MERGER ANTITRUST LAW

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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Class 11 (October 1): H&R Block/TaxACT (Unit 9)[1]

In the first part of the course, we examined antitrust institutions (including the substantive statutes, the federal enforcement agencies and other potential plaintiffs, the DOJ/FTC merger review process under the HSR Act, merger antitrust litigation, and settlements of investigations and litigations), developed a model for predicting antitrust challenges and enforcement outcomes in the context of these institutions, used this model to assess the inquiry, substantive and relief risks in transactions, and then used this risk assessment to inform the negotiations on behalf of a buyer or seller on various provisions in the merger agreement to allocate the antitrust risk.

As we have discussed, effective advocacy—either as a prosecutor or defense counsel—depends on capturing both the "heart" and "mind" of the decision maker, whether the ultimate decision-makers in the DOJ, FTC, or a federal court judge.

Consider, for example, advocacy before a federal district court judge. Capturing the judge's heart means successfully appealing to the judge's judgment, experience, and common sense that the position you are advocating is the one that best serves justice. If the judge is convinced, she will look for ways to find in your favor. Capturing the judge's mind means providing the judge with a way to justify the outcome you are advocating, consistent with the prevailing analytical paradigm and judicial precedent. More to the point, you should ideally provide the judge with legal arguments and supporting evidence that the judge can incorporate into her opinion that will make the judge look like a scholar to the bench and bar, is likely to be regarded as a model by other judges writing opinions in future similar cases, and (by no means least) will not be reversed on appeal. The bottom line: even if you capture the "heart" of the decision maker and convince her your outcome is the "just" one, you may still lose if you cannot provide the "mind" with an acceptable way to justify a decision in your favor within the prevailing judicial paradigm. We will spend the rest of the course on the "mind" part of this equation by examining how modern judges justify the outcomes they reach.

As a quick aside, when writing briefs, the fact section should be written not only to provide the factual predicates for the theory of the case but also to provide a compelling narrative to appeal to the "heart" of the judge. The argument section should speak more to the judge's "mind." If the judge is not convinced that a decision in your favor is the "just" outcome by the time the judge has finished reading the fact section, you have a problem.

This brings us to our first merger antitrust decision in the course: H&R Block/TaxAct. The case involves the proposed acquisition in 2010 by H&R Block of TaxACT for $287.5 million in cash. H&R Block was the largest firm in "assisted preparation" of income tax returns and the second largest firm in digital "do-it-yourself" (DDIY) tax software (15.6%). TaxACT was the third-

[1] A reasonably complete set of the most important filings in the litigation (including the trial transcript) may be found here on AppliedAntitrust.com.

largest firm in DDIY tax software (12.8%). Nonparty Intuit was the largest firm in the DDIY space (62.2%). The space was highly concentrated, with a three-firm concentration ratio (3-FCR) of 90.6%, so the transaction was a three-to-two combination with slightly less than a 10% fringe *if* DDIY is the proper relevant product market. The DOJ challenged the deal and ultimately prevailed at trial, resulting in a permanent injunction blocking the transaction. The parties then voluntarily terminated their merger agreement without taking an appeal. Shortly thereafter, TaxACT was acquired by InfoSpace.[2]

While we will spend some time on the litigation aspects of the case, we will focus primarily on how Judge Beryl A. Howell of the District Court of the District of Columbia explained her decision that the transaction, if consummated, would violate Section 7 of the Clayton Act.

The institutional context. First, review the substantive elements of a Section 7 violation (slides 3-4). Then, look at Section 15 of the Clayton Act, which gives the Attorney General a right of action to seek injunctive relief for threatened or actual violations of Section 7 (p. 6). Also, review Rule 65 of the Federal Rules of Civil Procedure, which governs actions for injunctions and restraining orders (pp. 6-8). You have seen these materials before in prior units, so you should not need to spend much time on them.

