MERGER ANTITRUST LAW

Unit 1: Introduction to Merger Antitrust Law: TransDigm/Takata

Class 1

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Fall 2022

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Federal Merger Antitrust Statutes

THE FEDERAL MERGER ANTITRUST STATUTUES

Substantive Prohibitions

Clayton Act § 7. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. [15 U.S.C. § 18]

[*Remainder of section omitted*]

Sherman Act § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1]

Sherman Act § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2]

FTC Act § 5. Unfair methods of competition unlawful; prevention by Commission [1]

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. [15 U.S.C. § 45(a)(1)]

[*Remainder of section omitted*]

Causes of Action

Sherman Act § 4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. [15 U.S.C. § 4]

Clayton Act § 4. Suits by persons injured

(a) *Amount of recovery; prejudgment interest*. Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [prejudgment interest provision redacted] [15 U.S.C. § 15(a)]

[*Sections 4(b)-4(c) omitted*]

[1] Technically, Section 5 of the FTC Act is not an antitrust law. Section 1 of the Clayton Act defines "antitrust law" to include only the Sherman Act, the Clayton Act, and the import cartel provisions of the Wilson Tariff Act, Act of Aug. 27, 1894, ch. 349, §§ 73-76, 28 Stat. 509, 570, *as amended by* Act of Feb. 12, 1913, ch. 40, 37 Stat. 667 (current version found at 15 U.S.C. §§ 8-11). 15 U.S.C. § 12.

Clayton Act § 4C. Actions by State Attorneys General

(a) Parens patriae; monetary relief; damages; prejudgment interest

(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title [the Sherman Act]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity. [15 U.S.C. § 15c(a)(1)]

Clayton Act § 15. Restraining violations; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof. [15 U.S.C. § 25]

Clayton Act § 16. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring

suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. [15 U.S.C. § 26]

FTC Act § 5. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) [*Substantive prohibition—see above*]

(2) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations [with limited exceptions] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) – (4) [*Omitted*]

(b) *Proceeding by Commission; modifying and setting aside orders*. Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. [*Remainder of subsection omitted*]

[*Remainder of section omitted* [2]]

FTC Act § 13(b). Power of Commission; jurisdiction of courts

(b) *Temporary restraining orders; preliminary injunctions*. Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

2. The remainder of Section 5 sets for the procedure for the Commission to adjudicate alleged violations of Section 5. The only relief the Commission may enter is a *cease and desist order*, which is essentially an injunction.

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28.[3] In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found. [15 U.S.C. § 53(b)]

Clayton Act § 11. Enforcement provisions

(a) *Commission, Board, or Secretary authorized to enforce compliance*. Authority to enforce compliance with sections 13, 14, 18 [Clayton Act § 7], and 19 of this title [the Clayton Act] by the persons respectively subject thereto is vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to part A of subtitle VII of title 49; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: [*Remainder of section adopts the same quasi-adjudicative process that the Commission uses to enforce FTC Act § 5*]. [15 U.S.C. § 21]

[3] Section 1391 is the federal general venue statute. *See* 28 U.S.C. § 1391.

Merger Review Process

THE MERGER REVIEW PROCESS[1]

Summary of the Hart-Scott-Rodino Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976[2] and its implementing regulations require that the parties to sufficiently large mergers, consolidations, tender offers, private or open-market purchases, asset acquisitions, joint ventures in corporate form, and certain other types of ownership integrations or transfers must:

1. file a notification report form with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission before closing their transaction, and
2. observe a postnotification *waiting period* before the transaction can be consummated.

The HSR Act does not change the standards of substantive merger antitrust law, nor does it provide any remedies for anticompetitive mergers. Rather, the HSR Act simply provides the federal antitrust enforcement authorities with an opportunity to learn about and review major transactions before they are consummated.

The notification must be made on a form (not surprisingly called an "HSR form") prescribed by the federal enforcement agencies. The HSR Act provides for an *initial waiting* period of 30 calendar days (15 days for all-cash tender offers) following the filing of the notification. The act authorizes the investigating agency to request additional documents and data from the reporting parties during the initial waiting period. This request, almost universally called a *second request*, extends the waiting period for the time it takes the parties to comply plus an additional waiting period, called the *final waiting period*, of 30 calendar days (10 days for all-cash tender offers). Second requests tend to be enormously burdensome, both because a second request may only be issued once to each reporting party, so investigating agency has an incentive to ask for everything conceivably relevant to its investigation, and because the length of time the agency has to investigate the transaction is largely a function of the length of time it takes the parties to respond. It is not unusual for the response to a second request to include well over a million documents. Even so, most companies doing sophisticated transactions today can comply with a second request in six weeks to four months. If it takes the parties 10 business days to make their HSR notifications, then the total time from signing to the end of the final waiting period can be as little as four to sixth months (= 0.5 months before filing + 30 days for the initial waiting period + 1.5-4 months for second request compliance + 30 days for the final waiting period). That said, many parties take eight to ten months or more to comply with their second

1. We will examine the HSR Act and the merger review process in some detail in Unit 3.

2. Hart-Scott-Rodino Antitrust Improvements Act of 1976 §201, Pub. L. No. 94-435, 90 Stat. 1390, *amended*, Pub. L. No. 98-620, Title IV, §402(10)(A), 98 Stat. 3358 (1984); Pub. L. No. 106-553, 114 Stat. 2762 (2000) (current version at Clayton Act §7A, 15 U.S.C. §18a).

requests, extending the end of the HSR final waiting period to ten months to a year after signing the merger agreement.

Since almost everyone acknowledges that 30 days of the final waiting period is not an adequate amount of time for the investigating staff to review the documents and data submitted by the parties and make a recommendation on the disposition of the investigation, and for the leadership of the agency to make a reasoned and informed decision, the parties typically enter into a *timing agreement* with the agency to provide the agency with additional time beyond the expiration of the final waiting period (often between 30 to 90 days).

There are four outcomes possible at the end of the agency investigation:

1. The agency closes the investigation without taking enforcement action and allows the transaction to close without further interference
2. The agency and the parties settle the investigation with a judicial or administrative *consent decree* requiring the merging parties to restructure their deal—usually by divesting businesses or assets to a third party approved by the investigating agency—to eliminate the agency's competitive concerns.
3. The agency initiates litigation to enjoin the closing of the transaction on the grounds that the merger or acquisition, if consummated, would violate the antitrust laws.
4. The parties voluntarily terminate their transaction, either because (a) the parties will not settle at the agency's ask and will not litigate, or (b) the agency concludes that no settlement will resolve the agency's concerns and parties will not litigate.

Contrary to popular parlance, the HSR Act is not a "clearance" statute. Satisfying the HSR Act's reporting and waiting period requirements confers no immunity from future challenge. On numerous occasions, states, takeover targets, and other private parties have successfully challenged reported mergers and acquisitions after the federal authorities have "cleared" the transaction. Indeed, even the DOJ and the FTC have challenged mergers and acquisitions after they have permitted the Act's waiting period to expire. Until recently, all of these challenges involved cases where the parties failed to disclose information in the HSR merger review that, if disclosed, likely would have resulted in a challenge at the end of the review.[3]

[3] The FTC's complaint in 2020 challenging Facebook's acquisitions of Instagram in 2012 and WhatsApp in 2014 appears to be an exception. The FTC has not alleged that Facebook failed to submit required documents or information during the course fo the investigation. Rather, the Commission appears to believe that the acquistiions were appatently anticompetitive on the information discovered in the course of the review at the time and the agency simply made an error in failing to challenge the transactions at the time. *See* Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. filed Dec.9, 2020), *dismissed without prejudice and with leave to refile*, 2021 WL 2643627 (D.D.C. June 28, 2021).

