Unit 2:
Predicting Merger Antitrust Law Challenges

Merger Antitrust Law

Fall 2019 Georgetown University Law Center

Dale Collins

August 30, 2019

Topics

- Thinking systematically about antitrust risk
  - Inquiry risk
  - Substantive risk
  - Remedies risk
- Substantive risk
  - The governing statute: Section 7 of the Clayton Act
  - A predictive model
- Synergies/efficiencies
- Putting things together

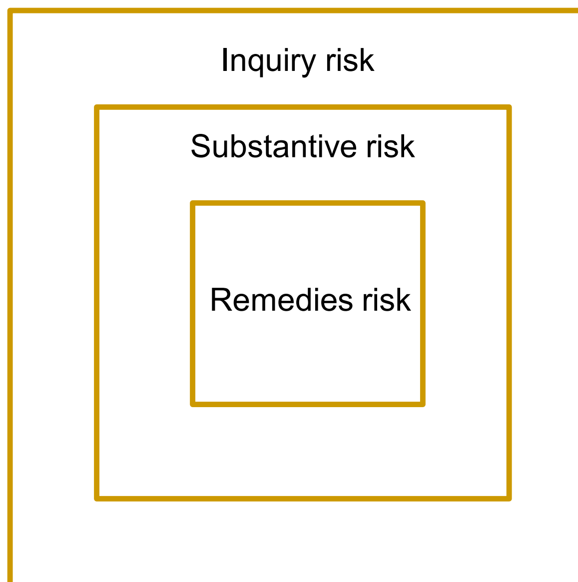
Thinking Systematically about Antitrust Risk

Types of antitrust risks

- *Substantive risk*: The risk that the transaction is anticompetitive and hence unlawful
  - When is a merger anticompetitive?
  - How can we practically assess antitrust risk?
- *Inquiry risk*: The risk that legality of the transaction will be put in issue
  - Who has standing to investigate or challenge the transaction?
  - What is the probability that one of these entities will act?
- *Remedies risk*: The risk that the transaction will be blocked or restructured
  - What are the outcomes of an antitrust challenge?
  - Will the transaction be blocked in its entirety?
  - Can the transaction be "fixed" to alleviate the agency's concerns and if so how?

Types of antitrust risks

- The three risks are nested
  - The substantive risk does not arise unless there is an inquiry
  - The remedies risk does not arise unless the transaction is found to be anticompetitive



But the best way to address the risks is:

- Substantive risk
- Inquiry risk
- Remedies risk

Costs associated with antitrust risk

- Outcome costs—Four possible outcomes:
  1. The investigating agency clears transaction on the merits without taking enforcement action
  2. The parties restructure (“fix”) the deal to eliminate the substantive antitrust concern
     - Restructure the deal preclosing to avoid a consent decree (“fix-it-first”)
     - Post-closing “fix” under a judicial consent decree (DOJ) or a FTC consent order
  3. The investigating agency obtains an injunction from federal district court blocking the closing and the parties subsequently terminate their purchase agreement
  4. The parties voluntarily terminate the deal rather than settle or litigate

Costs associated with antitrust risk

- Delay/opportunity costs
  - Possible delay in the closing of the transaction and the realization of the benefits of the closing to the acquiring and acquired parties
- Management distraction costs
  - Possible diversion of management time and resources into the defense of the transaction and away from running the business
- Expense costs
  - Possible increased financial outlays for the defense of the transaction

Substantive Risk:
Predicting Merger Enforcement Outcomes

The Statutes

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*

Called the *relevant market*

- Other statutes
  - Sherman Act §§ 1-2 and FTC Act § 5 also regulate mergers
  - BUT are either coextensive or less restrictive than Clayton Act § 7

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

Clayton Act § 7

- *Incipiency standard*: The Supreme Court has interpreted the "may be" and "tend to" language in the anticompetitive effects test to:
  - Require proof only of a *reasonable probability* that the proscribed anticompetitive effect will occur as a result of the challenged acquisition[1]
  - Does *not* require proof that an actual anticompetitive effect will occur
- No operational content in the statutory language itself
  - What is a "relevant market"?
  - What does in mean to "substantially lessen competition"?
  - Judicial interpretation has varied enormously over the years

[1] United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957).