The PNB *presumption*. One of the most important aspects of horizontal merger law is the *Philadelphia National Bank* presumption. Recall that Section 7 prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly" (slide 3). In 1963, the Supreme Court in *Philadelphia National Bank*[3] created a presumption of anticompetitive effect in horizontal cases based on the combined market share of the merging firms and the increase in market concentration resulting from the merger. While there is an academic debate over whether plaintiffs in horizontal merger cases must use the *PNB* presumption, I know of no horizontal merger case where the plaintiff has not used the presumption. No doubt courts expect to see it. While we will examine the economics behind the presumption in more detail in Class 14, we need to become familiar with it now because it bears directly on the development of the tests for Section 7's market definition elements.

When the Supreme Court decided *PNB*, the dominant theory in industrial organization was the "structure-conduct-performance" (SCP) paradigm. The idea was that market structure would determine how firms in the market behave, which in turn would determine how competitively the market would perform.[4] As a special case, the paradigm held that as markets become more concentrated with fewer firms (or more dominant firms), firms would compete less aggressively

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[2] Unlike the usual case when the first deal fails, InfoSpace paid $287.5 million in cash to acquire TaxACT, the same amount H&R Block was to pay. *See* Press Release, TaxACT, *InfoSpace to Acquire TaxACT* (Jan. 9, 2012). After the acquisition, 2nd Story Software, the operating company for the TaxACT business, became a wholly-owned subsidiary of InfoSpace, and continued operations in Cedar Rapids, Iowa as a standalone business unit led by the TaxACT management team.

[3] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[4] The SCP model was first introduced in 1933 by economists Edward Chamberlin and Joan Robinson and then later developed by Joe S. Bain in 1959. *See* EDWARD CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933); JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING (1956). It was the dominant paradigm in industrial organization during the 1960s until the late 1970s, the period when the Supreme Court issued the formative merger antitrust opinions. For an economic history, see Matthew T. Panhans, *The Rise, Fall, and Legacy of the Structure-Conduct-Performance Paradigm* (Jan. 2023). For some of the legal history, see William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Perspectives 43 (2000).

with one another, market equilibrium prices would increase, and the market would perform less competitively. This theory of oligopoly remains a mainstay in judicial antitrust opinions.[5]

The *PNB* Court used this intuition to create a rebuttable presumption of the requisite anticompetitive effect in a Section 7 case whenever a horizontal transaction produces a firm with an "undue percentage" of the relevant market and results in a "significant increase" in market concentration:

> Specifically, we think that a merger which produces a firm controlling *an undue percentage of the relevant market*, and *results in a significant increase in the concentration of firms in that market*, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[6]

The Supreme Court explained that a merger with these characteristics "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[7] Once a relevant market has been established, the market shares and market concentration may be determined through the usual discovery tools, market research reports, other third-party statistics, or regular course of business documents. Market shares do not have to be exact; a "reliable, reasonable, close approximation" of the relevant market share is sufficient for applying the *PNB* presumption.[8]

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[5] *See, e.g.*, Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 432 (5th Cir. 2008); FTC v. H.J. Heinz Co., 246 F.3d 708, 71516 (D.C. Cir. 2001); FTC v. University Health, Inc., 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) ("Significant market concentration makes it easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.") (quotation marks omitted); FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989); FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986) (explaining that "increased concentration raises a likelihood of interdependent anticompetitive conduct ... [based] 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") (citations and quotation marks omitted); FTC. v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 60 (D.D.C. 2009); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 123 (D.D.C. 2004). The Horizontal Merger Guidelines have refined this theory into coordinated effects, which we will cover later in this unit.

[6] *Philadelphia Nat'l Bank*, 374 U.S. at 363 (emphasis added; citing United States v. Koppers Co., 202 F. Supp. 437 (W.D. Pa. 1962)).

[7] *Id.*; *accord* United States v. General Dynamics Corp., 415 U.S. 486, 497 (1974); United State v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 366 (1970); United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966); Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1214 (11th Cir. 2012); United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 858 (6th Cir. 2005); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1074 (N.D. Ill. 2012); FTC v. ProMedica Health Sys., Inc., 2011 WL 1219281, at *53 (N.D. Ohio 2011); FTC v. Lab. Corp. of Am., 2011 WL 3100372, at *14 (C.D. Cal. 2011).