TransDigm/Takata

TransDigm Announces the Acquisition of Takata Corporation's Aerospace Business

CLEVELAND, Feb. 22, 2017 /PRNewswire/ -- TransDigm Group Incorporated (NYSE: TDG) announced today that it has acquired the stock of SCHROTH Safety Products GmbH and certain aviation and defense assets and liabilities from subsidiaries ("Business") of Takata Corporation (TYO:7312) for approximately $90 million in cash.

The primary businesses purchased are that of SCHROTH Safety Products GmbH and Takata Protection Systems Inc., both of which will be known going forward as SCHROTH, which design and manufacture proprietary, highly engineered, advanced safety systems for aviation, racing and military ground vehicles throughout the world. Nearly all of the revenues are from proprietary products. Aftermarket content accounts for approximately 40% of the revenues, while aerospace and defense accounts for approximately 80% of the revenues.

SCHROTH, which accounts for approximately 90% of the revenues, specializes in specialty technical restraints, passenger belts covering Airbus and Boeing platforms, structural monument airbags for Airbus and Boeing platforms including the Boeing 787, and cockpit security components for the Airbus A350 and A380 platforms. SCHROTH also provides restraint systems into business jet, general aviation, helicopter, military and racing markets.

Located in Arnsberg, Germany and Pompano Beach and Orlando, Florida, the Business employs approximately 260 people and is estimated to have revenues of approximately $43 million for the fiscal year ending March 31, 2017.

W. Nicholas Howley, Chairman and CEO of TransDigm, stated, "SCHROTH has built a solid reputation based on technical expertise and product excellence. The company has significant and growing aftermarket on attractive high use platforms. SCHROTH fits well with our consistent product and acquisition strategy. As with all TransDigm acquisitions, we see opportunities for significant value creation."

About TransDigm

TransDigm Group, through its wholly-owned subsidiaries, is a leading global designer, producer and supplier of highly engineered aircraft components for use on nearly all commercial and military aircraft in service today. Major product offerings, substantially all of which are ultimately provided to end-users in the aerospace industry, include mechanical/electro-mechanical actuators and controls, ignition systems and engine technology, specialized pumps and valves, power conditioning devices, specialized AC/DC electric motors and generators, NiCad batteries and chargers, engineered latching and locking devices, rods and locking devices, engineered connectors and elastomers, databus and power controls, cockpit security components and systems, specialized cockpit displays, aircraft audio systems, specialized lavatory components, seatbelts and safety restraints, engineered interior surfaces and related components, lighting and control technology, military personnel parachutes, high performance hoists, winches and lifting devices, and cargo loading, handling and delivery systems.

Forward-Looking Statements

Statements in this press release that are not historical facts are forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995.Words such as "believe," "may," "will," "should," "expect," "intend," "plan," "predict," "anticipate," "estimate," or "continue" and other words and terms of similar meaning may identify forward-looking statements.

All forward-looking statements involve risks and uncertainties which could affect TransDigm's actual results and could cause its actual results to differ materially from those expressed or implied in any forward-looking statements made by, or on behalf of, TransDigm. These risks and uncertainties include but are not limited to

failure to complete or successfully integrate the acquisition; that the acquired business does not perform in accordance with our expectations; and other factors. Further information regarding important factors that could cause actual results to differ materially from projected results can be found in TransDigm's Annual Report on Form 10-K and other reports that TransDigm or its subsidiaries have filed with the Securities and Exchange Commission. Except as required by law, TransDigm undertakes no obligation to revise or update the forward-looking statements contained in this press release.

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To view the original version on PR Newswire, visit:http://www.prnewswire.com/news-releases/transdigm-announces-the-acquisition-of-takata-corporations-aerospace-business-300411547.html

SOURCE TransDigm Group Incorporated

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
Department of Justice, Antitrust Division
450 5th Street, N.W., Suite 8700
Washington, D.C. 20530,

Plaintiff,

v.

TRANSDIGM GROUP INCORPORATED
1301 East 9th Street, Suite 3000
Cleveland, Ohio 44114,

Defendant.

Civil Action No.:

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action for equitable relief against defendant TransDigm Group Incorporated ("TransDigm") to remedy the harm to competition caused by TransDigm's acquisition of SCHROTH Safety Products GmbH and substantially all the assets of Takata Protection Systems, Inc. from Takata Corporation ("Takata"). The United States alleges as follows:

I. NATURE OF THE ACTION

1. In February 2017, TransDigm acquired SCHROTH Safety Products GmbH and substantially all the assets of Takata Protection Systems, Inc. (collectively, "SCHROTH") from Takata. TransDigm's AmSafe, Inc. ("AmSafe") subsidiary is the world's dominant supplier of restraint systems used on commercial airplanes. Prior to the acquisition, SCHROTH was

AmSafe's closest competitor and, indeed, its only meaningful competitor for certain types of restraint systems.

2. Restraint systems are critical safety components on every commercial airplane seat that save lives and reduce injuries in the event of turbulence, collision, or impact. There are a wide range of restraint systems used on commercial airplanes, including traditional two-point lapbelts, three-point shoulder belts, technical restraints, and more advanced "inflatable" restraint systems such as airbags. The airplane type, seat type, and seating configuration dictate the proper restraint type for each airplane seat.

3. Prior to the acquisition, SCHROTH was a growing competitive threat to AmSafe. Until 2012, AmSafe, the long-standing industry leader, was nearly unrivaled in the markets for restraint systems used on commercial airplanes. Certification requirements and other entry barriers reinforced AmSafe's position as the dominant supplier to the industry. However, beginning in 2012, after being acquired by Takata, SCHROTH embarked on an ambitious plan to capture market share from AmSafe by competing with AmSafe on price and heavily investing in research and development of new restraint technologies. Over the next five years, the increasing competition between AmSafe and SCHROTH resulted in lower prices for restraint system products for commercial airplanes and the development of innovative new restraint technologies such as inflatable restraints. TransDigm's acquisition of SCHROTH removed SCHROTH as an independent competitor and eliminated the myriad benefits that customers had begun to realize from competition in this industry.

4. Accordingly, TransDigm's acquisition of SCHROTH is likely to substantially lessen competition in the development, manufacture, and sale of restraint systems used on

commercial airplanes worldwide, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

II. DEFENDANT AND THE TRANSACTION

5. TransDigm is a Delaware corporation headquartered in Cleveland, Ohio. TransDigm operates as a holding company and owns over 100 subsidiaries. Through its subsidiaries, TransDigm is a leading global designer, manufacturer, and supplier of highly engineered airplane components. TransDigm's fiscal year 2016 revenues were approximately $3.1 billion. TransDigm is the ultimate parent company of AmSafe, a Delaware corporation headquartered in Phoenix, Arizona. AmSafe develops, manufactures, and sells a wide range of restraint systems used on commercial airplanes. AmSafe had global revenues of approximately $198 million in fiscal year 2016.

