MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
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Tuesdays and Thursdays, 11:10 am – 1:10 pm
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CLASS 14 WRITTEN ASSIGNMENT—INSTRUCTOR'S ANSWER

Instructions

Submit by email by 11:10 am on Tuesday, October 17
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 14

Assignment: Calls for a memorandum to a partner (which may be sent to a client)

Dianne Lockhart, a partner in Able & Baker LLP, is working on a merger in an oligopolistically structured market. Ms. Lockhart understands that the federal antitrust enforcement agencies have a theory of anticompetitive harm called "coordinated effects" or "coordinated interaction" that they can apply in some circumstances to mergers in this type of market, but she is not familiar with the details. Ms. Lockhart would like you to prepare a brief memorandum, which she may send to the client, explaining the coordinated effects theory of anticompetitive harm under the 2010 Horizontal Merger Guidelines. She also would like you to address what factors the agencies and the courts consider in deciding whether a merger is anticompetitive under the coordinated effects theory.

If you have any questions, send me an email. See you in class.

PRIVILEGED AND CONFIDENTIAL
ATTORNEY OPINION WORK PRODUCT[1]

ABLE & BAKER LLP

INSTRUCTOR'S ANSWER

TO: Dianne Lockhart, Esq.
FROM: Dale Collins

Coordinated Effects

You have asked me to prepare a brief memorandum explaining the coordinated effects theory of anticompetitive harm under the 2010 Horizontal Merger Guidelines. You also have asked that the memorandum address what factors the agencies and the courts consider in deciding whether a merger is anticompetitive under the coordinated effects theory.

Merger law historically "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding to restrict output and achieve profits above competitive levels."[2] In modern antitrust terms, coordinated effects (or coordinated interaction) is a theory of anticompetitive harm that depends on the merger making oligopolistic interdependence more likely or more effective.

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[1] **Note to students**: This memorandum addresses a pure theory of law, does not contain any client confidences, and therefore is not protected by the attorney-client privilege even if shared with the client. Since Ms. Lockhart is working on a merger that may ultimately be challenged in court, the memorandum is arguably prepared "in anticipation of litigation." Since it contains an attorney's analysis of the case law and agency practice, it is attorney opinion work product. Opinion work product is the mental impressions, conclusions, opinions, or legal theories of an attorney. *See* United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998) (*Adlman II*) (holding that "a document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation"). Attorney opinion work product is almost never subject to discovery. *See* Hickman v. Taylor, 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney."); Upjohn Co. v. United States, 449 U.S. 383, 401-02 (1981) ("As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need . . . [A]far stronger showing of necessity and unavailability by other means would be required than is needed to justify ordinary work product."); Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir.1999) (finding that appellant failed to present the "very rare and extraordinary situation justifying disclosure of opinion work product"); Fed. R. Civ. P. 26(b)(3)(B) ("If the court orders discovery of those materials [prepared in anticipation of litigation], it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.").

[2] FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986); *accord* ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 568 (6th Cir. 2014); Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 432 (5th Cir. 2008); FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1218 n.24 (11th Cir. 1991); United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 44 (D.D.C. 2022); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 313 (D.D.C. 2020); FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 209 (D.D.C. 2018); United States v. Anthem, Inc., 236 F. Supp. 3d 171, 206 (D.D.C. 2017); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1079 (N.D. Ill. 2012); United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 77 (D.D.C. 2011); FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 60 (D.D.C. 2009).

The key idea is that oligopolistic behavior becomes more likely and more effective when more firms in the market *accommodate* each other. Accommodation occurs when firms are willing to pull their short-term competitive punches against each other, say by not undercutting a competitor's price to win market share or not invading a competitor's territory to win its customers. More formally, firms in the market, recognizing their interdependence in a multiperiod game and their ability to earn higher profits in the long run, elect unilaterally to forego increasing their short-run profits by not competing as aggressively with one another as they might otherwise. Coordinated effects "involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others."[3]

Consider the options available to a firm if the merged firm seeks to anticompetitively increase price:

1. "Do nothing"—Continue with the firm's premerger prices and production levels
2. Attempt to gain market share by competing more aggressively against the higher-priced merged firm, perhaps by lowering price
3. "Accommodate" the merged firm's price increase by increasing its own price to some extent (although not necessarily matching the merged firm's price)

The coordinated effects theory applies when the merger increases the probability or effectiveness of accommodating conduct among some or all the firms in the market (the "collusive group) sufficient to facilitate the exercise of joint market power to the harm of consumers.