Clayton Act § 7

- *Modern view*:[1] Transaction threatens—with a reasonable probability—to hurt some *identifiable* set of customers through:
  - Increased prices
  - Reduced market output
  - Reduced product or service quality
  - Reduced rate of technological innovation or product improvement
  - (Maybe) reduced product diversity[2]

These are called *anticompetitive effects*

A firm that has the power to produce or strengthen an anticompetitive effect is said to have *market power*

- Forward-looking analysis
  - Compare the postmerger outcomes with and without the deal
  - Can view potential competitors today as future competitors tomorrow

[1] The modern view dates from the late 1980s or early 1990s, after the agencies and the courts had assimilated the 1982 DOJ Merger Guidelines.
[2] The idea that reduced product diversity may be a cognizable customer harm was formally introduced in the 2010 DOJ/FTC Horizontal Merger Guidelines. A reduction in product diversity is typically accompanied by a reduction in costs, so the balance of whether a reduction in product diversity can often be difficult to determine and hence is rarely a driver in merger antitrust decision making.

Clayton Act § 7

- Other dimensions of possible anticompetitive effect
  - Historically, there have not been challenges on other dimensions (quality, rate of technological innovation, or product diversity) when there is no alleged price effect
    - Economic theory not well-developed in predicting—
      - Consequences of transaction for nonprice market variables
      - Consequences of changes in nonprice market variables for consumer welfare
    - But adverse effect on other dimensions is frequently mentioned in modern complaints that also allege an anticompetitive price effect
  - *Implication*: Agencies will demand strong direct evidence to proceed on a theory other than a price increase—Most likely will require:
    1. An "admission against interest" by the acquiring company that:
       - The merging companies compete significantly in product quality or innovation,
       - This competition is costly and is materially reducing profits, and
       - A benefit of the transaction will be to eliminate this competition and increase profits by saving costs;
    2. Evidence that the merging companies vigorously compete in the nonprice dimension and that other companies will not replace the nonprice competition lost due to the merger; *and*
    3. Evidence that customers will be significantly harmed by the loss of this nonprice competition
       - Customer harm could be reflected in future increased prices (e.g., as a consequence of reduced competition of reduced cost-reducing innovation)
  - Note: Nonprice competition, especially innovation competition, is an important consideration in Europe

A Predictive Model

But this is all too complicated—

- Basic distinction
  - *Decision making*: How do the agencies decide a merger is anticompetitive merger?
  - *Explanation*: How do the agencies explain why they believe that a merger is anticompetitive?

> - How the agencies (or the courts) explain their decisions often does not reveal why they decided on that particular outcome
> - What you read in judicial opinions may only be a defense of an outcome that the judge reached for other (unexplained) reasons

But this is all too complicated—

- A predictive model
  - What follows in the remainder of this section is the model I use in *predicting* agency enforcement behavior in horizontal merger investigations
    - It works very well
  - The model does not attempt to describe—
    - how the agencies actually work,
    - how they explain their decisions, or
    - how they litigate their decisions in court
  - It is *not* defense-biased, although it may appear so to some on a first reading
    - A biased model is not helpful to the client or the counsel
  - Later in the course, we will examine—
    - how the agencies explain their enforcement decisions, and
    - how they advocate their positions in court

Assessing substantive antitrust risk

- So how do the DOJ/FTC approach merger antitrust investigations?
  - Recall that the purpose of merger antitrust law is to prevent the creation or facilitation of market power to the harm of customers in the market as a whole through—
    - Increased prices
    - Decreased product or service quality
    - Decreased rate of technological innovation or product improvement
    - [Maybe] decreased product variety

Rule 1. Absent compelling evidence of significant customer harm from other sources, only price increases count

  - Economic theory not well-developed in predicting—
    - Consequences of transaction for nonprice market variables
    - Consequences of changes in nonprice market variables for consumer welfare
  - *Implication*: Need strong direct evidence to proceed on a theory other than a price increase

Assessing substantive antitrust risk

- So how do the DOJ/FTC approach merger antitrust investigations?
  - They ask a simple, basic question:

Is the merger likely to result in a price increase or other competitive harm to any identifiable customer group?