6. Takata is a global automotive and aerospace parts manufacturer based in Japan. Takata was the ultimate parent entity of SCHROTH Safety Products GmbH, a German limited liability corporation base in Arnsberg, Germany, and Takata Protection Systems, Inc., a Colorado corporation based in Pompano Beach, Florida. SCHROTH Safety Products and Takata Protection Systems collectively had approximately $37 million in revenue in fiscal year 2016.

7. On February 22, 2017, TransDigm completed its acquisition of SCHROTH Safety Products and substantially all the assets of Takata Protection Systems from Takata for approximately $90 million. Because of the way the transaction was structured, it was not required to be reported under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §

18a. After the acquisition was completed, the Takata Protection Systems assets were incorporated as SCHROTH Safety Products LLC.

III. JURISDICTION AND VENUE

8. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain TransDigm from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

9. TransDigm sells restraint systems used on commercial airplanes throughout the United States. It is engaged in the regular, continuous, and substantial flow of interstate commerce, and its activities in the development, manufacture, and sale of restraint systems used on commercial airplanes have had a substantial effect upon interstate commerce. The Court has subject matter jurisdiction over this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

10. TransDigm has consented to venue and personal jurisdiction in this District. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

IV. TRADE AND COMMERCE

A. Industry Overview

11. Commercial airplanes are fixed-wing aircraft used for scheduled passenger transport. Restraint systems used on commercial airplanes are critical safety devices that secure the occupant of a seat to prevent injury in the event of turbulence, collision, and impact.

12. Restraint systems used in the economy and premium cabins in commercial airplanes vary based on the airplane type, seat type (*e.g.*, economy, premium, crew, "lie-flat," etc.), and seating configuration of the airplane.

13. Restraint systems used on commercial airplanes come in two primary forms: (i) conventional belt systems with two or more belts or "points" that are connected to a central buckle; or (ii) inflatable systems with one or more airbags that may be installed in combination with a conventional belt system. The airbags can be installed either within the belt itself (called an "inflatable lapbelt") or in a structural monument within the airplane (called a "structural mounted airbag").

14. Economy cabin seats typically require two-point lapbelts, though other restraint systems such as inflatable restraint systems may be necessary in limited circumstances to comply with Federal Aviation Administration ("FAA") safety requirements.

15. Premium cabin seats come in many different seating configurations, and passenger restraint systems used in premium cabin seats vary as well. Premium cabin restraint systems include two-point lapbelts, three-point shoulder belts, and inflatable restraint systems. While two-point lapbelts and three-point shoulder belts are used widely throughout the premium cabins, the use of inflatable restraint systems is more common in first-class and other ultra-premium cabins.

16. Flight crew seats on commercial airplanes require special restraint systems called "technical" restraints. Technical restraints are multipoint restraints with four or more belts that provide additional protection to the flight crew.

17. Restraint systems typically are purchased by commercial airlines and airplane seat manufacturers. Because certification of a restraint system is expensive and time-consuming, once a restraint system is certified for a particular seat and airplane type it is rarely substituted in the aftermarket for a different restraint system or supplier. Accordingly, competition between suppliers of restraint systems generally only occurs when a customer is designing a new seat or

purchasing a new seat design, either when retrofitting existing airplanes or purchasing new airplanes.

B. Industry Regulation and Certification Requirements

18. All commercial airplanes must contain FAA-certified restraint systems on every seat installed on the airplane. The process for obtaining FAA certification is complex and involves several distinct stages.

19. Before selling a restraint system, a supplier of airplane restraint systems must first obtain a technical standard order authorization ("TSOA"). A TSOA certifies that the supplier's restraint system meets the minimum design requirements of the codified FAA Technical Standard Order ("TSO") for that object, and that the manufacturer has a quality system necessary to produce the object in conformance with the TSO. To obtain a TSOA for a restraint system, a supplier must test its restraint system for durability and other characteristics. Once a TSOA is issued for the restraint system, the supplier must then obtain a TSOA for the entire seat system—*i.e.*, the seat and belt combination. To obtain a TSOA for the seat system, the seat system must successfully complete dynamic crash testing to demonstrate that the seat system meets the FAA required g-force and head-injury-criteria safety requirements. Dynamic crash-testing is expensive and can be cost prohibitive to potential suppliers. Once a supplier obtains a TSOA for the seat system, it must then obtain a supplemental type certificate, which certifies that the seat system meets the applicable airworthiness requirements for the particular airplane type on which it is to be installed.

20. Certain restraint system types such as inflatable restraint systems do not have a codified TSO and must instead satisfy a "special condition" from the FAA prior to manufacture and installation of the restraint system. In those circumstances, the FAA must first determine

and then publish the terms of the special condition. Once the special condition is published, the supplier must then satisfy the terms of the special condition to install the object on an airplane.

V. RELEVANT MARKETS

21. AmSafe and SCHROTH compete across the full range of restraint systems used on commercial airplanes. However, restraint systems are designed for specific airplane configurations and seat types and are therefore not interchangeable or substitutable for different restraint systems. FAA regulations dictate which restraint system may be used for a particular airplane configuration and seat type. In the event of a small but significant price increase for a given type of restraint system, commercial customers would not substitute another restraint system in sufficient numbers so as to render the price increase unprofitable. Thus, each restraint system described below is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

22. The relevant geographic market for restraint systems used on commercial airplanes is worldwide. Restraint systems are marketed internationally and may be sourced economically from suppliers globally.

A. Relevant Market 1: Two-Point Lapbelts Used on Commercial Airplanes

23. A two-point lapbelt is a restraint harness that connects two fixed belts to a single buckle and restrains an occupant at his or her waist. Two-point lapbelts are used on nearly every seat in the economy cabins of commercial airplanes; they also are regularly used in the premium cabins. Commercial airline companies prefer lightweight two-point lapbelts in the economy cabins to save fuel costs, reduce CO_2 emissions, and provide convenience to their passengers. Two-point lapbelts are significantly less expensive than other restraint system types.

24. The market for the development, manufacture, and sale of two-point lapbelts used on commercial airplanes is already highly concentrated and has become significantly more concentrated as a result of TransDigm's acquisition of SCHROTH. Prior to the acquisition, there were only three significant suppliers of two-point lapbelts used on commercial airplanes: AmSafe, SCHROTH, and a third firm, a small, privately-held company that has been supplying two-point lapbelts for many years. Although a handful of other firms served the market, they only sell a negligible quantity of two-point lapbelts each year. AmSafe is by far the largest supplier of two-point lapbelts used on commercial airplanes, and serves the vast majority of major commercial airlines around the world. However, SCHROTH recently entered this market after developing a new, innovative lightweight two-point lapbelt and had emerged as AmSafe's most significant competitor as it aggressively sought to market its lapbelt to major international airline customers.

B. Relevant Market 2: Three-Point Shoulder Belts Used on Commercial Airplanes

25. A three-point shoulder belt is a restraint harness that restrains an occupant at his or her waist and shoulder. It consists of both a lapbelt component and shoulder belt (or sash) component. Three-point shoulder belts are widely used in the premium cabins of commercial airplanes where the seating configurations often necessitate the additional protection provided by three-point shoulder belts.

26. The market for the development, manufacture, and sale of three-point shoulder belts used on commercial airplanes was already highly concentrated prior to the acquisition. In fact, AmSafe and SCHROTH were the only two significant suppliers of three-point shoulder belts used on commercial airplanes although a handful of other firms made a negligible quantity of sales each year. As with two-point lapbelts, AmSafe was the dominant supplier of three-point

shoulder belts, and SCHROTH was aggressively seeking to grow its business at AmSafe's expense.