A causal connection to the merger is essential: a merger threatens to "substantially lessen competition"[4] and therefore violates Section 7 under the coordinated effects theory only if the merger proximately causes an increase in the probability or effectiveness of anticompetitive coordination in the relevant market.

Modern courts use one of two methods in testing whether anticompetitive coordinated effects are likely to occur as a result of a merger.

First, some courts use the two-element test adopted from the 2010 Horizontal Merger Guidelines: (1) the relevant market premerger is susceptible to coordinated interaction, and (2) the merger is reasonably probable to increase either the likelihood or effectiveness of coordinated interaction.[5]

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[3] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 7 (rev. 2010).

[4] Clayton Act § 7, 15 U.S.C. § 18.

[5] *See, e.g.*, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 234 (S.D.N.Y. 2020); New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 234 (S.D.N.Y. 2020); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 317 (D.D.C. 2020). Section 7.1 of the 2010 Merger Guidelines provides:

> The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.

2010 Horizontal Merger Guidelines § 7.1, The first element is satisfied when the *PNB* presumption is triggered and is superfluous in any event if the second and third elements are satisfied. If anything, it probably was intended to act as a "safe harbor" for transactions in unconcentrated markets.

In this approach, the plaintiff has the burden of proving a prima facie case of anticompetitive effects in its prima facie case.

The second approach, which predates the 2010 Horizontal Merger Guidelines in precedent, essentially employs a rebuttable presumption to establish a prima facie case of coordinated effects from the *PNB* presumption.[6] In this approach, once the *PNB* presumption is triggered, the burden of production shifts to the merging parties to adduce evidence sufficient to raise a genuine issue of material fact that the merger is reasonably probable to result in anticompetitive coordinated effects. Presumably, the merging parties can satisfy their burden of production by adducing sufficient evidence for the trier of fact to find either (1) the relevant market premerger is not susceptible to coordinated interaction, or (2) the merger is not reasonably likely to increase either the likelihood or effectiveness of coordinated interaction.

The primary factors courts consider in finding that the market is susceptible to coordinated interaction are:

1. The market is highly concentrated
2. Prior actual or attempted attempts to coordinate (whether successful or unsuccessful, whether unlawful or lawful)
3. The merger will involve a firm that has been disruptive to coordination (a "maverick")[7]
4. Market transparency on the dimensions of competition that firms will allegedly coordinate (usually prices or output, but it can be other variables)
5. Limited competitive responses from noncoordinating firms that would disrupt coordination (e.g., entry, expansion, or repositioning)
6. Aligned incentives to coordinate
7. Profitability or other advantages of correlation

The first three factors are the most important; the remaining factors are more secondary.

Finally, it is important to note that a theory of coordinated effects does not need to involve every firm in the relevant market. It is sufficient that coordination occurs among some subset of firms (the "collusive group") that collectively can influence a dimension of competition, especially

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[6] *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 44-45 (D.D.C. 2022) ("[W]hen the government has shown that a merger will substantially increase concentration in an already concentrated market, . . . 'the burden is on the defendants to produce evidence of "structural market barriers to collusion" specific to this industry that would defeat the "ordinary presumption of collusion" that attaches to a merger in a highly concentrated market.'") (quoting *H&R Block*, 833 F. Supp. 2d at 77); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1087 (N.D. Ill. 2012). The origin of this approach appears to go back to at least *PPG Industries* and *Heinz*. *See* FTC v. PPG Indus., 798 F.2d 1500, 1503 (D.C. Cir. 1986) ("This conclusion [that a prima face of anticompetitive effects can be shown by the *PNB* presumption] rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."); FTC v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001) ("Merger law 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.'") (quoting *PPG*).

[7] The elimination of a "maverick" is often treated as a separate theory of anticompetitive harm.

market price or aggregate output. As a result, courts often ignore fringe firms in the market when assessing a theory of competitive effects.[8]

[8] *See, e.g.*, United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 77 (D.D.C. 2011) (finding coordinated effects among the "Big Three" digital do-it-yourself tax software firms collectively accounting for approximately 90% of market revenues notwithstanding the existence of multiple small firms in the market).