Focused attention on whether New Deal collectivism had failed
    - FDR, Attorney General Homer Cummings, and AAG Robert Jackson instituted a new, aggressive antitrust enforcement policy
    - Policy continued by AAG Thurman Arnold
  - Policy sustained with continued rapid economic growth created by WWII mobilization
    - Real GDP increased by 102.6% between 1938 and 1945 with war mobilization (CAGR = 10.6%)



Evolution of merger antitrust law

- Post-World War II (1946-1973)
  - Very negative reaction to the support by large industrial enterprises of the Nazi Germany and Imperial Japanese regimes
  - Strong anti-bigness congressional language in the legislative history of the 1950 Celler-Kefauver Act[1] amendments to Section 7 of the Clayton Act
    - Amended Section 7 to—
      - Expanded coverage to asset acquisitions
      - Changed competitive effects language to current form (except for jurisdictional reach):

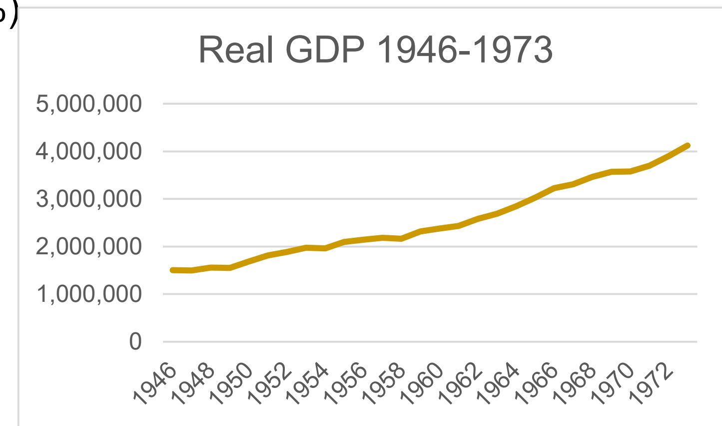
        > where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

    - Supreme Court interpreted the "may be" and "tend to" language in the anticompetitive effects test to mean:
      - Only a *reasonable probability* that the proscribed anticompetitive effect will occur[2]
      - The plaintiff does not have to prove that an actual anticompetitive effect would occur
        - This is called the *incipiency standard*
    - Only two significant restrictions remained after the 1950 amendments
      - Applied only to "corporations" that are "in commerce"
      - Anticompetitive effect arguably had to be "in commerce"

[1] Ch. 1184, 64 Stat. 1125 (1950) (amending Section 7 of the Clayton Act).
[2] *See* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957); *accord* Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39, 325.

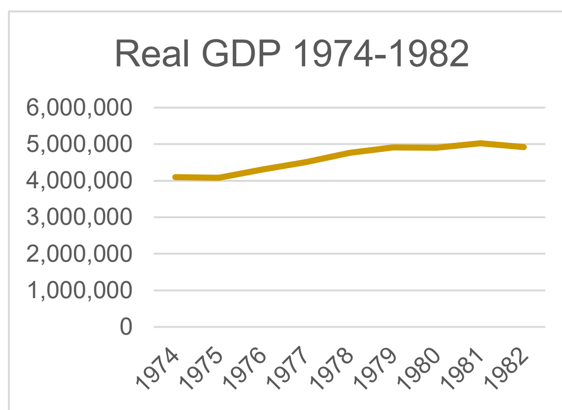
Evolution of merger antitrust law

- Post-World War II (1946-1973)
  - Celler-Kefauver Act legislative history aggressively hostile to business combinations
    - This is actually the aspect of the 1950 legislation that most influenced the courts
  - 1950 congressional concerns
    - Fear of “the rising tide of economic concentration in the American economy”
    - Loss of opportunity for small business when competing with large enterprises
    - The spread of multistate enterprises and the loss of local control over industry
  - Broadly shared macroeconomic concerns at the time
    - Suggested a very restrictive merger antitrust regime
    - Did not require deep microeconomic analysis to implement
  - Aggressive enforcement policy sustained by significant continuous economic growth
    - Real GDP increased by 174% (CAGR = 3.8%)