C. Relevant Market 3: Technical Restraints Used on Commercial Airplanes

27. Technical restraints are multipoint restraint harnesses (usually four or five points) that restrain an occupant at his or her waist and shoulders. Technical restraints consist of multiple belts that connect to a single fixed buckle—typically a rotary-style buckle. Technical restraints are used by the flight crew in commercial airplanes. The critical nature of the flight crew's responsibilities and the design of their seats necessitate the additional protections provided by technical restraints.

28. The market for the development, manufacture, and sale of technical restraint systems used on commercial airplanes was already highly concentrated and became significantly more concentrated as a result of the acquisition. Prior to the acquisition, there were only three significant suppliers of technical restraints used on commercial airplanes: AmSafe, SCHROTH, and a third firm, an international aerospace equipment manufacturer. Although a handful of other firms supplied technical restraints, they only sold a negligible quantity of technical restraints each year. As with passenger restraints, AmSafe was the leading supplier of technical restraints, and SCHROTH was aggressively seeking to grow its business at AmSafe's expense.

D. Relevant Market 4: Inflatable Restraint Systems Used on Commercial Airplanes

29. Inflatable restraint systems, which include both inflatable lapbelts and structural mounted airbags, are restraint systems that utilize one or more airbags to restrain an airplane seat occupant. Inflatable restraint systems are most commonly used in the premium cabin of commercial airplanes, particularly in first-class and other ultra-premium cabins that have "lie-flat" or oblique-facing seats. Inflatable restraint systems also are used in the economy cabin in

certain circumstances, for example, in bulkhead rows to prevent an occupant's head from impacting the bulkhead. When required by FAA regulations, inflatable restraint systems provide airplane passengers with additional safety.

30. The market for the development, manufacture, and sale of inflatable restraint systems used on commercial airplanes was already highly concentrated prior to the acquisition. The only two suppliers of inflatable restraint systems used on commercial airplanes were AmSafe and SCHROTH. AmSafe and SCHROTH both offered structural mounted airbags, while AmSafe was the exclusive supplier of inflatable lapbelts. In recent years, SCHROTH had emerged as a strong competitor to AmSafe in the development of inflatable restraint technologies.

VI. ANTICOMPETITIVE EFFECTS

31. Mergers and acquisitions that reduce the number of competitors in highly concentrated markets are likely to substantially lessen competition. Before TransDigm's acquisition of SCHROTH, the markets for all restraint system types set forth above were highly concentrated. In each of these markets, SCHROTH and at most one other smaller firm competed with AmSafe prior to the acquisition and AmSafe had at least a substantial—and often a dominant—share of the market. TransDigm's acquisition of SCHROTH therefore significantly increased concentration in already highly concentrated markets and is unlawful.

32. TransDigm's acquisition of SCHROTH also eliminated head-to-head competition between AmSafe and SCHROTH in the development, manufacture, and sale of restraint systems used on commercial airplanes worldwide. Prior to the acquisition, SCHROTH was a growing competitive threat to AmSafe and was challenging AmSafe on pricing and innovation.

33. In 2012, Takata acquired SCHROTH with the stated intention to "overtake AmSafe" in the markets for restraint systems used on commercial airplanes. AmSafe had traditionally dominated these markets with few, if any, significant competitors. Sensing a demand for new competitors and restraint technologies, SCHROTH began to compete with AmSafe on price and to invest heavily in research and development to create new restraint technologies.

34. Customers were already beginning to see the benefits of increased competition in these markets. Between 2012 and 2017, SCHROTH introduced several new innovative restraint products, challenging older products from AmSafe. These products included a new lightweight two-point lapbelt called the "Airlite," structural mounted airbag systems, and other advanced restraint systems. Prior to the acquisition, SCHROTH had already found customers—including major U.S. commercial airlines—for both its new Airlite belt and structural mounted airbag systems. With the introduction of these new products, potential customers also had begun qualifying SCHROTH as an alternative supplier to AmSafe and leveraging SCHROTH against AmSafe to obtain more favorable pricing. As new commercial airplanes were expected to be ordered, SCHROTH believed that its market share would continue to grow. Indeed, SCHROTH expected that it would capture nearly 20% of the sales of restraint systems used on commercial airplanes by 2020, with most of the gains coming at the expense of AmSafe.

35. Prior to the acquisition, SCHROTH and AmSafe competed head-to-head on price. The resulting loss of a competitor indicates that the acquisition likely will result in significant harm from expected price increases. Furthermore, prior to the acquisition, AmSafe and SCHROTH also competed to develop new restraint technologies. The transaction eliminated that competition depriving customers of more innovative and life-saving restraint systems.

36. The transaction, therefore, is likely to substantially lessen competition in the development, manufacture, and sale of restraint systems used on commercial airplanes worldwide in violation of Section 7 of the Clayton Act.

VII. ENTRY

37. New entry and expansion by existing competitors are unlikely to prevent or remedy the acquisition's likely anticompetitive effects. Entry into the development, manufacture, and sale of restraint systems used on commercial airplanes is costly, and unlikely to be timely or sufficient to prevent the harm to competition caused by the elimination of SCHROTH as an independent supplier.

38. Barriers to entry and expansion include certification requirements. Before a supplier may sell restraint systems, it must first obtain several authorizations, including a TSOA for the restraint system, a TSOA for the seat system, a supplemental type certificate, and, in certain cases, a special condition. These certification requirements discourage entry by imposing substantial sunk costs on potential suppliers with no guarantee that their restraint systems will be successful in the market. They also take substantial time—in some cases, years—to complete.

39. Barriers to entry and expansion also include the significant technical expertise required to design a restraint system that satisfies the certification requirements. The technical expertise required to design a restraint system is proportionate to the complexity of the restraint system design. However, while more advanced restraint systems such as inflatable restraint systems require more expertise than simpler belt-type restraint systems, even belt-type restraint systems require significant expertise to design the belt to be strong, lightweight, and functional.

40. Additional barriers to entry and expansion include economies of scale and reputation. Customers of restraint systems used on commercial airplanes require large volumes

of restraint systems at low prices. Companies that cannot manufacture restraint systems at these volumes efficiently cannot compete effectively. Furthermore, customers of restraint systems used on commercial airplanes prefer established suppliers with known reputations.

VIII. VIOLATIONS ALLEGED

41. The acquisition of SCHROTH by TransDigm is likely to substantially lessen competition in each of the relevant markets set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

42. The transaction will likely have the following anticompetitive effects, among others:

a. actual and potential competition between AmSafe and SCHROTH in the relevant markets will be eliminated;

b. competition generally in the relevant markets will be substantially lessened; and

c. prices in the relevant markets will likely increase and innovation will likely decline.

IX. REQUEST FOR RELIEF

43. The United States requests that this Court:

a. adjudge and decree TransDigm's acquisition of SCHROTH to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. order TransDigm to divest all assets acquired from Takata Corporation on February 22, 2017 relating to SCHROTH Safety Products GmbH and Takata Protection Systems and to take any further actions necessary to restore the market to the competitive position that existed prior to the acquisition;

c. award the United States its costs of this action; and

d. grant the United States such other relief as the Court deems just and proper.