[8] United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) (citing FTC v. PPG Indus., Inc., 798 F.2d 1500, 1505 (D.C. Cir. 1986)).

You may be wondering where the *PNB* Court got its economics. Justice William Brennan is the author of the *PNB* majority opinion. Richard Posner, Brennan's law clerk during the 1962-63 term, reports that Brennan "wasn't very interested in the details of legal analysis, so we law clerks wrote the opinions and he would go over them." Interview with Richard Posner, Securities and Exchange Commission Historical Society Oral History Project 2 (Jan. 25, 2011).Posner further reported he was the clerk that Brennan asked to draft the *PNB* majority opinion. *Id.* While on the Harvard Law Review, Posner had been assigned to cite check a portion of a path-breaking article by Derek Bok in which Bok had argued for a simplified approach to Section 7 cases. *See* Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960). In *Philadelphia National Bank*,

So what does this have to do with market definition? If the *PNB* presumption is to be economically meaningful, then the market must be defined in ways that permit a reasonable inference of anticompetitive effect in the context of the SCP paradigm. That is, the *PNB* presumption should apply when the combined firm's market share and the increase in market concentration surpass thresholds that make a price increase likely within the SCP model. As we will see, this is the reason for the reinterpretation of the judicial tests for market definition as well as the DOJ's creation of the "hypothetical monopolist test" in the 1982 Merger Guidelines—both of which remain mainstays of modern market definition law.

The class notes (slides 5-11) provide a quick overview, and the reading materials (pp. 9-18) provide more detail.[9]

Allocation of the burdens of proof under Baker-Hughes. A fundamental question in merger antitrust law is the quantum of evidence the merging parties must adduce to defeat the plaintiff's prima facie case. *Philadelphia National Bank* stated once the plaintiff had made out its prima facie case, the transaction "must be enjoined in the absence of evidence *clearly showing* that the merger is not likely to have such anticompetitive effects."[10]

Notwithstanding this indication that the presumption was rebuttable, as a practical matter the lower courts quickly treated the presumption as if it was conclusive. In 1974, the Supreme Court in *United States v. General Dynamics Corp.*[11] firmly reestablished that the *PNB* presumption was rebuttable. Still, despite some implicit skepticism of *PNB's* "clear showing" language, the Court did not explicitly overrule it. As a result, the DOJ and FTC invariably invoked the "clear showing" standard in their merger antitrust litigations. The government's approach was that if it could establish a market definition that triggered the *PNB* presumption, the case was essentially over since the defendants could not make the "clear showing" necessary to overcome the presumption.

As a general rule, courts did not push back too hard on this approach until the D.C. Circuit's 1990 opinion in *Baker Hughes*.[12] In that case, the court of appeals explicitly rejected the "clear showing" standard and instead adopted a three-step burden-shifting approach to the allocation of the burdens of proof in a horizontal merger antitrust case:

Posner incorporated the idea of a simple prima facie based on market share and market concentration to create a showing of anticompetitive effect in what is now known as the *PNB* presumption.

After clerking for Justice Brennan, Posner served from 1963 to 1965 as an attorney-advisor to FTC Commissioner Philip Elman. For the next two years, Posner was an assistant to Solicitor General Thurgood Marshall. Posner joined the faculty of the Stanford Law School in 1968 as an associate professor and moved to the University of Chicago Law School as a professor in 1969. In 1981, Posner was nominated by President Ronald Reagan to be a judge on the Court of Appeals for the Seventh Circuit, where he served as chief judge from 1993 to 2000. Posner retired as judge on the Seventh Circuit in 2017 and did not assume senior status. He continues as a senior lecturer in law at the University of Chicago.

[9] I may have gotten a bit carried away in giving you more detail than you need on *Philadephia National Bank* and the *PNB* presumption for this unit on market definition. But the material is essential to merger antitrust law and you might as well learn it now.