Evolution of merger antitrust law

- The "malaise" period (circa 1974 to 1982)
  - "Stagflation" gripped the nation
    - Significant inflation as a result of the Mideast oil shocks in 1973 and 1979 and the easy monetary policy of the late 1960s to finance the Vietnam War
    - "Productivity crisis" from the obsolescence of "old economy" and equipment
  - Substantial concern about U.S. competitiveness in the world market (especially against Japan) in areas that since WWII that had been traditional American strengths (e.g., automobiles, steel)
  - Growing influx of imported manufacturing goods threatened some American industries in the domestic market (e.g., consumer electronics)
  - Gasoline shortages/price controls from OPEC output restrictions
  - Economic growth significantly slowed down: Real GDP up by 20% (CAGR = 2.3%)



Evolution of merger antitrust law

- The “malaise” period (circa 1974 to 1982) (con’t)
  - “Sentiment toward business
    - Government policies generally needed to be revised to:
      - Foster America’s industrial competitiveness
      - Revive the nation’s industrial base
      - Return to the country to the post-WWII standards of steady growth, low inflation, and low unemployment
    - WWII concerns about the evils of large industrial concentrations largely had dissipated
      - Could not afford to act on the concerns in any event, especially given the perceived success of the Japanese keiretsu
  - Rapidly emerging perception/consensus that—
    - Many antitrust rules impeded efficient business operations and constrained competitiveness
    - Antitrust was a blunt and unnecessary instrument for achieving distributional goals
    - To the extent that distribution goals remain, other government instruments might be better suited to achieving them
  - Strong political pressures to address these concerns
  - First courts, and then reluctantly antitrust enforcement officials, and finally congress responded

Evolution of merger antitrust law

- The "malaise" period (circa 1974 to 1981) (con't)
  - One legislative development: Antitrust Procedural Improvements Act[1]
    - Enacted in 1980 to expand the reach of Section 7
      - Eliminated limitation to corporations and made Section 7 applicable to acquisitions by and of any "person"
      - Eliminated requirement that the acquired and acquiring entities must be engaged "in commerce" and as amended reaches entities "engaged in commerce or in any activity affecting commerce"
      - Eliminated requirement that the effect be "in any line of commerce" and expanded it to "any line of commerce or in any activity affecting commerce"
    - With the 1980 amendments, the reach of Section 7 is coextensive with the reach of the Commerce Clause
      - Just as with the Sherman Act
  - Summary of changes to the Clayton Act

	Application	Subject matter jurisdiction	Type of acquisition	Type of transaction
Clayton Act (1914)	Corporations	"In commerce"	Stock	Horizontal
Celler-Kefauver Act (1950)			Stock and assets	All types
APIA (1980)	Persons	"In commerce" or any activity affecting commerce		

[1] Pub. L. 96-349, § 6(a), 94 Stat. 1157 (1980).

Evolution of merger antitrust goals

- The modern period (circa 1982 to present)
  - *New view*: Antitrust law should maximize output and industrial productivity
  - Antitrust rules refashioned
    - No change in strict prohibitions and aggressive enforcement against "garden variety" horizontal price fixing
    - But new limitations on finding concerted action
      - Single entities: *Copperweld, American Needle*
      - From circumstantial evidence: *Matsushita, Business Elecs.*, *Brooke Group*
    - New possibilities of removing horizontal conduct from per se treatment (*BMI)*
    - Significant loosing of restrictions on dominant firm behavior
      - *Spectrum Sports*, *Brooke Group, Trinko*, *Linkline* , *Weyerhauser* , DOJ Section 2 Report (but see *Aspen Skiing,* withdrawal of Section 2 report)
      - Only episodic government actions (*Microsoft*, *American Airlines, Intel*)
    - Significant loosing of restrictions on distributional restraints
      - *Monsanto, Kahn, Leegin* (but see *Kodak*)
    - New requirement for finding illegal tying arrangements (*Jefferson Parish*)
    - Remedies and procedure impose limitations on private actions
      - *Empagran* , *Twombly*

