

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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Class 18 (November 2): Sysco/U.S. Foods (Unit 10)¹

On Tuesday, we will turn to the FTC's challenge to the Sysco/U.S. Foods. Quickly review the merger litigation deck (Unit 5 class notes), especially the slides on the FTC litigation process (Unit 5 slides 15-16, 22-25) and on preliminary injunction proceedings under Section 13(b) of the FTC Act (Unit 5 slides 27-41). You will recall that FTC merger challenges proceed simultaneously on two tracks: (1) a preliminary injunction track in federal district court under Section 13(b), and (2) an administrative track for adjudicating the case on the merits before an administrative law judge (ALJ). Notwithstanding the two tracks, almost all FTC preclosing challenges are decided in the preliminary injunction proceeding. The parties have always voluntarily terminated the deal if the preliminary injunction is granted, and, at least for the last 25 years or so, the FTC has dismissed the administrative complaint if the preliminary injunction is denied (although sometimes the losing party takes an appeal).

The standard of a preliminary injunction under Section 13(b) has a different articulation than the standard under Section 15 of the Clayton Act, which applies to challenges brought by the Department of Justice. There is an ongoing debate whether the difference in the articulation means a substantive difference in the standard.

Section 15 invests federal district courts "with jurisdiction to prevent and restrain violations of the Clayton Act in cases brought by the Department of Justice and authorizes the district courts in such cases to "make such temporary restraining order or prohibition as shall be deemed just in the premises." This language authorizes the courts to grant preliminary injunctions. Under Section 15, courts apply the traditional equity standard for preliminary injunctions, namely the showing that (1) the government is likely to succeed on the merits at trial, (2) the balance of equities tips in the government's favor, and (3) the grant of the injunction is in the public interest. In government cases, there is no requirement of showing irreparable injury, and if a likelihood of success on the merits is shown, the public equities of preventing a likely anticompetitive merger will invariably outweigh any private equities of the parties and make the injunction in the public interest (although the courts may give lip service to the requirement). (Unit 4A slide 35)

By contrast, Section 13(b) authorizes federal district courts to issue preliminary injunctions in merger antitrust case brought by the FTC when "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest" (Unit 4A slides 36-38). Although courts could have implemented Section 13(b) using the traditional test for preliminary injunctive relief in government cases, perhaps in deference to the

¹ A reasonable complete set of the most important filings in the litigation may be found [here](http://www.appliedantitrust.com) on AppliedAntitrust.com.

FTC's status as an "expert agency" that will (in theory) ultimately decide the merits, the courts have allowed the FTC to meet the statutory requirement of a showing of a likelihood of success on the merits by presenting evidence that "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."² Judicial practice in treating the equities is the same in FTC cases as it is in DOJ cases.

The "serious question" articulation has led to a widely held view that the FTC can obtain a preliminary injunction *without* showing a likelihood of success on the merits. You can see an example of this view in the FTC's brief in support of a preliminary injunction in the *Ardagh* case (Unit 5 reading materials pp. 29-37) as well as Ardagh's effort to pull the standard back into the more traditional test (Unit 5 reading materials pp. 38-44).

I believe that, regardless of what judges say in their opinions, behind the scenes they in fact apply the same test to DOJ and FTC merger challenges. The judges, at least in the District of Columbia where most merger challenges are brought, also understand the almost inevitable consequences of a preliminary injunction decision for the deal and—although never expressed in a preliminary injunction opinion—apply a full merits test when deciding a motion for a preliminary injunction.

Sysco/US Foods introduces targeted buyers and price discrimination, so carefully read Section 3 of the 2010 Horizontal Merger Guidelines (pp. 6-7). Powerful customers are also part of the case, so review Section 8 of the Guidelines (p. 8). I have included in the reading the usual introductory materials (pp. 10-50), but given that we are only going to spend only one class on the case, feel free to skip these pages altogether. Please read the press release and excerpt from the Form 8-K on Sysco's agreement to sell 11 US Foods distribution centers to the Performance Food Group conditioned on the consummation of the Sysco/US Foods merger (pp. 51-57). This agreement was signed before the HSR waiting period had expired (or at least before the timing agreement had expired) and the FTC filed its petition for a preliminary injunction 17 days later. Be prepared to discuss your thoughts in class as to why Sysco entered into this agreement.

Read the materials on the litigation (pp. 58-197), focusing on the Memorandum Opinion. We will spend the bulk of the class discussing the organization of the opinion and the court's analysis of the evidence and the arguments justifying its entry of a preliminary injunction. The opinion introduces four concepts that we have not yet discussed: (1) cluster markets in product market definition, (2) targeted customer markets in product market definition, (3) defining geographic markets when suppliers travel to customers, and (4) the "second price auction theory" of unilateral effects. The class notes examine each of these concepts in addition to analyzing the flow of the argument in the opinion. I would read the class notes straight through after you have read the opinion.

Shortly after the court entered the preliminary injunction, the parties terminated their acquisition agreement without taking an appeal and the FTC dismissed its administrative complaint

² FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984) (collecting citations); *accord* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.); *id.* at 1042 (Tatel, J.); FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001); FTC v. Staples, Inc., No. CV 15-2115 (EGS), 2016 WL 2899222, at *6 (D.D.C. May 17, 2016); FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 30 (D.D.C. 2009).

(pp. 198-208) So, again, feel free to skip these materials. The Sysco stock chart, however, is worth a glance (p. 209).

Given the length of the materials, there is no homework assignment for this class.

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