[10] *Philadelphia Nat'l Bank*, 374 U.S. at 363 (emphasis added); *accord* United States v. Phillipsburg Nat'l Bank & Tr. Co., 399 U.S. 350, 366 (1970).

[11] 415 U.S. 486 (1974).

[12] United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

1. The plaintiff bears the burden of proof in market definition, market shares, and market concentration within the relevant market sufficient to trigger the *PNB* presumption and thereby prove a prima facie Section 7 violation (essentially a burden of production).
2. If the plaintiff satisfies this burden, the *burden of production* shifts to the defendant to adduce evidence sufficient to rebut the *PNB* presumption by raising a factual question for the trier of fact as to the likely competitive effects of the transaction.
3. If the defendant satisfies its burden of production, then the plaintiff has the *burden of persuasion* to prove in light of all of the evidence in the record that the merger is reasonably probable to have an anticompetitive effect in the relevant market.[13]

The *Baker Hughes* court of appeals directly confronted *Philadelphia National Bank's* "clear showing" language and concluded that *General Dynamics* and other cases had implicitly changed the standard. The three-step burden-shifting approach became the law of the circuit in the District of Columbia, where most merger antitrust cases until the Biden administration have been litigated. It was also quickly adopted by other courts when confronted with a merger antitrust case. The *Baker Hughes* approach now appears well-entrenched in law, especially since its author (Clarence Thomas) and another panel member (Ruth Bader Ginsburg) became long-serving Supreme Court justices.

The class notes provide a quick summary (slides 12-15), and the reading materials give more detail (pp. 19-26). When you read the excerpt from *Baker Hughes* (pp. 20-23), pay attention to the articulation of the three-step burden-shifting approach and to the panel's rejection of the *PNB* "clear showing" rule. The notes on *Baker Hughes* (pp. 23-27) provide a deeper dive into burdens on the parties at each of the three steps. In my experience, most practitioners and even judges do not really understand the *Baker Hughes* approach, and a thorough understanding will enable you to make better arguments and write better briefs.[14]

H&R Block/TaxAct. Next, turn to the case study. As usual, we start with some developments prior to the decision. On October 13, 2010, the parties announced the deal (pp. 29-30). On May 23, 2011, following the completion of its HSR merger review seven months after the announcement, the DOJ issued a news release (pp. 31-33) and filed a complaint seeking a permanent injunction to block the transaction (pp. 34-56). The merging parties filed an answer denying any violation a little over a month later (pp. 57-72). After the parties' unsuccessful motion to transfer venue and the completion of discovery, the court's minute order of August 4, 2011, set a hearing date of September 6, 2011, and the parameters for trial (p. 73). Eight days of trial began on September 6, 2011, and concluded on September 19, 2011, and the court heard closing arguments on October 3, 2011.

The complaint, answer, and orders are easy reads, but do not go through them too quickly since this will be our only time to look at some pretrial papers other than the complaint. Be sure that you understand the analytical structure of the DOJ's complaint and the factual allegations it makes in support of its claim that the transaction, if consummated, would violate Section 7. Also,

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[13] *Id.* at 982-83.

[14] As you will read, Thomas based his three-step burden-shifting approach on *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981), a civil rights case. Consequently, the *Baker Hughes* approach has application beyond antitrust cases. For those of you who have taken the basic antitrust course, think about how the *Baker-Hughes* three-step burden-shifting approach to mergers compares with the allocations of the burdens of proof in rule of reason cases under Section 1.

be sure you understand the structure of the defense the merging parties are asserting in their answer.

The district court issued an order entering a blocking permanent injunction on October 31, 2011 (pp. 74-75) and released a public version of the memorandum opinion in support of the order on November 10, 2011. Read the opinion up to the expert opinion section on market definition (pp. 76-106). Pay particular attention to the organization of the opinion as set out in the table of contents (p. 78).

The early sections of the opinion address the parties to the deal, the history of TaxACT and the transaction, and the deal rationale (pp. 79-85). They also discuss tax preparation products and the role of free products (pp. 85-88). In light of these facts, think about the transaction's antitrust risk and what antitrust risk-shifting provisions the seller might want in the acquisition agreement.