Evolution of merger antitrust law

- The modern period (circa 1983 to present)
  - Merger antitrust enforcement radically changed
    - 1982 DOJ Merger Guidelines released on June 14, 1982
    - Market definition
      - Utilized the “hypothetical monopolist” concept of the 1982 DOJ Merger Guidelines
    - Horizontal mergers require affirmative finding of anticompetitive effect
    - Vertical mergers require affirmative finding of anticompetitive effect
      - Only episodic government actions
    - Conglomerate merger theories of harm abandoned

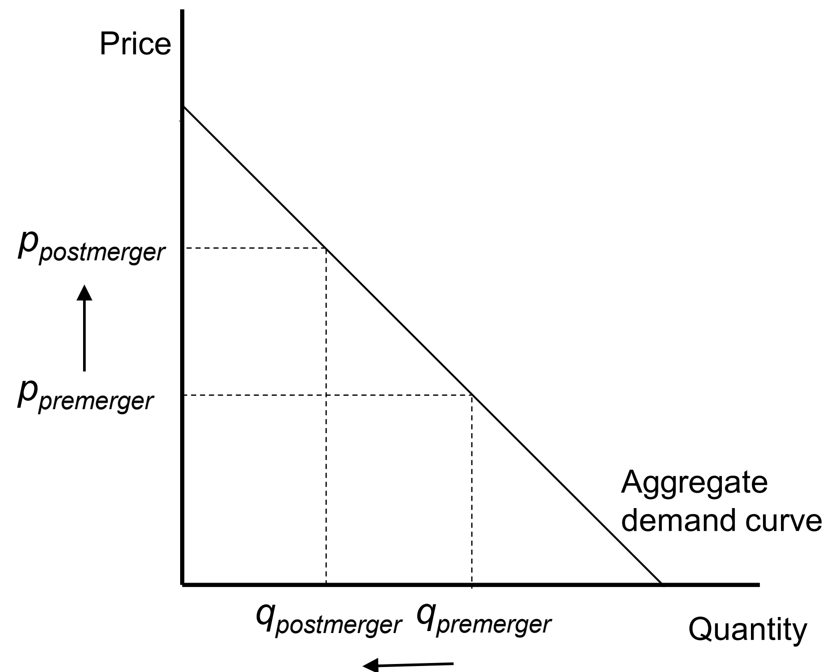
Public Policy behind the Consumer Welfare Standard

Public policy of modern merger antitrust law

- Modern view
  - Mergers are socially bad when they harm consumers (customers) by—
    1. Increasing market price or decreasing market output;
    2. Shifting wealth from consumers to producers; or
    3. Creating economic inefficiency ("deadweight loss")
  - Other potential socially adverse effects when they harm consumers by—
    4. Decreasing marketwide product or service quality
    5. Decreasing the rate of technological innovation or product improvement
    6. Decreasing marketwide product choice
  - This approach to antitrust law is commonly known as the *consumer welfare standard*
    - Animates modern U.S. antitrust law generally
    - Focuses on the efficiency of the market in delivering value to consumers
    - Emerged in the Supreme Court in the late 1970s and in the DOJ/FTC in the early 1980s

