

MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:00-5:00 pm
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READING GUIDANCE

Class 1 (August 31): Introduction to Merger Antitrust Law: TransDigm/Takata (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](http://www.appliedantitrust.com) page of [AppliedAntitrust.com](http://www.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 primary source materials. *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 sections marked “optional”) whether we cover it in class or not.

Federal merger antitrust statutes. First, read the major substantive provisions of the federal antitrust statutes that regulate mergers and acquisitions (pp. 6-7 in the [Unit 1 reading materials](#)) and the related slides in the [Unit 1 class notes](#) (slides 4-13). Obviously, the language of the statutes that create the antitrust violations are fundamental to this course and you should read them with care. 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 hundreds if not thousands 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 on their face they do not give you a clue about what conduct or transactions are prohibited. To inform the business community (and, for that matter, the enforcement agency staff) of how they will exercise their prosecutorial discretion in challenging mergers, the Department of Justice Antitrust Division and the Federal Trade Commission, the two federal agencies with general antitrust enforcement authority, have issued merger guidelines (slides 14-18). We consider these guidelines in detail throughout the course, but the slides for today will give you some important history.

Federal antitrust procedural statutes. The next group of statutes creates the governmental and private causes of action to enforce the federal antitrust laws (pp. 7-10). 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. It is important

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.

that you get a general sense of these procedural provisions now, but you can leave a more detailed understanding of them until we return to take up merger antitrust litigation in Class 5.

As you know, a number of bills have been introduced in both the House of Representatives and the Senate to amend the antitrust statutes both substantively and procedurally. Some of these bills apply to mergers and acquisitions. At this point, especially with the filibuster still in place, it is not clear which, if any, of these bills will be enacted into law. However, the sophisticated practitioner should know about possible legislative changes and be prepared to discuss their implications if enacted with clients. We will look at the various legislative proposals broadly in Class 2 and then focus more on the details throughout the course when a bill would amend the current law we are studying.

I should also note that the federal antitrust laws do not preempt state antitrust laws, and many—but not all—states have enacted their own 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 and states routinely challenge transactions in federal court using Section 7. As a result, there is no need to cover state merger antitrust law separately.

The institutional setting. Next, read the remainder of the slides on the institutions of antitrust law enforcement in general and merger antitrust law enforcement in particular (slides 19-24) and on the organization of the Antitrust Division and the FTC (slides 25-32). An understanding of these materials is essential to the practice of merger antitrust law.

DOJ/FTC merger review process. The Antitrust Division and the FTC review large mergers and acquisitions under the Hart-Scott-Rodino Act (pp. 12-13 and slides 33-36). We will explore merger reviews in much more detail in Class 4, but it is important to be aware of the basics of the process before you get into the case study.

The TransDigm/Takata case study. The final section of the required reading is our first case study. The reading consists of 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. 169-90). We will spend much of the first two classes discussing the challenge to the transaction. 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 but all of which we will address in class):²

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?

² This is not a homework assignment. All homework assignments will be in a separate document labelled as such.

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 violation?
11. What is the public policy concern animating Section 7?
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 before 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. I look forward to seeing you in class on Tuesday, August 31.

Dale Collins