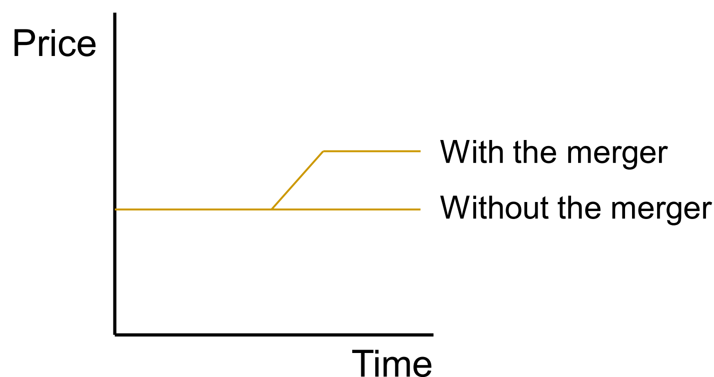
  - If the answer is YES, the investigating agency will find a way to package it into a cognizable theory of anticompetitive merger harm and pursue enforcement action
  - If the answer is NO, the investigating agency will close the investigation without taking enforcement action
- This is *the* central question in merger antitrust analysis
  - It will drive almost everything we do in this course

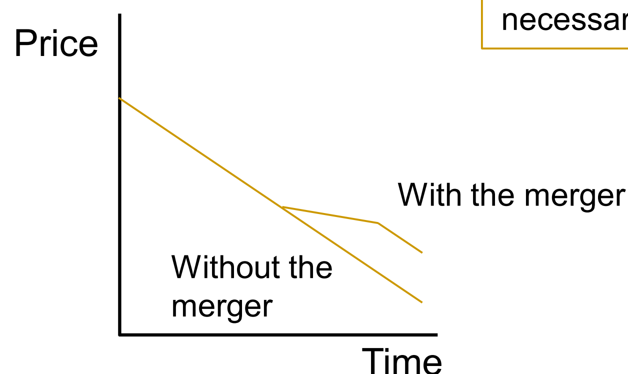
Assessing substantive antitrust risk

- What is a price increase?
  - A price increase occurs as a result of a transaction whenever prices, *going forward*, likely would be higher with the transaction than without it[1]
    - A decrease in the rate of a price decline is regarded as a price increase, even if price levels continue to decline

NB: This is important! Section 7 is an "incipiency" statutes: it looks to *likely* effects, not necessarily certain ones

Examples of Price Increases



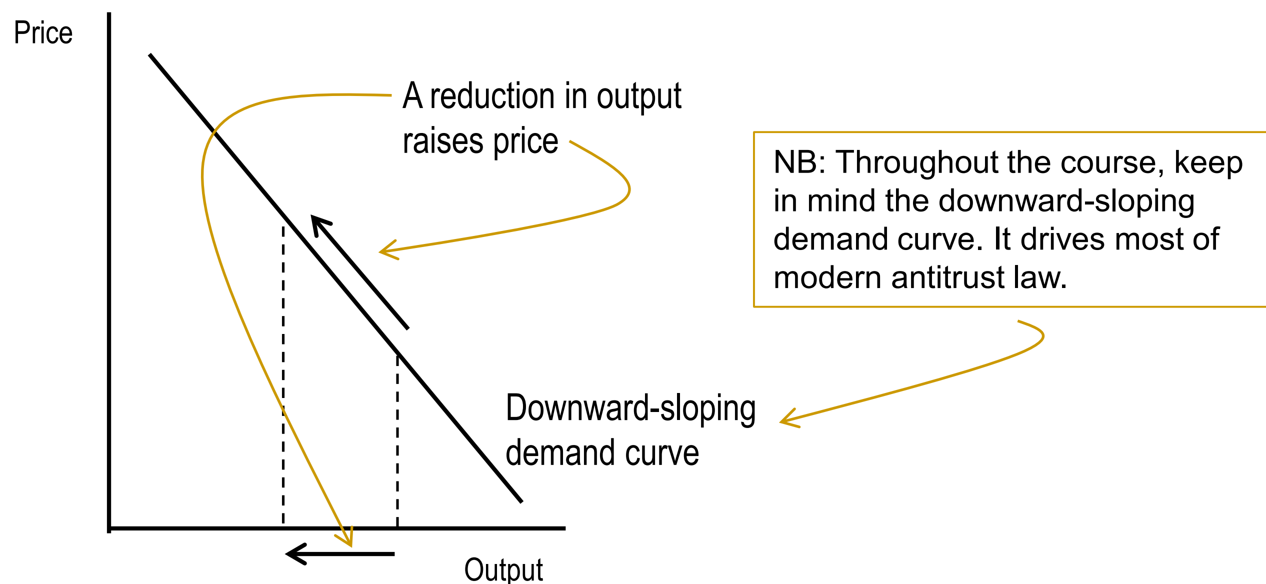


[1] "Likely" in the Section 7 context means "reasonably probable." *See* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957).

