MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30-4:55 pm
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READING GUIDANCE

Class 1 (August 28): Predicting Merger Antitrust Challenges (Unit 1)[1]

Welcome again to the course. Links to the required reading and the class notes for the first class are embedded in this note and also may be found on Canvas and on the Merger Antitrust Law page of AppliedAntitrust.com. This memorandum gives you my thoughts on how you should approach these materials.

There are two types of reading in this course. *Reading materials* for the most part will be the primary source material. *Class notes* are outlines in PowerPoint that cover topical areas in the course. Class notes will often cover more than we will have the time to discuss in class. You are responsible for everything in the class notes (except any slides marked "optional") whether we cover it in class or not.

Federal merger antitrust statutes. The Unit 1 reading materials start with the major substantive provisions of the federal antitrust statutes that regulate mergers and acquisitions (pp. 4-5). If you are used to reading modern statutes, you should find the form of the federal antitrust statutes quite interesting. The antitrust statutes enable one of the country's most significant types of economic regulation, yet instead of taking 1000s of pages of text as do many modern statutes the substantive provisions of the antitrust laws take a little more than a page. You might also note that they do not give you a clue about what conduct or transactions are prohibited.

The next group of statutes creates the governmental and private causes of action to enforce the federal antitrust laws (pp. 6-8). A cause of action enables the plaintiff to bring its claims for adjudication to a federal court and empowers the court to adjudicate the claims and provide sanctions or relief. As you will see as we go through the course, we will focus on procedure as much as substantive law and economics.

I should note that the federal antitrust laws do not preempt state antitrust laws, and many—but not all states—have enacted antitrust statutes that apply to mergers. The substantive provisions of these state statutes, however, are not more restrictive than Section 7 of the Clayton Act, which is the principal federal merger antitrust statute. As a result, there is no need to cover state merger antitrust law separately.

The institutional setting. After reading the statutes, I would read slides 3-17 of the class notes on the institutions of antitrust law enforcement in general and merger antitrust law enforcement in particular. An understanding of this setting is critical to the practice of merger antitrust law.

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[1] Like most antitrust lawyers, I use the term "mergers" loosely to mean all types of formal structural combinations and includes, for example, mergers under state law, asset acquisitions, stock acquisitions, and structural joint ventures where the joint venture partners integrate some of their businesses or assets. The formal structure of a combination is rarely important in assessing the legality of the combination under the merger antitrust laws.

DOJ/FTC merger review process. The Antitrust Division of the Department of Justice and the Federal Trade Commission review large mergers and acquisitions under the Hart-Scott-Rodino Act (pp. 9-10 of the reading materials and slides 18-21 of the class notes). We will explore this process in much more detail in Classes 4 and 5, but it is important to be aware of the basics of the process now.

Goals of merger antitrust law. As noted above, the language of the antitrust statutes do not give much insight into what conduct might violate the law. This has been an intentional feature of the antitrust laws since the Sherman Act was passed in 1890. On numerous occasions the supporters of the Sherman bill assured the Senate and the House of Representatives that they were merely seeking to enable federal courts to apply the common law to anticompetitive business activities.[2] The framers of the Sherman Act found the common law approach appealing both because it provided a body of law familiar to courts and lawyers that they could immediately apply (although there was some dispute over the details) *and* because it could be continuously adjusted by the courts using the common law process to cope with emerging new business practices as well as changes in the political conception of what the antitrust laws are supposed to accomplish.

This common law approach is fundamental to U.S. antitrust law. The excerpt from the Baxter article (pp. 12-25) develops this idea and is an easy read. From a practical perspective, the common law approach to antitrust law invites enforcement officials, private plaintiffs, and defendants to make arguments to the courts that they should abolish or reformulate some then-existing judicially created antitrust rule or statutory interpretation. For example, prosecutors may argue that Section 7 should be interpreted to extend the law to make unlawful some transaction that does not appear to violate the existing interpretations of the statute, while defense lawyers may argue that the interpretation of Section 7 should be limited so that a transaction apparently unlawful under the existing rules should be found to be lawful. No other area of federal statutory law permits the courts greater flexibility to change the law without the intervention of Congress.

Merger antitrust law has evolved enormously since 1890 (slides 22-43). The excerpt from the Supreme Court's 1950 *Brown Shoe* opinion (pp. 26-29) introduced a conception of the merger antitrust laws as preventing increases in industrial concentration, protecting small businesses, and preserving local control of business. This conception governed merger antitrust law and enforcement until the early 1970s, when a new conception began to emerge that sought to make mergers unlawful only when they impaired economic efficiency or decreased consumer welfare. In merger antitrust law, the first systematic government articulation of this new view was in the introduction to the DOJ's 1982 Merger Guidelines (pp. 32-33), which were written under Baxter's direction.[3] Over the next ten years and without the intervention of Congress, the courts

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[2] *See, e.g.*, 20 CONG. REC. 1167 (Jan. 25, 1889), 21 CONG. REC. 2456, 2457, 2561, 2563 (Mar. 21, 1890) (remarks of Sen. John Sherman (R. Ohio)); *id*. at 3146, 3152 (Apr. 8, 1890) (remarks of Sen. George F. Hoar (R., Mass.)).

