MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2022

Tuesdays and Thursdays, 3:30-5:30 pm
Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

Class 4 (September 8): The DOJ/FTC Merger Review Process (Unit 4)

On Thursday, we will turn to Unit 4 and inquiry risk by examining the DOJ/FTC merger review process under the HSR Act.

For reasons we will discuss, state and private merger antitrust challenges are rare, so almost all challenges result from DOJ and FTC merger reviews. The upshot is that, in most situations, only the DOJ and FTC present significant inquiry risk. The Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") requires that the parties to 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 prior to closing their transaction, and

(2) observe a statutory-prescribed postnotification *waiting period* before they can close their transaction (usually 30 calendar days for a preliminary reviews and months for an in-depth review).

The HSR Act provides the institutional context in which the DOJ and FTC conduct the vast bulk of merger investigations. The class notes (slides 3-5) give a basic summary of the HSR Act. I could ask you to read the text of the Act, but it is long, complicated, and tedious. For our purposes, the reading materials and the slides will do just fine, but if you want to read the statue, I have posted a copy in the Unit 4 supplemental materials.

The class notes provide a more detailed schematic of the DOJ/FTC merger review process under the HSR Act (slides 6-9), which is explained more fully in the reading materials (pp. 5-24). I think about the merger review process in three stages:

1. *Prefiling/filing*. Prefiling work includes the preliminary antitrust risk analysis for the client, the negotiation of the merger agreement with the other side in friendly deals or the preparation for a hostile takeover, and the prefiling preparation of the defense. Because this work requires anticipating what will happen not only in the merger review process but also in possible litigation or settlement, we will postpone our discussion of the prefiling work until Class 8.

   After the prefiling work is completed, it is time to make the merger control filing. First, it is necessary to ascertain whether the transaction is *reportable*, that is, whether the HSR Act and its implementing regulations require the parties to submit a merger control filing to the DOJ and FTC. This assessment involves two steps: (a) determining whether the transaction meets the statutory threshold size tests and so is *prima facie reportable*, and (b) determining whether an exemption applies. The rules here are quite involved, but I have

summarized the most important ones in the class notes (slides 10-16). If a transaction is prima facie reportable and no exemption applies, the transaction is *reportable* if it crosses a notification threshold (slide 17). The thresholds in the HSR Act for prima facie reportability and the statutory exemptions are adjusted annually in the Federal Register. In 2022, the most important number is $101.0 million, which is the value of voting securities and assets of the acquired person that the acquiring person must *hold* as a result of the acquisition (existing holdings plus the value of the voting securities or assets to be acquired) as the first prerequisite of reportability.[1]

If the transaction is reportable, then each party must make its own filing on a prescribed form. Technically, this is the Notification and Report Form, but everyone simply calls it the "HSR filing," "HSR report," or "HSR form." I have included the form in the reading materials (pp. 25-37), which you will find surprisingly uninformative. You only need to skim it. I also have described the form in the class notes (slide 19), which is worth somewhat more attention.

In most cases, the most important parts of the form are the documents submitted in response to Items 4(c) and 4(d). You should pay careful attention to the note on these documents (pp. 38-42) and the class notes (slide 20). The class notes also have the current schedule of filing fees, payable by the acquiring party, as well as a new fee schedule that is likely to be enacted into legislation sometime in the current Congress (slide 21), as well as a graph on the number of filings the DOJ and FTC receive each year (slide 22).

In addition to filing the required HSR reports, the parties to a reportable transaction must observe a specified statutory waiting period before they can close their transaction (slide 23). The *initial waiting period* is usually 30 calendar days (15 calendar days for all-cash tender offers) after all required HSR reports have been filed. In negotiated transactions, where the buyer will acquire stock of a subsidiary or assets directly from the seller, both the buyer and the seller must file their respective HSR reports before the waiting period begins to run. In open market transactions, where the buyer acquires the target's stock on the open market (including through a tender offer), the waiting period starts to run after the buyer has filed its HSR form. (This prevents the target in a hostile transaction from defeating the acquisition simply by not filing its HSR form.) The initial waiting period will be extended if the investigating agency issues a second request (discussed below). The investigating agency may grant early termination of a waiting period at any time, including during an extended second request period.

For HSR-reportable transactions, the HSR Act prohibits the acquiring firm from acquiring a beneficial interest in the acquiring firm until the required HSR reports have been filed and the applicable HSR waiting period has ended. The merging parties can violate this requirement in several ways:

(a) the parties can simply fail to file;

(b) the parties can invoke an inapplicable exemption (usually in the investment exemption) and not file when a filing was required;

[1] The 2022 Federal Register notice with the current inflation-adjusted numbers for the HSR Act and implementing regulations is posted in the Unit 4 supplemental materials. *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2022) (effective Feb. 23, 2022).

(c) the parties file, but one of their filings is incomplete (usually because the party failed to include all of its 4(c) and 4(d) documents); or

(d) the parties make their proper filings, but during the waiting period the acquiring firm exercises control or influence over the acquired firm in a manner that indicates that it has already "acquired" the target (often by influencing the target firm's bidding or contracting during the waiting period).