Dated: December 21, 2017

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

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*LEAD ATTORNEY TO BE NOTICED

TransDigm Agrees to Divest SCHROTH to Management and Perusa

CLEVELAND, Dec. 21, 2017 /PRNewswire/ -- As previously announced on the TransDigm Group Incorporated (the "Company") (NYSE: TDG) November 09, 2017 earnings call, the U.S. Department of Justice has been investigating the Company's acquisition of SCHROTH Safety Products, which closed on February 22, 2017.

Although TransDigm respectfully disagrees with the Department of Justice's position, the Company decided that given the size of the deal, the expense and burden of continued investigation and the uniqueness of the situation, that it was prudent to settle the matter and agree to divest the SCHROTH business.

Therefore, after running a lengthy search and evaluation process to identify a buyer and working with the Department of Justice, the Company has agreed to sell SCHROTH Safety Products in a management buyout (MBO) to Perusa Partners Fund 2, L.P., a private equity fund advised by Perusa GmbH, as majority shareholder, as well as dedicated SCHROTH managers from both Germany and the U.S.

The Department of Justice has accepted this proposal, which is subject to court approval. The transaction is subject to customary closing conditions and regulatory approvals.

About SCHROTH

SCHROTH Safety Products, a global leader in the development and manufacturing of occupant protection systems for specialized applications in aerospace, motorsports, defense, and medical transport is made up of two businesses. SCHROTH Safety Products GmbH, based in Arnsberg, Germany and SCHROTH Safety Products LLC., based in Pompano Beach, Florida.

About Perusa

Perusa Partners Fund 2, L.P. is a private equity fund with 200 million Euro committed equity. The fund invests in medium-sized companies and in carve-outs of business segments within larger corporations in German-speaking Europe as well as in the Nordic region. The fund is advised by Perusa GmbH. Perusa is pursuing a strong operational approach to increase the efficiency and thus the long-term value as well as the potential of the portfolio companies.

About TransDigm Group

TransDigm Group, through its wholly-owned subsidiaries, is a leading global designer, producer and supplier of highly engineered aircraft components for use on nearly all commercial and military aircraft in service today. Major product offerings, substantially all of which are ultimately provided to end-users in the aerospace industry, include mechanical/electro-mechanical actuators and controls, ignition systems and engine technology, specialized pumps and valves, power conditioning devices, specialized AC/DC electric motors and generators, NiCad batteries and chargers, engineered latching and locking devices, rods and locking devices, engineered connectors and elastomers, databus and power controls, cockpit security components and systems, specialized cockpit displays, aircraft audio systems, specialized lavatory components, seatbelts and safety restraints, engineered interior surfaces and related components, lighting and control technology, military personnel parachutes, high performance hoists, winches and lifting devices, and cargo loading, handling and delivery systems.

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View original content:http://www.prnewswire.com/news-releases/transdigm-agrees-to-divest-schroth-to-management-and-perusa-300574569.html

SOURCE TransDigm Group Incorporated

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, December 21, 2017

Justice Department Requires TransDigm Group to Divest Airplane Restraint Businesses Acquired from Takata

Divestiture Will Restore Competition in the Development, Manufacture, and Sale of Restraint Systems Used on Commercial Airplanes

The Department of Justice announced today that TransDigm Group Incorporated will be required to divest two businesses it acquired from Takata Corporation. The divestitures will restore competition in markets for several types of restraint systems used on commercial airplanes. TransDigm acquired the businesses—SCHROTH Safety Products GmbH and SCHROTH Safety Products LLC (collectively, "SCHROTH")—from Takata in February 2017 in a $90 million transaction that, due to its structure, was not reportable under the Hart-Scott-Rodino Antitrust Improvements Act.

The Justice Department's Antitrust Division filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia challenging the consummated acquisition. At the same time, it filed a proposed settlement that, if approved by the court, would resolve the Department's competitive concerns.

"Today's settlement, which requires TransDigm to divest the entire SCHROTH business, restores competition without relying on a regulatory behavioral decree," said Assistant Attorney General Makan Delrahim of the Justice Department's Antitrust Division. "TransDigm's AmSafe subsidiary is the world's largest supplier of restraint systems used on commercial airplanes and SCHROTH was its only meaningful competitor."

According to the Department's complaint, AmSafe and SCHROTH develop, manufacture, and sell a wide range of restraint systems used on commercial airplanes, including traditional two-point lapbelts, three-point shoulder belts, technical restraints, and more advanced "inflatable" restraint systems such as airbags. The complaint alleges that prior to the acquisition, SCHROTH was a growing competitive threat to AmSafe that was challenging AmSafe on price and investing heavily in the research and development of new restraint technologies. According to the complaint, the acquisition eliminated TransDigm's most significant competitor, and the loss of competition between AmSafe and SCHROTH was likely to result in higher prices and reduced innovation.

Under the terms of the proposed settlement, TransDigm must divest the entirety of SCHROTH, including its facilities in Pompano Beach, Florida, and Arnsberg, Germany, to a consortium between Perusa Partners Fund 2, L.P. and SSP MEP Beteiligungs GmbH & Co. KG (MEP KG), or an alternate acquirer approved by the United States. Pursuant to an agreement with the Antitrust Division, TransDigm held SCHROTH separate from AmSafe during the pendency of the Division's investigation.

Perusa is a diversified German private equity fund that invests in mid-sized companies. MEP KG is a German limited partnership owned by several members of the existing management team of SCHROTH, including executives who have extensive experience in the airplane restraint systems business. The Department said that the divestiture will remedy the acquisition's anticompetitive effects by quickly reestablishing SCHROTH as an independent competitor.

TransDigm, a Delaware corporation headquartered in Cleveland, Ohio, is a leading global designer, manufacturer, and supplier of highly engineered airplane components. In 2016, TransDigm's global revenues were $3.1 billion. TransDigm's AmSafe subsidiary is a Delaware corporation headquartered in Phoenix, Arizona. AmSafe had global revenues of approximately $198 million in 2016.

SCHROTH Safety Products GmbH (SSPG) is a German limited liability corporation based in Arnsberg, Germany. SCHROTH Safety Products LLC (SSPL) is a Delaware corporation based in Pompano Beach, Florida. SSPG and SSPL collectively had approximately $37 million in revenue in fiscal year 2016.

As required by the Tunney Act, the proposed consent decree, along with the Department's competitive impact statement, will be published in the Federal Register. Any person may submit written comments concerning the proposed settlement within 60 days of its publication to Maribeth Petrizzi, Chief, Defense, Industrials, and Aerospace Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, N.W., Suite 8700, Washington, D.C. 20530. At the conclusion of the 60-day comment period, the court may enter the final judgment upon a finding that it serves the public interest.

Attachment(s):
Download Competitive Impact Statement
Download Complaint
Download Explanation of Consent Decree Procedures
Download Hold Separate Stipulation and Order
Download Proposed Final Judgment

Topic(s):
Antitrust

Component(s):
Antitrust Division

Press Release Number:
17-1463

Updated February 1, 2018

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d)
of The Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): January 26, 2018

TransDigm Group Incorporated
(Exact name of registrant as specified in its charter)

Delaware	001-32833	41-2101738
(State or other jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

1301 East 9th Street, Suite 3000, Cleveland, Ohio	44114
(Address of principal executive offices)	(Zip Code)

(216) 706-2960
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report.)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

¨ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

¨ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

¨ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

¨ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter). ¨

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ¨

Item 7.01 Regulation FD Disclosure

On January 26, 2018, TransDigm Group Incorporated (the "Company") completed the divestiture of SCHROTH Safety Products in a management buyout (MBO) to Perusa Partners Fund 2, L.P., a private equity fund advised by Perusa GmbH, as majority shareholder, as well as dedicated SCHROTH managers from both Germany and the U.S for approximately $61.4 million, subject to a working capital adjustment. The sale was previously announced by the Company on December 21, 2017.