Assessing substantive antitrust risk

- What is a price increase?
  - The agencies consider a reduction in market output to be effectively a price increase

A Reduction in Output Implies a Price Increase



- The idea is that when supply becomes limited, the customers who value the product the most bid up the prices. This makes the demand curve *downward sloping*. A downward-sloping demand curve drives most of antitrust economics.
- The *market-clearing price* is the price at which demand is equal to supply

Assessing substantive antitrust risk

- Harm can be to *any identifiable group of customers*
  - Does not have to affect all customers
  - Sufficient if some identifiable group of customers
    - That is, some group that can be characterized systematically
  - Some common groups
    - Customers in a particular geography
    - Customers of a particular type of product
    - Customers of a particular type of product in a particular geography

NB: Should also note that no merger is too small to challenge.

Rule 2. The agencies believe that no customer group is too small to deserve antitrust protection

- If a relevant market is necessary, the agencies will seek to define the market to be the customer group threatened with harm
  - Success in court has been mixed
  - Not always consistent with the market definition paradigms in the case law and 1992 Horizontal Merger Guidelines
  - 2010 Horizontal Merger Guidelines drafted in part to provide more flexibility

Assessing substantive antitrust risk

- The size of the deal is irrelevant.
- In particular:

> *Rule 3. The agencies believe that no merger is too small to challenge*

- Indeed, there are staff members at the agencies who prefer to challenge small deals—or equivalently, small parts of large deals—because the costs of litigation to the parties typically outweigh the benefits they would receive of a successful defense
  - Hence, the merging parties in small deals will often terminate their merger agreement and walk away from the deal at the end of an investigation rather than put the agency to its proof in litigation
  - The merging parties in large deals where the problem areas are small almost always will agree to a divestiture consent decree rather than delay the closing through the end of litigation
    - True even when they have a high degree of confidence that they would prevail in litigation

Assessing substantive antitrust risk

- Interesting factoids in agency prosecutorial decision making
  - Key factors in the decision to challenge horizontal mergers:
    1. The existence of incriminating documents (or occasionally incriminating public statements)
    2. Closeness and uniqueness of competition between the merging parties
    3. The number of other significant competitors
    4. Customer complaints
    5. “Natural experiments” (past events that can be probative of the transaction’s likely effect)
    6. History of actual or attempted collusion/coordination in the market
  - The 2010 DOJ/FTC Horizontal Merger Guidelines are rarely invoked by the agencies or the parties during the agency’s assessment of a transaction
    - The 2010 guidelines are sufficiently unpredictive that they can be used to support any enforcement decision
    - That said, the agencies do invoke the 2010 Guidelines retroactively when explaining an enforcement decision
    - The agencies are also citing the Guidelines in their court filings, and courts are increasingly citing them as “authority” (much to the consternation of defense counsel)
  - Formal market definition and HHIs play essentially no role and are rarely addressed in the investigation (although they are important in litigation)
    - Very information-intensive approach of questionable probative value
    - Consequently, not particularly useful for screening by either agencies or parties

Another basic distinction

- Truth v. evidence
  - The agencies (and the courts) deal in *evidence*
  - Having the truth but being unable to prove it will not win the day
  - The investigating staff also needs evidence to be able to prove its case to the agency decision makers and, if necessary, in litigation

So what are the sources of evidence?

Major sources of evidence

- Ordinary course of business documents of the merging firms
- Company responses to second requests
  - Includes responsive documents and responses to data and narrative interrogatories
- Interviews/testimony/public statements of merging firm representatives
- Interviews with knowledgeable customers
- Interviews with competitors
- Customer and competitor responses to DOJ Civil Investigative Demands (CIDs) or FTC subpoenas
- Analysis of bidding or “win-loss” data
  - Including the ability of customers to play the merging firms off one another
- “Natural” experiments
- Expert economics analysis