The first three types of violations are *failures to file*; the last type of violation is commonly called *gun-jumping*. In 2022, the HSR Act provides for civil penalties of up to $46,517 per day for every day of the violation, or about $16.0 million per year, as well as injunctive relief. The class notes cover HSR Act violations (slides 24-28). The *ValueAct*, *Flakeboard*, and *Nautilis* materials in the reading materials (pp. 44-91) provide three examples of HSR Act violations. Read the press releases to get a basic understanding of each case. If you do not have time to read the complaints in their entirety, try to read the introduction and fact sections. To date, no action for an HSR Act violation has been litigated on the merits; all have been settled by consent decree.

2. *Initial waiting period investigation*. The next stage in the merger process after filing the HSR form is the *initial waiting period investigation* (slides 29-38). As noted above, the initial waiting period under the HSR Act is 30 calendar days (15 calendar days for all-cash tender offers). This waiting period is intended to provide the agencies the opportunity to decide whether one or both of them would like to review the transaction, allocate the investigation responsibility to one of the agencies (so that both of them will not be investigating simultaneously—this is called the clearance process (see slide 31)), and permit the investigating agency to conduct a preliminary substantive review.

   If one of the agencies opens an initial waiting period investigation, the investigating staff will contact the merging parties to introduce themselves and ask the parties to voluntarily submit some additional information (slide 32). This request is likely to be memorialized in a so-called "voluntary access letter." I have included the Biden DOJ model form in the reading materials (pp. 93-95). The Biden FTC has not released a model letter, but its website gives some guidance on the likely nature of the request (p. 96). In the initial telephone call, the staff also will invite the parties to give a presentation, if they would like to do so, on why the transaction does not present an antitrust problem. For reasons we will discuss in class, the parties should always take advantage of this invitation (see slides 33-34).

   During the initial waiting period investigation, the staff will also interview (usually by telephone) customers and competitors in the industry. The slides give some more detail (slide 35).

   The investigating agency has three options at the end of the initial waiting period:

   (a) close the investigation, terminate the waiting period, or allow it to expire, and permit the parties to close their transaction without further interference;

   (b) begin a "second request investigation" by issuing a "second request"; or

   (c) convince the merging parties to "pull and refile" their HSR forms to restart a new initial waiting period (slides 37-38).

It is important to note that the FTC Premerger Notification Office (which is responsible for the administration of the HSR Act) takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement. Accordingly, the parties cannot voluntarily "extend" the initial waiting period to give the agency more time to investigate (although they can commit by a contractual "timing agreement" outside of the HSR Act not to close the transaction until sometime after the HSR waiting period has expired).

3. *Second request investigations*. Before the initial waiting period ends, if the reviewing agency decides that an in-depth investigation is warranted, it will issue a Request for Additional Information and Documentary Material (more fondly known as a "second request"). Second requests are somewhat like precomplaint subpoenas, although they are not compulsory process. The parties do not have to respond to a second request as they would a subpoena or a civil investigative demand (CID) but, as explained below, the issuance of a second request extends the HSR Act waiting period for a statutorily prescribed time (usually 30 calendar days) after all parties have properly responded to their respective second requests. The upshot is that if the parties do not respond to their second requests, the waiting period never expires and they cannot close their deal.

   The slides give a brief overview of second request investigations (slides 39-44). I have included the Biden FTC model second request in the reading materials (pp. 97-125). As painful as it might be, read the FTC model second request with some care.[2]

If the reviewing agency issues a second request before the end of the initial waiting period, the waiting period is extended for the period of time that it takes for the merging parties to comply with their respective second requests plus an additional 30 calendar days (10 days for an all-cash tender offer) (see slide 45).

Timing agreements. The agencies, with some justification, believe that the statutory time periods provide too little time for the staff to complete a review of the second request submissions and prepare its recommendation and for the ultimate decision-makers within the agency to make a decision on the outcome of the investigation. As a result, the investigating agency in second request investigations almost always asks the parties to enter into a "timing agreement" that commits the parties not to close their transaction until some time—usually two months, but it can be much longer—after the statutory waiting period expires. If the parties do not agree to an extension, the agency typically goes into "litigation mode" and threatens to cease talking to the parties about the merits or possible settlement. So unless the parties believe that further interaction with the investigating agency is likely to be futile, the parties almost always agree to extend the time for the investigation through a timing agreement (slides 46-47).[3] The reading materials include a blog post from the FTC's Director of the Bureau of Competition on timing agreements as well as the FTC model timing agreement form (pp. 126-27). The DOJ has a somewhat different

[2] The DOJ's model second request no longer appears on the ATD's website. Perhaps it has been withdrawn, presumably to revise it. Over the summer, I sent an FOIA request and received a copy of model second request with a date of April 2022. I have no idea whether it is currently effective or not.

