

## MERGER ANTITRUST LAW

LAWJ/G-1469-05  
Georgetown University Law Center  
Fall 2019

Tuesdays and Thursdays, 3:30-5:30 pm  
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### CLASS 15 WRITTEN ASSIGNMENT

#### Instructions

Submit by email by 3:30 pm on Thursday, October 24  
Send to [dale.collins@shearman.com](mailto:dale.collins@shearman.com)  
Subject line: Merger Antitrust Law: Assignment for Class 15

#### Assignment

##### Part 1. Calls for a memorandum to a partner (which may be sent to a client)

John Clark, a partner in Able & Baker LLP with whom you work, has read your memorandum on the role of the *Brown Shoe* factors in product market definition. He now would like for you to write a separate memorandum on the hypothetical monopolist test in product market definition under the 2010 DOJ/FTC Horizontal Merger Guidelines. Once again, he is planning on sending the memorandum to the client, so it needs to be concise and clear to an intelligent lawyer but one unskilled in merger antitrust law. You may assume that that the client has read your *Brown Shoe* memorandum, so there is no need for you to cover the Section 7 basics on market definition again. However, Clark has asked that the memorandum cover what is the hypothetical monopolist test, the theory behind the test and to provide a simple example of how the test might be used in practice.<sup>1</sup>

##### Part 2. Calls for answers to the following questions<sup>2</sup>

1. Products A and B are being tested as a candidate market. The market price for each unit of either product is \$300, each type of product as a constant incremental cost of \$160 per unit and aggregate sales of 1000 units. When the price for both products is increased by \$15, each firm loses 100 units to products other than A and B. What is the critical loss for the candidate market of products A and B? Do A and B constitute a relevant market under the hypothetical monopolist test using critical loss analysis and SSNIP of 5%?

2. In *FTC v. Occidental Petroleum Corp.*, No. 86-900, 1986 WL 952 (D.D.C. Apr. 29, 1986), the FTC challenged the pending acquisition by Occidental Petroleum, a major producer of

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<sup>1</sup> You do not have to make up your own example, but you may do so if you like. Feel free to use an example in the notes, in the Horizontal Merger Guidelines or one you find on the internet. The point of the assignment is not to test your creativity in creating examples, but rather your ability in explaining one.

<sup>2</sup> Use the probability version of the hypothetical monopolist test.

polyvinyl chloride (“PVC”), of Tenneco’s PVC business. Both companies produced PVC in plants in the United States. The parties agreed that the relevant product markets were suspension homopolymer PVC and dispersion PVC, and the PI proceeding focused largely on the relevant geographic market. The FTC alleged that the relevant geographic market was the United States for both types of products; the merging parties argued that the relevant geographic market was worldwide. In the Section 13(b) proceeding for a preliminary injunction, the evidence showed that if the price of all suspension homopolymer PVC produced in the United States was increased by 5%, U.S. customers would divert about 17% of their purchases to imports from foreign suppliers (who were ready to serve these customers). The evidence also showed that if the price of all dispersion PVC produced in the United States was increased by 5%, U.S. customers would divert about 12% of their purchases to imports from foreign suppliers (again, who were ready to serve these customers).<sup>3</sup> The evidence in the hearing also showed that the percentage gross margins for homopolymer PVC and dispersion PVC were 28% and 45%, respectively. Was the FTC correct that the relevant geographic market was the United States using the hypothetical monopolist test and a SSNIP of 5%?

3. Premium ice cream sells at \$4.00/pint and has a constant marginal cost of \$2.25/pint. The own-elasticity of aggregate demand for premium ice cream is -1.9, with almost all diversion going to regular ice cream. Two premium ice cream manufacturers proposed to merge. Is premium ice cream a relevant product market under the hypothetical monopolist test under a 5% SSNIP, or should the market be expanded to include regular ice cream?

If you have any questions, send me an e-mail. See you in class.

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<sup>3</sup> I have made up some of the facts here, but the hypothetical is consistent with the results in the case.