Defense menu in horizontal transactions

- In decreasing order of strength—
  1. Parties do not compete with one another
  2. Parties compete only tangentially
  3. Parties compete but have significant other close and effective competitors
  4. Parties do compete and have few existing competitors, but movement into market—
     - is easy (no barriers to entry or repositioning), and
     - would occur quickly if merged company acted anticompetitively
  - Some other reason deal is not likely to harm any group of customers
- Special cases
  - Parties have competed in the past, but because of changing conditions would not compete with each other in the future even absent the merger
    - Includes the "failing company" defense
    - Invoked with some frequency, but almost always fails for lack of convincing evidence

Basic structural test for horizontal mergers

Reduction in Bidders/Competitors*

5 → 4	Usually clears if no bad documents and no material customer complaints
4 → 3	Usually challenged unless there are no bad documents and there is a strong procompetitive business rationale, some customer support, *and* minimal customer complaints
3 → 2	Almost always challenged unless there are no bad documents, and there is a compelling business rational that is strongly supported by customers and no material customer complaints
2 → 1	Always challenged

* Critically, these must be meaningful and effective alternatives from the perspective of the customer; "fringe" firms that customers do not regard as feasible alternatives do not count

- Future competitors
  - Can increase the number of future competitors and reduce antitrust concern
  - If the merger involves a potential competitor, will decrease the number of future competitors and can increase antitrust concern
- The chances of success
  - *improve* if there are demonstrable powerful forces that constrain price increases beyond the mere number of players (e.g., powerful customers, low barriers to entry or repositioning)
  - *decrease* if there are factors that facilitate the exercise of market power in the wake of the transaction (e.g., close and unique competition between the merging parties; merging parties are the largest firms)

Recent tightening in enforcement standards

- Up to 2015, 5 → 4 deals almost always cleared and the chart would be compressed to begin at 4 → 3
- The Trump administration, to the surprise of many, maintained the later Obama administration approach and did not return to the more lenient pre-2015 standards

Exacerbating factors

- Incriminating ("hot") company documents
  - Suggest that a strategy of the merged firm will be to raise prices, reduce production or capacity, or reduce the rate of innovation or product improvement
  - Suggest the merging companies are close competitors of one another in some overlapping product
  - Suggest that customers have few realistic alternatives to merging firm
  - Suggest that the competitors pay attention to each other's prices and—
    - are careful not to destabilize high prices, or
    - have attempted to stabilize prices but failed
  - Suggest that the target company is a "maverick" that does not go along with the higher prices that other companies in the market want to charge
  - Expect these documents to be cited in any complaint challenging the transaction
- Incriminating public statements
  - Occasionally, a senior executive of one of the merging parties (typically the buyer) will make an incriminating statement in a public forum, in the press, or on a blog
  - Expect these documents to be cited in any complaint challenging the transaction

Exacerbating factors

- Customer complaints: Canonical form—
  1. The merging companies are close competitors of one another in one or more overlapping products;
  2. Customer "plays" the companies off one another to get better prices; and
  3. Insufficient number of realistic alternatives to preserve price competition post-merger
  4. Customer conclusion: Customer will pay higher prices as a result of the merger

> Rule 4. Customer complaints are second only to incriminating company documents or statements in their probative value to the DOJ and FTC

- High barriers to entry, expansion, and repositioning
  - Apparent barriers (e.g., high cost, required scale, time, reputation)
  - High gross margins of the merging parties
    - *Idea*: If high premerger gross margins did not precipitate entry, expansion, or repositioning, then a slightly higher margin due to a postmerger anticompetitive price increase is not likely to precipitate this type of market correction either.

Other considerations

- High combined market shares
  - Not helpful to the merging parties
  - BUT not decisive if sufficient (realistic) alternatives exist
- “Dominant” firm
  - If one of the merging firms is dominant (roughly speaking, has a very high market share) in an area of competitive overlap, the reviewing agency will be much more skeptical
- History of industry coordination
  - If there is a history of coordination, much less illegal collusion, among the firms in the relevant market, the reviewing agency will be much more skeptical
- Effect on competitors
  - In U.S., irrelevant unless it hurts customers
  - BUT one of the best predictors of enforcement action in the EU
- Efficiencies
  - Heavily discounted by enforcement agencies
  - BUT important to provide a procompetitive deal motivation

