MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 11:10 am – 1:10 pm

Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

READING GUIDANCE

Class 1 (August 29): Introduction to Merger Antitrust Law: TransDigm/Takata (Unit 1)[1]

Welcome again to the course. Links to the required reading and the class notes for the first class are embedded in this note and also may be found on Canvas and on the Merger Antitrust Law (2023) page of AppliedAntitrust.com. This memorandum gives you my thoughts on how you should approach these materials.

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

Federal merger antitrust statutes. First, read the major substantive provisions of the federal antitrust statutes that regulate mergers and acquisitions (pp. 4-5 in the Unit 1 reading materials) and the related slides in the Unit 1 class notes (slides 3-14). Obviously, the language of the statutes that create the antitrust violations is fundamental to this course and you should read them with care. If you are used to reading modern statutes, you should find the form of the federal antitrust statutes quite interesting. The antitrust statutes enable one of the country's most significant types of economic regulation, yet instead of taking hundreds if not thousands of pages of text as do many modern statutes, the substantive provisions of the antitrust laws take a little more than a page. You might also note that on their face they do not give you a clue about what conduct or transactions are prohibited. Almost everything is left to interpretation by the courts. As we will see in Class 3, this is an intended feature of federal antitrust law, not a bug.

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

Federal antitrust procedural statutes. The next group of statutes creates the governmental and private causes of action to enforce the federal antitrust laws (pp. 5-8). A cause of action enables the plaintiff to bring its claims for adjudication to a federal court and empowers the court to

[1] Like most antitrust lawyers, I use the term "mergers" loosely to mean all types of formal structural combinations and includes, for example, mergers under state law, asset acquisitions, and stock acquisitions, as well as structural joint ventures where the joint venture partners integrate some of their businesses or assets. The formal structure of a combination is rarely important in assessing the legality of the combination under the merger antitrust laws. That said, we will review a few merger structures in Class 7 (the investment banking class).

adjudicate the claims and provide sanctions or relief. As we go through the course, we will focus on procedure as much as substantive law and economics. It is important that you get a general sense of these procedural provisions now, but you can leave a more detailed understanding of them until we return to take up merger antitrust litigation in Class 6.

The consumer welfare standard. As you no doubt observed when reading the substantive antitrust statutes, they speak in sweeping phrases—"contacts, combination . . . and conspiracies in restraint of trade," "monopolization," and "attempted monopolization"—that give little indication of the line between lawful and unlawful business conduct. This is a feature, not a bug, of American antitrust law. Competition law had developed in Britain as part of the common law, with courts modifying competition rules as social norms, economic conditions, and economic learning changed. The framers of the Sherman Act in 1890 sought to continue to use a common law approach to federal competition law, and the Sherman Act is best thought of as an enabling act to authorize the federal courts to do just that.[2]

When a statute is ambiguous, the courts need some interpretative standard in order to apply the law. For reasons we will discuss in Class 3, courts for the last roughly 40 years have used *consumer welfare* as the interpretative standard. The general idea is that courts should construe the broad terms of the antitrust laws to maximize the welfare of customers even if this makes other interested parties (including producers and distributors) worse off. Read the short Hovenkamp working paper (pp. 9-23) and the class notes (slides 15-17) to get some background.[3]

In recent years, the consumer welfare standard has been attacked as being too narrow. Proponents of change argue that other values—such as concentration of political and economic power, the distribution of wealth, or producer welfare (especially for workers)—in addition to consumer welfare should be considered when interpreting and applying the antitrust laws. While there have been critics of the consumer welfare standard from the beginning, only in the last few years have the critics gained any traction. Today, in a dramatic departure from the last four decades, the three most important officials in the first two years of the Biden administration in competition policy—Lina Khan, the chair of the Federal Trade Commission, Jonathan Kanter, the assistant attorney general in charge of the Antitrust Division, and Tim Wu, former special

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[2] Historically, the common law approach to competition law sounded in contract. Unreasonable restraints of trade were void for public policy and hence unenforceable. So, for example, members of a price-fixing conspiracy could not bring an action on the contract for damages against a fellow conspirator that was cheating on the cartel agreement. But unreasonable restraints under the common law were neither criminal nor tortious. The Sherman Act framers sought to make violations both crimes that the government could prosecute and criminally sanction through imprisonment and fines and quasi-torts for which injured private parties could seek monetary damages (actually treble damages) and injunctive relief. Although federal courts used common law in civil actions, our federal system does not recognize common law crimes. If competition law violations were to be made criminal, a stature was required. The innovative feature of the Sherman Act was procedural in creating new causes of actions and remedies; the new statute did not change the substance or approach to the common law competition rules. We will explore this in a bit more detail in Class 3. For more on the evolution of antitrust law through the passage of the Sherman Act, see Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279 (2013).

[3] The slides depict downward-sloping demand curves. A demand curve gives the relationship between the price of a product and the amount of the product that consumers in the aggregate demand. The driving force in antitrust economics is the downward-sloping demand curve: the higher the price, the lower the demand. If you need more to understand a demand curve or consumer surplus, look at the short YouTube videos listed in the supplemental reading materials. Generally, if you ever run into a topic you do not understand, take a few minutes and search the web for good treatment.

assistant to the president for technology and competition policy—all reject the consumer welfare standard as the sole objective of the nation's antitrust laws. We will discuss this debate in Class 3 and consider its implications for the future of merger antitrust law throughout the course.