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

TRANSDIGM GROUP INCORPORATED

By /s/ James Skulina

James Skulina

Executive Vice President and
Interim Chief Financial Officer

Date: January 26, 2018

The Consumer Welfare Standard

7-20-2020

Antitrust: What Counts as Consumer Welfare?

Herbert J. Hovenkamp
University of Pennsylvania Carey Law School

Antitrust: What Counts as Consumer Welfare?

Herbert Hovenkamp[*]

Introduction

The antitrust laws speak in unmistakably economic terms about the conduct they prohibit. The Sherman Act is directed toward conduct that "restrains trade" or "monopolizes" markets.[1] The Clayton Act prohibits conduct whose effect may be substantially to "lessen competition" or "tend to create a monopoly."[2] Even so, economic effects can be measured in different ways. The dominant view of antitrust law today is its rules should be based on a "consumer welfare" principle. We assume that consumers are best off when prices are low. Dissenters on the right would include seller profits in their conception of consumer welfare. Those on the left would expand antitrust to incorporate political goals, pursue large firm size or industrial concentration for its own sake, or include effects such as wealth or social inequality.

A statement released by the Biden-Sanders Unity Task Force in July, 2020, speaks about the need for greater antitrust enforcement in several areas.[3] It expresses concern about health care mergers that raise price, an acknowledged problem that clearly falls within the consumer welfare principle.[4] It does the same thing for

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[*]James G. Dinan University Professor, Univ. of Pennsylvania Carey Law School and The Wharton School.

[1] 15 U.S.C. §1 (prohibiting contracts, combinations, or conspiracies in restraint of trade); 15 U.S.C. §2 (prohibiting those who monopolize or attempt to monopolize commerce).

[2]All three substantive antitrust sections of the Clayton Act prohibit the conduct they cover when it threatens to "substantially … lessen competition or tend to create a monopoly." See 15 U.S.C. §13 (price discrimination); 15 U.S.C. §14 (tying and exclusive dealing); 15 U.S.C. §18 (mergers).

[3]Biden-Sanders Unity Task Force Recommendations (July 8, 2020), available at https://joebiden.com/wp-content/uploads/2020/07/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf.

[4] *Id*. at 33.

anticompetitive outcomes in agricultural processing.[5] More problematically, it would "Charge antitrust regulators with systematically incorporating broader criteria into their analytical considerations, including in particular the impact of corporate consolidation on the labor market, underserved communities, and racial equity."[6] It also speaks of reversing the impact of Trump-administration mergers "to repair the damage done to working people and to reverse the impact on racial inequity."[7]

The temptation to use antitrust to achieve broader goals is understandable. The broad and brief language of the antitrust laws incorporate an elastic mandate and is directed at the courts. They can become a vehicle for achieving goals through the judicial system that are more difficult to achieve legislatively. By contrast, the consumer welfare principle is a way of limiting the scope of antitrust to a set of economic goals with consumers identified as the principal beneficiaries.

Most descriptions of the consumer welfare principle refer to prices: the goal of the antitrust laws should be to combat monopolistic prices. Articulating the goal in this way raises conceptual problems when we think about suppliers. For example, the antitrust concern with labor is with wage suppression, which means that wages are anticompetitively low. This can collide with a common misperception, which is that low wages invariably produce low consumer prices.

One thing that buyers and sellers have in common, however, is that both are injured by anticompetitive output reductions. Price and output move in opposite directions. While monopoly involves prices that are too high and monopsony (monopoly buying) involves prices that are too low, both require lower output. As a result, when consumer

[5] *Id*. at 52, 68.
[6] *Id*. at 67.
[7] *Id*. at 74.

welfare is articulated in terms of output rather than price, it protects both buyers and sellers, including sellers of their labor.

There are other reasons for preferring output rather than price as the primary indicator of consumer welfare. In most markets, firms have more control over output than they do over price. This is most true in competitive markets, although it is less true as markets are more monopolized. A seller in a perfectly competitive market lacks any control over price bu t usually has full control over output. A corn farmer cannot meaningfully ask "what price should I charge" for this year's crop. She will charge the market price. While she has the power to charge less, she has no incentive to do so because she can sell all she produces at the market price. The one absolute power she does have, however, is to determine output. The decision whether to plant 1000 acres in corn, 500, 100 acres or even zero is entirely hers and depends only on her capacity to produce.

The consumer welfare principle in antitrust is best understood as pursuing maximum output consistent with sustainable competition. In a competitive market this occurs when prices equal marginal cost. More practically and in real world markets, it tries to define and identify anticompetitive practices as ones that reduce market wide output below the competitive level. Output can go higher than the competitive level, but then at least some prices would have to be below cost. As a result, the definition refers to "sustainable" but competitive levels of output. If output is too high some firms will be losing money and must eventually raise their prices or exit.

Consumer welfare measured as output serves the customer's interest in low prices and also in markets that produce as wide a variety of goods and services as a competition can offer. It also serves the interest of labor, which is best off when production is highest. Concurrently, it benefits input suppliers and other participants in the market process. For example, if the output of toasters increases, consumers benefit from the lower prices. Labor benefits because more toaster production increases the demand for labor. Retailers, suppliers

of electric components, shipping companies, taxing authorities and virtually everyone with a stake in the production of toasters benefits as well.

Antitrust is a microeconomic discipline, concerned with the performance of individual markets rather than the economy as a whole. It is worth noting, however, that a goal of high output in a particular market contributes to a well-functioning overall economy. For example, macroeconomic measures such as GDP are based on the aggregate production of goods and services in the entire economy under consideration. All else being equal, when a particular good or service market experiences larger competitive output the overall economy will benefit as well.[8] That issue would almost never be relevant in any particular antitrust case, but it can be important at the legislative or policy level. Increasingly people have observed a link between competition policy – particularly high price-cost margins – and the performance of the economy as a whole.[9]

What is not included in consumer welfare under the antitrust laws? First, bigness itself is not an antitrust issue unless it leads to reduced output in some market. That is, the consumer welfare principle is consistent with very large firms. It favors economies of scale and scope.[10] To be sure, very large firms can injure small firms

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[8] For a good introduction to these issues, *see* JOHN BELLAMY FOSTER AND ROBERT W. MCCHESNEY, THE ENDLESS CRISIS: HOW MONOPOLY-FINANCE CAPITAL PRODUCES STAGNATION AND UPHEAVAL FROM THE USA TO CHINA (2017).

[9]For good commentary, *see* Jonathan B. Baker, *Overlapping Financial Investor Ownership, Market Power, and Antitrust Enforcement: My Qualified Agreement with Professor Elhauge*, 129 HARV. L. REV. FORUM 212, 219-225 (2016); Anna Gelpern & Adam J. Letivin, *Considering Law and Macroeconomics*, 83 L. & CONTEMP. PROBS. i (2020); Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33 J. ECON. PERSP. 23 (2019) Tay-Cheng Ma, *Antitrust and Democracy: Perspectives from Efficiency and Equity*, 12 J. COMP. L. & ECON. 233 (2016).