Special cases

1. Unilateral effects: Elimination of "local" competition[1]
   - In differentiated markets, some firms are close competitors with one another while other firms are more distant competitors
     - *Geographic differentiation*: Two pharmacies across the street from each other are closer competitors to each other than a pharmacy 10 miles away
     - *Product differentiation*: A Rolex watch and an Omega watch are closer competitors to each other than a Timex watch is to either, although all three watches tell time
   - *Idea*: The combination of two sufficiently close competitors in a highly differentiated market, where there are few if any other close competitors, can result in the loss of "local" competition without any changes in the behavior by other competitors in the same relevant market
   - Two ways to think about this theory
     - Supports challenges to mergers in large markets where the market shares of the combining firms are small and would not otherwise indicate a competitive problem
     - Often supports defining the relevant market narrowly around the local competition and then applying the basic structural test

[1] Introduced as a concept in the 1992 DOJ/FTC Horizontal Merger Guidelines

Special cases

2. Elimination of a "maverick"
   - A "maverick" is a firm that is particularly disruptive in the marketplace and that plays a significant role in preventing other firms from tacitly coordinating their behavior
     - Maverick firms often have sufficiently small market shares in the range that would not indicate that their acquisition would be otherwise anticompetitive
   - *Idea*: The elimination of a maverick firm through the acquisition of an "establishment" firm
     - will facilitate tacit coordination among the remaining competitors postmerger,
     - resulting in higher market prices or less innovation
   - This is a variant of the coordinated effects theory

   - Final thoughts
     - The notion of a "maverick" is a very ill-defined concept—has a "you know it when you see it" quality
     - May be entirely dependent on the business strategy of the current management

Special cases

3. Elimination of "actual" potential competition
   - An "actual potential competitor" is a firm that has not yet entered the market but will do so shortly in the future and in a substantial way[1]
   - Idea:
     - If premerger the market is performing oligopolistically, the entry of a new competitor is likely to make the market perform more competitively
     - The acquisition of an actual potential entrant by an incumbent firm will eliminate the addition of a new competitor
       - The same would be true if the potential entrant acquired an incumbent firm
     - If entry by other (nonmerging) firms is either distant/not foreseeable or would not be substantial, then the acquisition of the potential entrant means that the market will not become more competitive in the future
     - Since merger antitrust law is forward looking—compares what would happen with the merger to what would happen absent the merger—the acquisition reduces future competition and hence is anticompetitive
   - DOJ/FTC sometimes bring actions on this theory
     - But for the last 35 years all have been settled by consent decree

[1] Although the acquisition of an actual potential entrant by an incumbent firm should be viewed analytically as a type of horizontal transaction, for historical reasons it is viewed as a type of conglomerate transaction and hence is not addressed in either the 1992 or 2010 Horizontal Merger Guidelines.

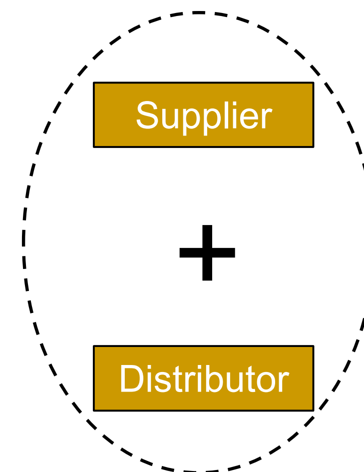
Special cases

4. Elimination of “perceived” potential competition
    - A “perceived” potential competitor is a firm that is perceived by incumbent firms as about ready to enter the market, even if the firm has no intention of entering the market
    - Idea
        - If the market has an oligopolistic structure but incumbent firms have moderated their prices (“limit pricing”) to discourage the perceived potential entrant from actually entering the market, the acquisition of the perceived potential entrant by an incumbent firm will eliminate this threat of entry and allow the incumbent firms to increase their prices
        - The perceived potential must be a uniquely downward price-constraining force: if other perceived potential entrants exist, the incumbent firms will continue to limit price
    - Not seriously used in the U.S. as a theory of anticompetitive harm for over 35 years
        - Required facts are very restrictive and difficult to prove
        - Historically has had limited success in the United States when it was invoked

Special cases

5. Vertical theories
   - A vertical transaction is one where the merging firms are on different levels of the chain of manufacture and distribution of a product and so do not compete with one another
   - Vertical mergers are usually viewed as unlikely to be anticompetitive
   - Some theories of vertical harm[1]
     - Exclusionary effects (foreclosure/raising rivals costs)
       - “Input foreclosure”
       - “Output foreclosure”

       NB: “Foreclosure” in this context is loosely used. It includes competitively disadvantaging rivals by raising their costs as well as complete exclusion from the market.
     - Coordinated effects
       - Elimination/disciplining of new disruptive competition
       - Elimination of a disruptive buyer
       - Create greater firm homogeneity
       - Anticompetitive information conduits



[1] There is no need to know anything now about these theories other than they exist. We will cover them in detail near the end of the course.