Turning to the litigation itself, recall the alleged basis for the DOJ's complaint and the merging parties' response to it in their answer from your earlier reading of these documents. We will briefly discuss the steps in the litigation before trial (pp. 81-82). The standard of review (pp. 88-90), including the discussion of the *Baker Hughes* burden-shifting approach, is particularly important.

Market definition. With that behind us, it is time to look at the merits. Historically, merger antitrust opinions address market definition first. The class notes briefly introduce market definition (slides 16-20). As you know, an essential element of every Section 7 violation is the finding of a *relevant product market*, which identifies the "line of commerce" (product market), and a *relevant geographic market*, which identifies the "area of the country" in which the threatened anticompetitive effect of the merger is to be located.[15] The parties stipulated to a national market, so the geographic market was not an issue. Product market definition, however, was the key to the case outcome.

There are two complementary judicial "tests" for whether a product grouping is a relevant product market in merger antitrust analysis under Section 7: (1) the "outer boundaries" and "practical indicia" criteria set forth by the Supreme Court in *Brown Shoe Co. v. United States*,[16] and (2) the "hypothetical monopolist test" under the Merger Guidelines.[17] Since 1982 until the Biden administration, the DOJ and FTC have looked primarily to the hypothetical monopolist test when making prosecutorial decisions, but if they have to prove their case in court, they will also invoke the *Brown Shoe* criteria. In writing opinions, modern courts almost always employ both tests. The emerging judicial practice appears to use the *Brown Shoe* factors first to define the relevant product market and then use the HMT to confirm it. (See slides 22-19.)[18]

The Brown Shoe *tests*. Under *Brown Shoe*, the "outer boundaries" of the relevant product market "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. The idea is that products within the relevant market must exhibit (1) high cross-elasticity of demand and

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[15] The nomenclature is not precise since the relevant product market and the relevant geographic market are not separate markets but rather the product and geographic dimensions of the *relevant market*.

[16] 370 U.S. 294, 325 (1962).

[17] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (rev. Aug. 19, 2010).

[18] We will examine the changes the Biden administration has made in its approach to market definition at the end of this memorandum.

interchangeability of use with other products in the market and (2) comparatively low cross-elasticity of demand and interchangeability of use with products outside the market. Moreover,

> within this broad market, well-defined *submarkets* may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[19]

The original purpose of the *Brown Shoe* "practical indicia" was to enable the finding of relevant (sub)markets within larger markets defined by the "outer boundaries" test. Modern courts, however, do not view submarkets as analytically different from markets and regard the *Brown Shoe* "practical indicia" as factors probative of reasonable interchangeability of use and high cross-elasticity of demand required for markets.

Read the excerpt from *Brown Shoe* in the reading materials (pp. 192) and then read the class notes on the *Brown Shoe* tests (slides 29-36). Now would also be a good time to reread Section 4 of the 2010 DOJ/FTC Horizontal Merger Guidelines on market definition (pp. 193-202). Then read *H&R Block's* application of the *Brown Shoe* factors to the facts of the case (pp. 90-106).[20]

Note that the Merger Guidelines define markets strictly from a demand-side point of view. The idea is that the constraints on the merged firm in increasing prices come from the loss of sales and accompanying profits to demand-side substitutes within the market. But courts recognize that supply-side factors can also play a significant role in constraining prices. The idea here is that other firms in the market can expand production and "hill the hole" in aggregate output created by the merged firm (acting alone or tacitly with others) and so mitigate or defeat a price increase. The Merger Guidelines are not oblivious to supply-side factors but account for them not in the definition of the market but rather in the identities and shares of the market participants. Read the class notes on supply-side switching for a quick treatment (slides 37-47).