[3] As noted above, the FTC Premerger Notification Office takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement, so technically a timing agreement does not extend the HSR Act's statutory bar to closing. This is actually beneficial to the parties, since an HSR Act gun-jumping violation cannot occur after the end of the waiting period even if the parties have contractually agreed not to close the transaction for some additional time.

model form (pp. 136-146).[4] We can talk in class about the wisdom of using the model forms in class. The forms also reveal the types of information in which the agencies are most interested, so they are worth a careful look. The DOJ also has released some frequently asked questions about voluntary requests and timing agreements that are worth reading (pp. 147-52).

Merger review outcomes. After the evidence is gathered, the parties will have the opportunity to make a presentation—actually, a series of presentations—to various levels of the agency as to why the transaction should not be challenged (slide 48). After that, the agency will make its decision.

There are four possible outcomes of a full investigation: (1) the agency closes the investigation without taking enforcement action, (2) the parties settle the investigation through a consent decree (which typically will require the divestiture of assets or businesses), (3) the agency commences litigation to block the transaction, or (4) the parties voluntarily terminate the transaction. The class notes summarize these outcomes (slide 50). The class notes contain some historical statistics about the distribution of these outcomes (slides 49-50). The distribution appears to be shifting somewhat in the Biden administration with the agencies less willing to accept consent decrees, resulting in more litigations and more voluntary terminations.

A fifth possible resolution of a merger investigation is a "fix it first" solution (slide 50).[5] The Biden's administration reluctance to accept consent decrees is giving this solution some traction. A "fix it first" actually implements a curative divestiture *before* the main transaction closes. (By contrast, a divestiture consent decree permits divestiture to close *after* the main transaction closes, although sometimes only a matter of days separate the two.) the merging parties usually put "fix it first" solutions in place early in the investigation, if not before the parties file their HSR notifications and the investigation starts.

In a typical "fix it first" solution, the merging parties would divest an overlapping business so that they could present a nonproblematic, "clean" deal to the agencies for review. The following hypothetical illustrates the general idea. Suppose two supermarket chains proposed to merge. The chains overlap only in Chattanooga (but the overlap is significant), and the transaction otherwise presents no antitrust problems. The merging parties recognize that they made be required to divest one of their Chattanooga businesses to resolve likely FTC concerns at the end of an investigation of their original deals. In earlier administrations, the parties would file their HSR notifications on the original transaction and proceed with confidence that they could resolve later any FTC concerns with a divestiture consent decree. In the Biden administration, however, the agencies are expressly less interested in accepting consent decrees. Given the uncertainty that the FTC would accept a consent decree—or simply to avoid the costs and hassles of a significant merger investigation—the parties may decide to sell the overlapping business to a third party without a consent decree. Without any Chattanooga overlap, they would file their HSR notifications on the restructured "clean" transaction. If the divestiture sale was HSR reportable, the divestiture seller and buyer would also file their respective HSR notifications. The FTC would then review both transactions simultaneously. Assuming that the divestiture sale did not present any antitrust problem and that the divestiture would preserve competition in Chattanooga, the FTC should close both reviews without taking enforcement action. The divestiture sale would have to close before

---

[4] The DOJ has removed its model timing agreement from its website, perhaps because it is being revised. I obtained the version in the reading materials over the summer through an FOIA request.

[5] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., MERGER REMEDIES MANUAL 17-18 (rev. Sept. 2020) (describing "fix it first" solutions).

the main transaction because the merging parties' HSR filings did not cover a transfer of the divestiture seller's Chattanooga business, but no consent decree would be necessary.

Three more observations on "fix it first" solutions. First, the divestiture sale agreement can be conditioned on the termination of the HSR waiting period for the main transaction without enforcement action, so the divestiture seller would not have to sell unless the FTC had "cleared" the restructured transaction. Second, the FTC will have to be convinced that the divestiture sale will preserve competition in Chattanooga after the closing of the main transaction, so the FTC will vet the divestiture agreement and the divestiture buyer just as it would in a consent decree exercise.[6] Third, if the merging parties file on the original transaction and later decide to pursue a "fix it first" solution, they can withdraw their original HSR notifications and refile on a restructured transaction.[7]

Interestingly, unlike the European Commission, neither the DOJ nor the FTC has the authority on its own to block a pending transaction (although the FTC can challenge a consummated transaction administratively and order appropriate relief, including divestiture). Rather, to block a pending transaction, both the DOJ and the FTC must obtain a preliminary injunction from a federal district court. We will examine this procedure in Unit 6.

If you have any questions or comments, send me an e-mail. See you in class.

---

[6] Since the main transaction and the divestiture sale are related, the FTC will take the position that the merging parties' failure to implement a curative divestiture that preserves competition in Chattanooga is an anticompetitive effect of the main transaction.

[7] There is an open question of how far the merging parties can proceed into a merger review of the original transaction and still be able to change course to pursue a "fix it first" solution. The Divison's Merger Remedies Manual states that a "fix it first" solution "may be inappropriate if it is presented to the Division after the Division has determined that it has a substantial basis for filing a complaint challenging the transaction." MERGER REMEDIES MANUAL, *supra* note 4, at 18.