Summary: Theories of anticompetitive harm

- Coordinated effects/tacit coordination
- Unilateral effects
- Elimination of a maverick firm
- Elimination of actual potential competition
- Elimination of perceived potential competition (never used)
- Vertical theories

Synergies/Efficiencies

Synergies/efficiencies

- Some definitions
  - *Synergies* (a business term)
    - Benefits from the transaction that lower the combined firms' costs or increase its revenues
  - *Efficiencies*
    - The term used in antitrust analysis for socially beneficial synergies

Efficiencies are relevant to the antitrust analysis only to the extent they are passed on or otherwise benefit to customers

Efficiencies

- Types of efficiencies enabled by the deal
  - Customer value-enhancing efficiencies
    - Make existing product better or cheaper, or
    - Create new products or product improvement better, cheaper, or faster
  - Cost-saving efficiencies
    - Reductions in duplicative costs
    - Increases in the productive efficiency of the combined operation (e.g., through best practices, transfer of more efficient production technology)
  - Anticompetitive synergies
    - Eliminate competition on price, quality, service, or innovation and so increase profits (horizontal theory of anticompetitive harm)
    - Create an incentive and ability to withhold important/ essential products or services used by competitors and so eliminate competition and increase price (vertical theory of anticompetitive harm)

Efficiencies

- Examples of typical efficiencies
  - Lower costs of production, distribution, or marketing
    - Elimination of redundant or higher cost facilities, technologies, and personnel
    - Economies of scale or scope
  - Complementary product lines
    - New or broader product offering desired by customers
    - Better integration between merging products further enhances customer value
  - Accelerated R&D and product improvement
    - Greater combined R&D assets (researchers, patents, know-how)
    - Complementarities in R&D assets
    - Greater sales base over which to spread R&D costs
  - Better service and product support
    - More sales representatives
    - More technical service support

Efficiencies

- Efficiencies play two roles in an antitrust merger analysis
  - They provide an explanation why the acquiring firm is pursuing the deal (and probably paying a significant premium) that does not depend on price increases to customers or other anticompetitive effects
  - In some cases, efficiencies can tip the agencies into not challenging the deal
    - Where efficiencies exist in a problematic market, the procompetitive pressure resulting from the efficiencies can offset any anticompetitive pressure from the elimination of competition
    - Where efficiencies exist outside of the problematic market, the agencies can weigh very large efficiencies outside of the market against very small anticompetitive effects inside the market and exercise their prosecutorial discretion not to challenge the deal
      - As a matter of law, however, efficiencies outside of a relevant market cannot be weighed against anticompetitive effects inside the market

Efficiencies

- To be credited by Investigating agency, synergies must be:
  1. Merger-specific
     - That is, could not be accomplished in the absence of the merger
  2. Verifiable by sufficient evidence
  3. Would completely and immediately be sufficient to offset any anticompetitive tendencies of the merger
  4. Not be the result of an anticompetitive effect of the transaction
- Agency view
  - Efficiencies usually given very little weight in the Obama administration
  - *Query*: What will be the weight given to synergies in the Trump administration?
    - Apparent (surprising) answer: Not much

Efficiencies

- Practice points
  - Efficiencies are very helpful in fashioning a procompetitive narrative
  - But agencies are (irrationally?) skeptical/hostile to the existence of efficiencies
  - Efficiencies will almost never outweigh prima facie evidence of an anticompetitive effect

Structuring the Defense

Canonical structure of a complete defense

1. Describe the parties and the deal
2. Describe the deal rationale
   - Implicit (if not explicit) in the presentation is that customers will benefit and not be harmed by the transaction
   - That is, the profit-maximizing strategy for the combined firm is to shift the demand curve to the right and make money on increased volume, not increased prices
3. Explain that the market will not allow the deal to be anticompetitive
   - That is, customers have alternatives that they can use to protect themselves