[3] The Department of Justice and the Federal Trade Commission have issued "merger guidelines" to inform the business community and the bar of how they would exercise their prosecutorial discretion in assessing whether to challenge transactions. The first set of merger guidelines were issued in 1968 by the Department of Justice. *See* U.S. Dep't of Justice, Merger Guidelines (May 30, 1968). The guidelines were revised by Baxter in 1982 and covered both horizontal and nonhorizontal transactions. *See* U.S. Dep't of Justice, Merger Guidelines (June 14, 1982) (published at 47 Fed. Reg. 28,493). The FTC refused to join the 1982 guidelines and issued their own separate statement of how the Commission would assess mergers and acquisitions. *See* Fed. Trade Comm'n, Statement Concerning Horizontal Merger Guidelines (June 14, 1982). After a minor revision in 1984, the guidelines were significantly revised in 1992. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (Apr.

gradually recognized efficiency and consumer welfare as the goals of antitrust law and reinterpreted the law accordingly. The view remains intact today, as reflected in Section 1 of the DOJ/FTC 2010 Horizontal Merger Guidelines (pp. 34-36).

We will spend much of the course examining rules that derive from this efficiency/consumer welfare perspective as well as arguments to change some rules or apply new economic tools to develop and promote efficiency and consumer welfare. For that reason, pay particular attention to slides 39-43. We will review these briefly in class just to make sure that everyone gets the concepts.

We also will touch briefly on the emerging the progressive critique that accepts efficiency and consumer welfare as appropriate goals but argues that the courts have failed to apply antitrust law sufficiently aggressively to advance these goals, as well as the populist critique that efficiency and consumer welfare need to relegated to being only one of the goals of antitrust law, that other goals—including eliminating structural monopolies and promoting the "competitive process" even when they do not have a demonstrable adverse effect on efficiency or consumer welfare—need to be included, and that current antitrust rules need to be accordingly refashioned.

The TransDigm/Takata case. The final section of the reading is the news release announcing TransDigm's pending acquisition of Taketa's aerospace business, the DOJ's complaint challenging this acquisition, and a news release reporting on the subsequent divestiture of the acquired assets to management (pp. 38-56). We will use this transaction to organize the class discussion on Tuesday, so these materials are worth a careful read. They are also the basis for the Class 1 written assignment. Be sure to bring a copy of the TransDigm complaint to class.

As you read the TransDigm/Takata case study, think about the following questions (not all of which are answered in the materials):

1. What is the transaction in issue?
2. Who is the buyer?
3. Who is the seller?
4. Who is the target?
5. Is this a horizontal, vertical, or conglomerate transaction?
6. Why did the buyer want to buy?
7. Why did the seller want to sell?
8. What antitrust statute(s) does the complaint apply to this transaction?
9. What other antitrust statute(s) could the transaction implicate?
10. What are the elements of a prima face case of a Section 7 case?
11. What is the public policy concern animating Section 7?

2, 1992). Although the 1992 guidelines reflected the same conception of the goals of merger antitrust law as the 1982 guidelines, they were limited to horizontal transactions. The 1992 guidelines significantly enhanced the economic techniques to analyze horizontal mergers. Significantly, the FTC joined in issuing the 1992 guidelines. The guidelines were again revised in 2010. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (rev. Aug. 19, 2010). The 2010 guidelines, which continue to be limited to horizontal transactions, remain in effect today.

12. What were the particular concerns about this transaction?
13. Who is the plaintiff in this case?
14. What gives this plaintiff a right of action to bring the case?
15. Who is the defendant in the case?
16. Was this transaction challenged prior to or after consummation?
17. When did the transaction close?
18. What relief is the plaintiff seeking?
19. Could the DOJ have sought other types of relief?
20. Who else could have brought a Section 7 challenge against the transaction and what kinds of relief could these other plaintiffs seek?
21. How did the DOJ find out about this transaction?
22. Why didn't the DOJ learn about the transaction through an HSR filing?
23. What did the DOJ do after it learned about the transaction?
24. In which court was the action brought?
25. What was the gravamen of the complaint?
26. What were the alleged relevant geographic market(s)?
27. What is the purpose of defining relevant markets in merger antitrust cases?
28. What happened as a result of the DOJ's investigation and complaint?

If you have any questions or comments, send me an e-mail. See you on Tuesday, August 28.

Dale