The hypothetical monopolist test. The *Brown Shoe* tests are problematic. The Supreme Court did not indicate any threshold for cross-elasticity or reasonable interchangeability of use or tell the lower courts how to weigh the various practical indicia. The upshot was that courts were left to use their own judgments. No meaningful test emerged in the lower courts, and instead the courts generally deferred to the market definitions alleged by the antitrust enforcement agencies. If the government gets to define the market, it can ensure that the market shares will trigger the *PNB* presumption of anticompetitive effect. For this reason, Justice Potter Stewart, in his dissent in *Von's Grocery*,[21] famously observed: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."[22] Unfortunately, this approach also resulted in enormous confusion, flawed analysis, and bad decisions.

The *hypothetical monopolist test*, first introduced in the 1982 Merger Guidelines and now adopted in one form or another by the courts, was designed to bring some economic sense and

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[19] *Id*. (internal citations and footnotes omitted; emphasis added).
[20] At this point, I would not read the market definition section of the 2023 Merger Guidelines. See the Postscript at the end of this reading guidance.
[21] United States v. Von's Grocery Store, 384 U.S. 270 (1966) (Stewart, J., dissenting).
[22] *Id*. at 301.

analytical rigor into market definition. The HMT is built around the notion of a hypothetical monopolist[23] of a product group called the *candidate market*. The HMT deems the candidate market a relevant market if the hypothetical monopolist could profitably raise the prices in the candidate market over premerger levels by "a small but significant nontransitory increase in price" (SSNIP), usually taken to be 5% of the prevailing price for a period of one year. The idea is that if a hypothetical monopolist could not profitably raise its prices, then a fortiori the merged firm—either individually or tacitly with other firms in the market—could not raise prices in the candidate market as a result of the merger. In this situation, the combined firm's market share and the change in concentration in the candidate market is not probative of the ability or likelihood of the merger resulting in a price increase in the candidate market and so should not predicate the *PNB* presumption. Candidate markets that satisfy the HMT at least satisfy a necessary condition for the merger to have an anticompetitive price effect. The class notes provide an introduction to the HMT (slides 48-55).

A recurring question for the HMT is whether the SSNIP is merely profitable for the hypothetical monopolist (the *profitability* or *breakeven test*) or whether the hypothetical monopolist's profit-maximizing price is equal to or greater than the SSNIP (the *profit-maximization test*)? The practice under the 1982 and 1992 Merger Guidelines in the agency and the courts was to use the profitability test. After the 2010 Merger Guidelines were released, some economists began to argue that the profit-maximization test was the proper one in economic analysis and the one prescribed by the language of the guidelines. While there is a good argument that the literal interpretation of the 2010 guidelines employs the profit-maximization test, the courts developed their precedent after the earlier guidelines using the profitability test. Today, although courts will occasionally use the profit-maximization test, most courts follow precedent and use the profitability test. In practice, as the class notes show, the markets will usually be the same under either test (see slides 47-53). Indeed, using the profit-maximization test may risk introducing the *Cellophane* fallacy into market definition in close-to-monopolized markets (slides 57-66).

The 2010 Merger Guidelines modified the hypothetical monopolist test in three significant ways:

1. Originally, market definition (using the hypothetical monopolist test) was an essential element of every horizontal merger case and was the point of departure for horizontal merger analysis. The 2010 Merger Guidelines, however, relegates market definition to one of several tools useful in merger antitrust analysis. The 2010 guidelines hold that market definition may not be necessary or even helpful in all cases.
2. The hypothetical monopolist test originally deemed only the *smallest product grouping* that satisfied the test to be a relevant market (the "smallest market principle"). However, under the 2010 Merger Guidelines, while the smallest market principle remains the preferred approach, the enforcement agencies and the courts can use a larger market if necessary to reflect the economic realities (slide 67).
3. Originally, the hypothetical monopolist test required the hypothetical monopolist to increase the prices of all the products in the candidate market by a uniform percentage. The 2010 Merger Guidelines, however, allow the hypothetical monopolist to raise the prices of one or more products selectively while leaving the prices of the other products constant. Under this change, the hypothetical monopolist test only

[23] Think of all the firms producing products in the candidate market merging into a single firm.

requires the hypothetical monopolist to profitably *raise the price of a single product* in the product group for the product grouping to be a relevant market (slide 68).