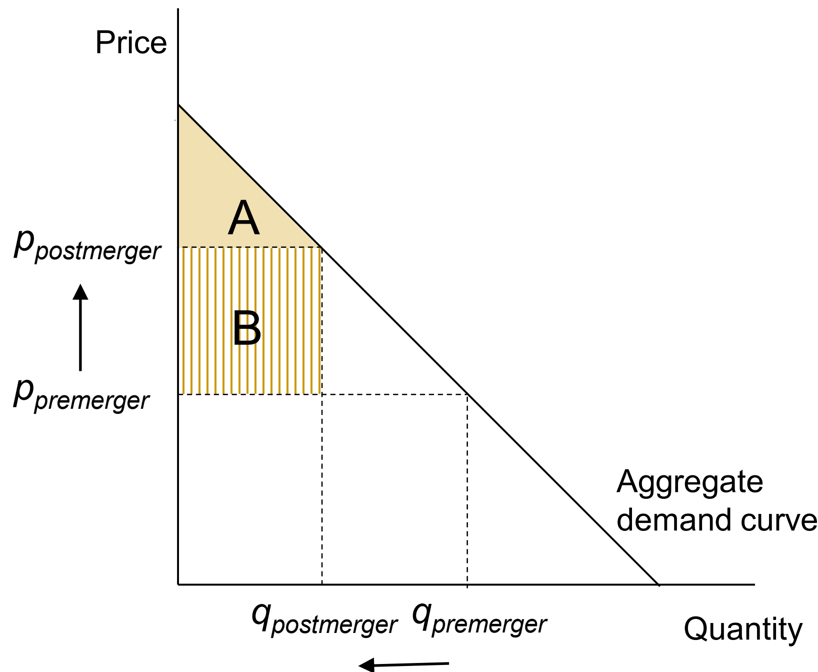
Public policy of merger antitrust law

1. Merger harms consumers by increases the market price or reducing the output available for consumers to purchase



Public policy of merger antitrust law

2. Merger harms consumers by shifting wealth from inframarginal consumers to producers*
   - Total wealth created ("surplus"): A + B
   - Sometimes called a "rent redistribution"



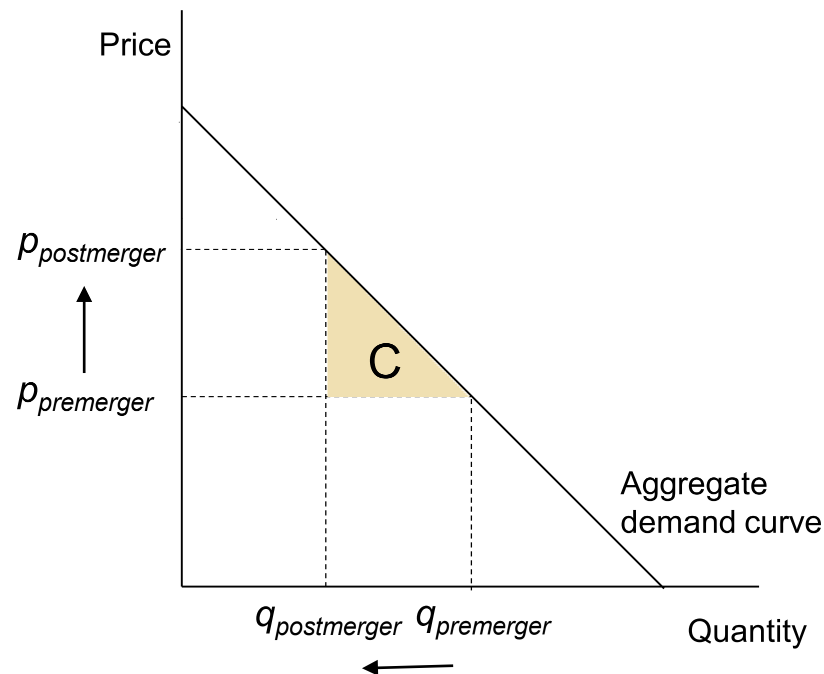
	Premerger	Postmerger
Consumers	A + B	A
Producers	0	B

Think about "consumer surplus" as the maximum amount consumers in the aggregate would be willing to pay above the price that they paid to obtain the product. This is the consumers "gains from trade" from their purchase transactions.

* Inframarginal customers here means customers that would purchase at both the competitive price and the monopoly price

Public policy of merger antitrust law

3. "Deadweight loss" of surplus of marginal customers*
   - Surplus C just disappears from the economy
   - Creates "allocative inefficiency" because it does not exhaust all gains from trade



* Marginal customers here means customers that would purchase at the competitive price but not at the monopoly price