[10] An economy of scale is a cost that declines as a firm produces a larger amount. An economy of scope is a cost that declines as someone produces a

that have higher costs or lower quality products. The impact of the consumer welfare principle on small firms is complex, however, and requires close analysis of individual cases. While small competitors of a large low cost and high output firm can be injured, many other small firms benefit, including suppliers and retailers. A good illustration is Amazon, which is a very large firm that generally sells at low prices and has maintained high consumer satisfaction.[11] Amazon has undoubtedly injured many small firms forced to compete with its prices and distribution. At the same time, however, Amazon acts as broker for millions of small firms who use its retail distribution services.[12] When a very large firm produces more, it creates opportunities for other firms that sell complements, that distribute the products that a large firm produces, or that supply it with inputs. So once again it is important not to paint with too broad a brush. Blowing up Amazon could ruin many small businesses.

As for labor and antitrust, that relationship is also complex and has changed over time. During the early years of Sherman Act enforcement organized labor was widely believed to be a source of monopoly. Many of the earliest antitrust criminal prosecutions were directed at labor unions.[13] For example, Eugene Debs went to prison in 1895 as a result of a conviction under the Sherman Act.[14] Congress

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larger variety of products, or in a larger number of places. For example, because of joint costs a firm might be able to produce toasters and space heaters out of the same plant more cheaply than two firms that each produced one of the two products.

[11]*See* Jon Markman, How Amazon.com Remains the Ruler of Retail, FORBES (Jan. 30, 2020) (Amazon #1 in consumer satisfaction for three consecutive years).

[12]For statistics, see https://www.feedbackexpress.com/amazon-1029528-new-sellers-year-plus-stats/#:~:text=Amazon%20US%20stats,and%20more%20than%2060%20countries. (last visited July 20, 2020) (noting that Amazon has 5 million independent sellers, with 1.7 million currently listing products for sale).

[13]*See, e.g.*, Herbert Hovenkamp, *Labor Conspiracies in American Law*, 66 TEX. L. REV. 919 (1988).

[14]*See in re* Debs, 158 U.S. 564, 596-600 (1895); and Hovenkamp, *Labor Conspiracies*, *id*. at 920.

came to labor's rescue during the New Deal,[15] and the result was the development of a complex labor immunity that today reaches even agreements among employers, provided that they are part of the collective bargaining process.[16]

But years of anti-union activity largely deprived the unions of the economic power and turned the tables. Most of the antitrust concerns about labor today are with anticompetitive practices that suppress wages, not with worker power to extract higher wages.[17] Agreements among employers not to hire away one another employees ("anti-poaching" agreements) are unlawful per se.[18] Today a fair amount of litigation is directed at overly broad use of labor noncompetition agreements, which are formally vertical but subject to antitrust attack when they are used by many firms in a market to impede worker mobility.[19]

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[15]*Id*. at 928, 929, 962.

[16]Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (extending labor antitrust immunity to agreement among multiple NFL team owners involved in collective bargaining). *See* 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶255-257 (5th ed. 2020).

[17]*See* Ioana Marinescu and Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031 (2019); Herbert Hovenkamp, *Competition Policy for Labour Markets*, OECD Directorate for Financial and Enterprise Affairs (5 June 2019), available at https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdf. *See also* Suresh Naidu, Eric Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power,* 132 HARV. L. REV. 537 (2018).

[18]*See* the Justice Department's statement, "No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No Poach" and wage-Fixing Agreements," available at https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements#:~:text=When%20companies%20agree%20not%20to,compete%20for%20those%20employees'%20labor.&text=Naked%20no%2Dpoach%20and%20wage,product%20prices%20or%20allocate%20customers. (spring 2018).

[19]*E.g.*, Deslandes v. McDonald's USA, LLC, 2018 WL 3105955 (N.D. Ill. June 25, 2018) (parallel use of noncompetition agreements among

Are there situations in which a practice that the consumer welfare principle would approve might nevertheless harm labor? Yes, when the practice in question reduces the demand for labor as a result of cost savings rather than a decrease in output. Consider the merger between Chrysler and Jeep, two producers of automobiles.[20] The merger was small as automobile mergers go and was lawful under the antitrust laws. Nevertheless, a likely result of such a merger would be consolidation of dealerships and some elimination of duplicate jobs. After the merger it is cheaper for Chrysler and better for consumers if Chryslers and Jeeps are sold through a common dealership. Sales and service can be performed by a common staff, reducing the number of employees to less than the number required by two separate facilities. At the same time, however, the overall automobile market remains competitive on both the consumer side and the input (labor) side. To the extent this consolidation reduces Chrysler/Jeep's costs, output of automobiles would go up.

Consolidations can reduce the demand for labor even though the firms could not possibly injure competition in any market. For example, if two pediatricians in New York City should form a partnership they might decide to share a single secretary or assistant. A job would be eliminated, but without any competitive harm to any market. So the consumer welfare principle does not condemn every practice that reduces the demand for labor, but only those practices that do so monopolistically, by suppressing the demand for labor rather than by reducing the amount of it that a firm needs. It is not antitrust's purpose to subsidize employment by requiring firms to use employees that they do not need. The merger that reduces the demand for labor through efficient consolidation is no different in principle than any

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McDonald's franchsees). *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §4.1d (6th ed. 2020).

[20]The acquisition, which occurred in 1987, was with American Motors, which at that time had already acquired Jeep. See "Chrysler is Bying American Motors," NEW YORK TIMES (March 10, 1987), available at https://www.nytimes.com/1987/03/10/business/chrysler-is-buying-american-motors-cost-is-1.5-billion.html.

other production change that requires less labor – for example, when a manufacturer shifts from a labor intensive assembly process to a more automated one that requires fewer employees.

If we really wanted to protect jobs from all changes that reduce the demand for employment we would do better to change the patent laws rather than antitrust law. Changes in technology almost certainly have greater and more explicit effects on labor than do mergers or other procompetitive antitrust practices. For example, a "Job Protection from Innovation Act" might provide that patent applications must show as a condition of patentability that their invention will not lead to a loss of jobs. No one advocates for such a statute because its economically harmful implications are too clear.

Distinguishing pro- from anti-competitive reductions in labor is not always easy. Most of the time the difference can be inferred from market structure. For example, if two small firms in a large field merge and eliminate a certain number of duplicate jobs, the reason is highly likely to be more efficient use of resources. As the employee-side market share of the two firms becomes larger, however, anticompetitive explanations become more plausible. Then it becomes necessary for a tribunal to investigate whether efficient consolidation or inefficient labor suppression is going on.[21]

[21] *Cf*. United States v. Anthem, Inc., 855 F.3d 345, 371-374 (D.C.Cir. 2018) (then Circuit judge Kavanaugh, dissenting, noting dispute about whether lower provider rates result from hospital merger would result from increase efficiency or anticompetitive suppression of input prices). *See also* Elena Prager & Matthew Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* (SSRN working paper Jun 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391889 (citing evidence that hospital mergers in concentrated markets can result in wage suppression for employees such as nurses and that the dominant explanation if employer power over labor).