The first change has had no traction with the courts. All courts to date have considered market definition to be an essential element of the plaintiff's prima facie case under the language of Section 7. The courts, however, have adopted the second two modifications. In particular, modern courts are using the one-product SSNIP test to define markets.[24] We will examine one-product SSNIP tests in Class 13.

Another important issue is whether the HMT is a necessary and sufficient condition for a product grouping to be a relevant antitrust market or simply a necessary condition. Originally, the HMT was widely considered by the agencies and the antitrust bar as a necessary and sufficient condition. However, courts did not accept the HMT as a sufficient test when the product grouping did not comport with a market's "commercial realities"—typically when either the candidate market excluded close substitutes or the industry did not recognize the product grouping as a market. The 2010 Merger Guidelines implicitly weakened the HMT to more of a necessary test when it eliminated the smallest market requirement (slide 69).[25]

The key to applying the HMT is determining how many customers divert from the product(s) whose price(s) are increased by the SSNIP and, in the case of a selective SSNIP, what substitute products they purchase. The class notes examine some approaches under the 1992 and 2010 guidelines (slides 70-75).

Finally, quickly read the market definition excerpt from *FTC v. Meta Platforms, Inc.* (pp. 214-24). The idea here is not for you to dig into the details but rather for you to see how another modern court analyzes market definition.

In Classes 12 and 13, we will look at the expert testimony on product market definition and the court's application of the hypothetical monopolist test (and its various implementing techniques) to confirm the market dimensions indicated by the *Brown Shoe* factors.

We will walk through the opinion in some detail in class (including the underlying analytics), so be prepared and bring a copy of the opinion to class. Everything in the opinion is fair game for class discussion.

Postscript: Market definition in the Biden administration. As discussed above, from the 1980s until the Biden administration, the DOJ and FTC primarily relied on the hypothetical monopolist test to define relevant markets. This approach replaced the *Brown Shoe* tests, which the agencies considered too amorphous, uncertain in their application, and lacking any meaningful connection to the economics underlying the *PNB* presumption to be particularly useful. With much prompting by the DOJ and the FTC in their briefs and at trial, courts came to recognize the value of rigorously identifying a relevant market where a hypothetical monopolist could exercise

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[24] *See, e.g.*, FTC v. Sanford Health, 926 F.3d 959, 963 (8th Cir. 2019); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 293 (D.D.C. 2020); FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 46 (D.D.C. 2018); *FTC v. Tronox Ltd*., 332 F. Supp. 3d 187, 203 (D.D.C. 2018); United States v. Anthem, Inc., 236 F. Supp. 3d 171, 198 (D.D.C. 2017); United States v. Aetna Inc., 240 F. Supp. 3d 1, 20 (D.D.C. 2017); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 121 (D.D.C. 2016); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 33 (D.D.C. 2015); United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 51-52 (D.D.C. 2011).

[25] As we will see in the Postscript at the end of this reading guidance, the 2023 Merger Gudielines have significantly demoted the role of the HMT in market definition. It remain to be seen—and I am doubtful—that this demotion will have much traction with the courts and future administrations.

market power and harm consumers. Even when data limitations precluded an economically accurate HMT test, the idea behind the HMT test provided the courts a framework for evaluating *Brown Shoe's* practical indicia as evidence of price constraints on the merged firm.

The 2023 DOJ/FTC Merger Guidelines chart a different course. Section 4.3 of the 2023 Merger Guidelines defines a "relevant antitrust market" as "an 'area of effective competition' in which competition may be lessened." [26] The guidelines then list four methods the agencies use to define markets:

> "A. [*Direct evidence of competition*:] Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.
>
> "B. [*Direct evidence of market power*:] Direct evidence of the exercise of market power can demonstrate the existence of a relevant market in which that power exists. This evidence can be valuable when assessing the risk that a dominant position may be entrenched, maintained, or extended, since the same evidence identifies market power and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.
>
> "C. [*Brown Shoe "practical indicia"*:] A relevant market can be identified from evidence on observed market characteristics ("practical indicia"), such as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Various practical indicia may identify a relevant market in different settings.
>
> "D. [*Hypothetical monopolist test*:] Another common method employed by courts and the Agencies is the hypothetical monopolist test. This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price. An analogous hypothetical monopsonist test applies when considering the impact of a merger on competition among buyers."[27]

Without further commentary on the first three methods, the 2023 Guidelines summarily conclude: "The Agencies use these tools to define relevant markets because they each leverage market realities to identify an area of effective competition."[28] (I have no idea of what this means!!!)

