MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2017

Tuesdays and Thursdays, 3:30-4:55 pm
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Links to the required reading and the class notes may be found on the assignments page of Canvas and on the Merger Antitrust Law page of AppliedAntitrust.com.

Class 16 (October 24): H&R Block/TaxACT (Unit 4)[1]

We will continue with a discussion of the market definition in the H&R Block/TaxACT decision (pp. 69-104). Pay close attention to how the court used the facts and the expert testimony in deciding on market definition. Be sure to study Section 4 in the 2010 DOJ/FTC Horizontal Merger Guidelines and the class notes on market definition. Most of the deck is straightforward and will be mostly familiar read, but pay close attention to the slides on critical loss and the aggregate diversion ratio at the end.[2] These concepts come up frequently in the opinions (including H&R Block) and are becoming two of the standard methods of proving the boundaries of the relevant market.[3]

When you finish market definition, you should take a break from the opinion and read the note on expert evidence (pp. 162-69). Expert testimony is essential in antitrust case in general, and merger antitrust cases in particular, which makes familiarity with the rules governing expert testimony equally essential. Then read the Memorandum Opinion and Order Denying Motion In Limine (pp. 147-61) to see how the court handled the DOJ's effort to exclude evidence of the email survey commissioned by the defendants and the portions of Dr. Meyer's testimony that relies on the survey.

Although we may not get to it on Tuesday, read the portion of the H&R Block/TaxACT opinion dealing with competitive effects through coordinated effect (pp. 104-121). I would then read Section I would then read the deck on anticompetitive effect in horizontal mergers. The early part of the deck should be easy going as it simply is a review of materials we have already covered. Be sure you have a good sense of how the HHIs work and how the court applied them in the case (slides 15-17). The section on coordinated effects deserves more attention, since it explores this theory of anticompetitive harm in more detail than we have yet seen. You can just

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[1] A reasonably set of the most important filings in the litigation (including thee trial transcript) may be found here on AppliedAntitrust.com.

[2] In the October 20 version of the deck I have added a few new slides that you should review. New slide 14 makes the important point that the question under the hypothetical monopolist test is whether the hypothetical monopolist "would likely impose at least" a SSNIP, not whether it could. The difference matters only if a SSNIP would be profitable, but the profit-maximizing price increase would be below the SSNIP. Also, there are some new slides at the end of the critical loss section that discuss critical elasticity and give an example.

[3] In a homogeneous candidate product market with symmetrical firms, each with a percentage gross margin *m*, and given the actual loss from a SSNIP or the own-elasticity of demand for a candidate market, you should be able to determine whether the candidate market satisfies the hypothetical monopolist test.

skim the slides on the Cournot model (slides 31-33), which provide some of the theoretical basis for the profit-concentration hypothesis, and you should at least be aware of and understand the last formula on slide 33 even if you do not go through the derivation. Pay some attention to the theoretical and empirical criticisms of the profit-concentration hypothesis (a good antitrust lawyer should know what there are).

This is probably further than we will get on Tuesday. In preparing for Thursday, read the section of the opinion on unilateral effects (pp. 121-33), Section 6 of the 2010 Merger Guidelines on unilateral effects, and the class notes (slides 53-72). Unilateral effects is the primary theory of anticompetitive harm employed by the agencies in their merger investigations. It is hard to find a merger review, much less a litigated case, that did rely on this theory. So it is important that you understand the theory and its application. Try to wade through the math on slides 61-64 so that you can see the difference between the profit-maximizing first order condition for a single firm premerger and the profit-maximizing first order conditions for the combined firm postmerger and how to interpret the terms in the first order condition (bottom of slides 63-64). This is the heart of the unilateral effects theory. Study the numerical example and the charts on slides 65-67. You can just skim the explication of the unilateral effects (slides 68-69).

Another tool used in applying the unilateral effects theory the GUPPI, *the gross upward pricing pressure index*. This is very closely related to the UPP (upward pricing pressure) we saw in the history deck in the slides on the 2010 DO/FTC Horizontal Merger Guidelines (you might want to go back and review those). It is important that you study the slides and understand the example (slides 70-72).

We are unlikely to get any further than this on Thursday. If on Tuesday we are progressing faster than I anticipate, we can add more reading. The rest of the opinion and the deck are important but easy.

Enjoy the reading! Email me if you have any questions.

Dale