Getting to Consumer Welfare

Antitrust policy has not always articulated a consumer welfare principle. It is largely a creature of the 1960s and after.[22] Historically, economists almost always used "welfare" to describe "general" or "total" welfare, which was the welfare of all participants in the economy. For example, Pareto optimality assesses equally everyone who is affected by an economic action, producers as well as consumers. The same thing is true of Kaldor-Hicks efficiency, which assesses welfare changes by comparing the welfare of all gainers against the welfare of all losers. A change is a welfare improvement if the gainers gain enough to compensate fully the losers out of their gains.[23]

Oliver Williamson advocated a so-called "welfare tradeoff" model for antitrust in the 1960s,[24] and Robert Bork popularized it in the 1970s.[25] The Williamson proposal was a variant of the total welfare model. It proclaimed an antitrust practice such as a merger to be competitively harmful if the welfare losses that it produced exceeded any welfare gains.[26] Bork in particular used the model to offset gains

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[22]Robert Bork used the term in 1960s, but in a way that referred to general welfare. *See* Robert H. Bork, *Resale Price Maintenance and Consumer Welfare I*, 74 YALE L.J 775 (1965); & II, 77 YALE L.J. 950, 950 (1968); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1965). The phrase had a few earlier uses, but none that became popular. Perhaps the most important is Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77 84 (1954) (monopoly harms consumer welfare). *See also* Covey T. Oliver, *The Fair Trade Acts*, 17 Tex. L. Rev. 391 (1939) (arguing that resale price maintenance ("fair trade") harms consumer welfare).

[23]*See, e.g.*, RICHARD POSNER, THE ECONOMICS OF JUSTICE (1981); Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221 (1980).

[24]Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

[25]ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 107-112 (1978).

[26]Bork, *id*. at 107 (discussing Williamson, *supra* note __ at 21).

and losses as between consumers and producers, not giving much attention to effects on third parties.

One particularly damaging feature of the welfare tradeoff model was that a relatively small profit increase for producers was sufficient to offset rather large price increases to consumers. As a result, even practices that raised price significantly were thought to promote welfare. For example, Williamson concluded that under typical assumptions about elasticities of demand a cost reduction of 1% - 4% would be sufficient to offset a price increase of about 20%.[27] "More generally it is evident that a relatively modest cost reduction is usually sufficient to offset relatively large price increases."[28] This led Williamson to conclude that "a merger which yields non- trivial real economies must produce substantial market power and result in relatively large price increases for the net allocative effects to be negative."[29] What he did not acknowledge was the severe measurement difficulties that would accompany most attempts to measure the size of welfare gains against welfare losses.

Williamson did acknowledge that a merger or other practice that resulted in both efficiencies and a price increase would also reduce output. That is true of any price-increasing practice. However, he did not consider where these efficiencies would come from. Two of the most important sources of efficiency are economies of scale in production and purchasing economies for inputs. However, these occur only at higher rates of output and, thus, of purchasing. So the fact that output goes down takes away the most important sources of efficiencies. To be sure, there are exceptions that can result from reorganization of production. For example, suppose one merging firm is producing 50 washers and 50 dryers at an inefficiently low rate and the other merging firm is also producing 50 washers and dryers inefficiently. After the merger the two firms might be able to switch

[27] Williamson, *Economies, supra* note__ at 22.
[28] *Ibid*.
[29] *Id*. at 23.

their production so that all of the washers are produced in one plant and all of the dryers in the other. Further, it might reduce output to 90 units of each, reflecting its increased market power, and still produce them more efficiently than it did before. But this would require not merely a merger but also significant reorganization or production.

Some efficiencies are so substantial that post-merger prices are lower than they were prior to the merger. In that case, however, there is nothing to trade off. That merger would be lawful under the consumer welfare test because it benefits rather than harms consumers. The Government's Horizontal Merger Guidelines take this approach, permitting an efficiencies defense to a merger only if efficiencies are so significant that output is at least as high after the merger as before.[30]

Other types of efficiencies can conceivably be attained at lower output levels, such as increased technological complementarity, access to IP portfolios, or redeployment of management. But merger law also requires that these efficiencies be "merger specific," which means that they cannot reasonably be attained except through merger.[31] Talent can be hired and IP can be licensed. In sum, the range of merger specific efficiencies that can result from an output reducing practice is very likely extremely small.

Bork's approach to the welfare tradeoff problem was also unique in another and quite damaging way. He disagreed with Williamson about the wisdom of measuring a welfare tradeoff, asserting that efficiencies simply cannot be measured. Using economies of scale as an example, he concluded that the problem of efficiency measurement is "utterly insoluble."[32] Rather, efficiencies should be taken on faith. When market power is completely lacking efficiencies can be inferred, because they are the only explanation that

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[30]Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines §10 (August, 2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.
[31]*Ibid.*
[32]BORK, ANTITRUST PARADOX, *supra* note __ at 126.

makes a practice profitable. For example, when the two New York pediatricians form a partnership and move into a single building they could not be exercising market power. Their union is profitable only if it reduces costs or improves the quality of their services. But that argument falls apart in the presence of any amount of market power. Then the action can be profitable if it *either* reduces costs or raises prices to noncompetitive levels.

Importantly, however, Bork's idea that efficiencies are impossible to measure permits someone to look at the alarming increase in price-cost margins over the last several decades and dismiss them as reflecting nothing more than efficiencies – simply by not requiring evidence. Under Bork's tutelage we have seen a dramatic rise in margins, and thus in the presence of monopoly power, over the past forty years.

Bork also did antitrust an important disservice by naming his version of the welfare tradeoff approach "consumer welfare," even though it expressly took into account the combined welfare of consumers and producers.[33] That conception of "consumer welfare" haunts antitrust to this day. Under it, for example, the dissenters in the Supreme Court's *Actavis* decision could speak of antitrust as adhering to a consumer welfare principle even as they would have approved a practice (pay-for-delay) that resulted in very substantially higher prices to consumers.[34] Or in the *American Express* decision the majority could profess adherence the consumer welfare principle even as they were approving a practice that resulted in higher consumer

[33]*See, e.g.*, Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 836 (2014) ("Bork shifted from consumer welfare to total welfare without changing labels, hence equating antitrust policy with efficiency while continuing to package it in a consumer welfare pill that courts would easily swallow.")

[34]*See* FTC v. Actavis, Inc., 570 U.S. 136, 161 (2013) (Roberts, C.J., dissenting, along with Justices Scalia and Thomas).

prices every time it was applied.[35] In both cases the practice was highly profitable to producers, and that was all that mattered.

Conclusion: Maximum Sustainable Output

We live in an era when monopoly profits are very high,[36] when labor's share of the returns to production has declined sharply,[37] when overall economic growth is significantly smaller than it was in the mid-twentieth century,[38] and economic inequality is near an all-time high.[39] Antitrust is not a cure-all for these problems, but it does have its role. It does best when it sticks to its economic purposes and lets other legislative agendas handle the rest. Even so, pushing output back up to competitive levels can do a great deal of good and, along with other policy choices, can assist in addressing all of these problems.

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[35] Ohio v. American Express, 138 S.Ct. 2274, 2290 (2018) (Thomas, j., for the majority). *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note __, §10.10. The challenged practice forbad merchants from offering customers a lower price in exchange for using a cheaper credit card.

[36] *See* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

[37] David Autor, et al, *Concentrating on the Fall of the Labor Share*, 107 AM ECON REV: PAPERS AND PROCEEDINGS 180, 181-83 (2017).

[38] *See* https://tradingeconomics.com/united-states/gdp-growth-annual.

[39] *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2d ed. 2018).