Consistent with the Neo-Brandeisian philosophies of the leadership of the FTC and the DOJ in the Biden administration, the market definition section of the 2023 Guidelines appears to be part of an attempt to refocus antitrust law on economic and political power and away from the market power/consumer welfare focus of the last 40 or so years. The market definition section of the 2023 Guidelines is devoid of any discussion of what an area of effective competition means.

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[26] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 4.3 (rev. Dec. 18, 2023).

[27] *Id*. (footnotes omitted).

[28] *Id*. The 2023 Guidelines contain some commentary on the HMT, *see id.* § 4.3.A, but this commentary does not exmine the underlying economics as do the 1992 and 2010 Guidelines.

Moreover, the first two methods do not define markets at all. The first method places the products of the two merging firms in the same relevant market but says nothing about what the boundaries of those markets might be. Rather, it suggests that the agencies have significant discretion in drawing the market boundaries provided only that the merging firms are in the same market. The second method does no more than note that at least one of the merging firms is a dominant firm. Again, it says nothing about the boundaries of the market and seems much more relevant to the analysis of anticompetitive effects than to market definition. The third method returns to the *Brown Shoe* tests of the 1960s and 1970s when the *Brown Shoe* "practical indicia" of market definition were unmoored to any economic principles. Only the fourth method of the hypothetical monopolist test has any economic foundation. However, it is listed as the last method of market definition, which suggests that it is not especially important in the minds of the DOJ's and FTC's current leadership.

As we have seen, the real significance of market definition—beyond courts treating it as a necessary element of a Section 7 violation—is that it establishes the product and geographic boundaries used to identify market participants and their shares. These shares are then used to calculate the postmerger HHI and the change ("deltas") in the HHI resulting from a horizontal merger. These market shares and HHI statistics, in turn, will determine whether the *PNB* presumption applies to the merger. The structural presumption has been central to horizontal merger enforcement since *Philadelphia National Bank* was decided in 1963, and to my knowledge, no horizontal merger case since then has been brought without relying on the presumption to make out a prima facie case.

The danger of economically untethered market definition methods—as we saw in the 1960s and 1970s—is a lack of predictability and the prospect of significant errors in merger challenge outcomes. However, modern courts are well-entrenched in the idea that a relevant market must be one where a hypothetical monopolist could exercise market power and harm customers. Whether the agencies will succeed in convincing courts to return to economically ungrounded methods of market definition remains to be seen.

I have included Section 4.3 in the reading materials (pp. 203-14). You should at least skim the section, but this postscript tells you most of what you need to know. For the most part, the 2010 Guidelines give a better and more complete explanation. Beyond demoting the role of the HMT and recognizing three other methods to define markets, the 2023 Guidelines include a few other innovations:

- Section 4.3.A: Expands the HMT to test the ability of a profit-maximizing hypothetical monopolist to make adverse changes to the terms of trade generally and not just in price (a "SSNIPT"). While correct in principle—the consumer welfare standard considers all terms of trade—the practical effect remains to be seen. As we discussed in Unit 2, merger antitrust law focuses primarily on price because price is often the most important and competitive variable controlled by firms and because we lack good models for predicting the change in other variables affecting consumer welfare.
- Section 4.3.B: Discusses how to modify the HMT for use in labor and other input markets). This subsection also explicitly recognizes the use of bargaining models to test whether a hypothetical monopolist could profitably implement a SSNIPT in auctions or negotiated transactions.

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