Merger guidelines. To inform the business community (and, for that matter, the enforcement agency staff) of how they will exercise their prosecutorial discretion in challenging mergers, the Department of Justice Antitrust Division and the Federal Trade Commission, the two federal agencies with general antitrust enforcement authority, issue merger guidelines that they revise periodically (slides 18-25). We will consider these guidelines in detail throughout the course, but the slides for today will introduce you to a little merger guidelines history.

As you probably know, the Biden administration has a view of what the antitrust laws should prohibit that is dramatically different from the views of past Democrat and Republican administrations for the last 40 years. For the last eighteen months, the FTC and DOJ have been working on revisions to the existing merger guidelines to reflect these views. On July 19, 2023, the DOJ and the FTC released draft merger guidelines to replace the 2010 Horizontal Merger Guidelines issued by the Obama administration and the 2020 Vertical Merger Guidelines issued by the Trump administration and to introduce some theories of anticompetitive harm that are novel in modern antitrust law.[4] The draft merger guidelines do not disappoint the expectation that the changes are radical. Public comments on the draft are due by September 18, after which the agencies will review the comments, make any changes to the draft guidelines that they deem appropriate, and then finalize the guidelines. The widespread expectation is that the final guidelines will look very much like the July 19 draft guidelines.

When thinking about merger guidelines, it is important to remember that they express what the agencies would like the law to be, not necessarily what the law is. The merger guidelines speak to the type of mergers the enforcement agencies would like to prohibit, but they are not legislative rules with the force of law and so are not binding on the courts. Regardless of what the guidelines say, the Clayton Act—and the courts—require that a merger or acquisition have a "reasonable probability" of substantially lessening competition in a relevant market to be unlawful. Most of the losses the DOJ and the FTC have sustained in court in this administration result not from the agencies advocating some novel antitrust theory that the courts rejected but rather from the failure of the agency under a more traditional theory to bear their burden of proof to show the required "reasonable probability" of anticompetitive harm. Put more bluntly, the agencies are having difficulty understanding what evidence is necessary to win a case in court.

Throughout the course, we will consider judicial precedent, the prior guidelines, and the changes the DOJ and FTC seek to make as indicated in the draft guidelines. If the final guidelines are issued before the course is over, we will switch our focus to them. At this point, however, I would like you to know that merger guidelines exist, a little about their evolution over time, and some general but essential things about the 2023 draft merger guidelines (slides 15-22). The reading for Thursday includes the 2010 Horizontal Merger Guidelines and the horizontal merger parts of the 2023 draft merger guidelines. Feel free to start reading those materials now if you are curious or just want to get ahead on the reading.

The institutional setting. Next, read the remainder of the slides on the institutions of antitrust law enforcement in general and merger antitrust law enforcement in particular (slides 26-32) and on

[4] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines (July 19, 2023).

the organization of the Antitrust Division and the FTC (slides 33-41). Understanding these institutions is essential to the practice of merger antitrust law. Although the class notes are not explicit on this, you may discern that while the Antitrust Division assistant attorney general (AAG) almost always is an antitrust practitioner with years of experience in the enforcement agencies or private practice, the FTC commissioners are often—as the case is today—Hill staffers or academics without any meaningful, practical antitrust experience.

DOJ/FTC merger review process. The Antitrust Division and the FTC review large mergers and acquisitions under the Hart-Scott-Rodino Act (pp. 25-26 and slides 42-45). We will explore merger investigations under the HSR Act in much more detail in Class 4, but it is important to know the basics of the process before you get into the case study. Don't worry if you do not understand all of the cells in the overview chart (slide 45)—we will examine the steps in detail in Class 4.

The TransDigm/Takata case study. This is our first case study. The reading consists of the news release announcing TransDigm's pending acquisition of Taketa's aerospace business, the DOJ's complaint challenging this acquisition, and a news release reporting on the subsequent divestiture of the acquired assets to management (pp. 28-50). Be sure to bring a copy of the *TransDigm* complaint to class.

As you read the TransDigm/Takata case study, think about the following questions (not all of which are answered in the materials, but all of which we will address in class):[5]

1. What is the transaction in issue?
2. Who is the buyer?
3. Who is the seller?
4. Who is the target?
5. Is this a horizontal, vertical, or conglomerate transaction?
6. Why did the buyer want to buy?
7. Why did the seller want to sell?
8. What antitrust statute(s) does the complaint apply to this transaction?
9. What other antitrust statute(s) could the transaction implicate?
10. What are the elements of a prima face case of a Section 7 violation?
11. What is the public policy concern animating Section 7?
12. What were the particular concerns about this transaction?
13. Who is the plaintiff in this case?
14. What gives this plaintiff a right of action to bring the case?
15. Who is the defendant in the case?
16. Was this transaction challenged before or after consummation?

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

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

If you have any questions or comments, send me an e-mail. I look forward to seeing you in class on Tuesday, August 29.

Dale Collins