Canonical structure of a complete defense

- The best way to assess the substantive risk is to develop the defense with the supporting evidence
- Canonical structure of the initial presentation of a complete defense
  - The parties and the deal
    - Brief overview of the merging parties
    - Brief overview of the deal (including terms, timing, and conditions precedent)
  - The deal rationale
    - Ideally, a rationale that both makes the deal in the profit-maximizing interest of the acquiring company's shareholders and in the interest of customers ("win-win")
    - Include any cost, cross-marketing, or product development deal synergies
  - The market will not allow the deal to be anticompetitive
    - This is equivalent to saying that customers can protect themselves from harm if the merged firm sought to act anticompetitively

The best defense is a good offense:
The transaction is affirmatively procompetitive and *the market would not allow the deal to be anticompetitive even if the combined firm tried*

Some key questions

- All transactions
  - Why are the companies doing the deal? Is the business model behind the combination procompetitive or anticompetitive? How does the buyer expect to recoup any premium paid for the target?
  - Whatever the mechanism, will the combination likely result in increased prices to any identifiable group of customers? (The business people will know.)
  - What cost savings or other synergies are expected from the deal? Can persuasive evidence of likelihood, magnitude, and timing be presented to the agency?
  - Will the deal enhance the ability of the combined company to create better products or services faster or otherwise improve consumer welfare in the long run?
  - What will the customers in the industry say about the deal if asked by the investigating agency?
  - Are there customers that will support the deal? If so, what is the reason for the support?
  - For customers that might complain, is there a way to neutralize their concerns (e.g., extend the term of their premerger contracts to provide additional protection against price increases)

Some key questions

- All transactions (con't)
  - What do the company documents say?
    - About the reason for the deal?
    - About competition between the merging parties (e.g., win-loss data)?
    - About the likely competitive effect of the deal?
    - About the premerger competitive landscape?
  - Does the company have good witnesses?
    - On the strategic rationale and synergies?
    - On each of the business lines likely to be investigated?
  - Same questions on documents and witnesses for the other merging party
  - If the investigating agency wants to challenge the deal, will it have customers that will testify against the deal?
  - Are their competitors or other parties that have the inventive and the wherewithal to work with the investigating agency to develop theories and evidence to challenge the deal?[1]

[1] The U.S. antitrust agencies give little credit to competitor testimony that a deal is anticompetitive. The idea is that an anticompetitive deal is likely to increase market prices and benefit competitors and that the real concern behind most competitor complaints is that the merged firm will become more efficient and procompetitively win business away from the complaining competitor. That said, the agencies are always willing to enlist competitors to help them better understand the market, gain access to industry customers, and generally develop evidence.

Some key questions

- Horizontal transactions
  - Are the merging companies strong and close competitors with one another?
  - How many other effective competitors does each merging party have?
  - Do customers play the merging parties off of one another to get better prices or other deal terms?
  - In bidding situations, do the merging firms frequently bid against one another? How many other bids do they usually face? Do they frequently find themselves competing against one another in the “best and final” round of bidding?
  - Are the conditions in the marketplace conducive to direct oligopolistic coordination on price?
    - If not, is there another mechanism for oligopolistic coordination (e.g., coordinated capacity reductions)?
  - Is the target firm a “maverick” and engage in disruptive market conduct (such as aggressive discounting)?

Some key questions

- Nonhorizontal transactions
  - Potential competition
    - Is either of the merging parties a potential entrant into a market in which the other company is an actual competitor?
    - If so—
      - Is the target market highly concentrated?
      - Is the target market performing more or less competitively or is it performing noncompetitively? (The merging party that is the actual competitor will know)
      - How likely is it that in the absence of the transaction the potential entrant merging party would in fact enter the market and in what scale and in what time frame?
      - Are their other firms equally likely to enter into the market on the same or greater scale and in the same or less time as the potential entrant merging party?
      - What would the effect of this entry be on the performance of the target market?
  - Vertical foreclosure
    - Does one of the merging firms supply an important input or distribution/retail channel to the other merging firm?
    - If so,
      - Could competitors in practice protect themselves from harm in the event of foreclosure or higher input prices (or lower downstream prices) from the combined firm by either (a) dealing with other firms in the market, or (b)vertically integrating into the input or downstream market?
  - Vertical information conduits
    - As a result of the transaction, will one merging party gain greater access to competitively sensitive information of its competitors?