MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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READING GUIDANCE

Class 1 (August 26): Introduction to Merger Antitrust Law: TransDigm/Takata (Unit 1)[1]

Welcome again to the course. Links to the required reading and class notes for the first class are embedded in this note and can also be found on Canvas and on the Merger Antitrust Law (2025) page of AppliedAntitrust.com. This memorandum gives my thoughts on how to approach the materials for today's class.[2]

TransDigm/Takata. On February 22, 2017, TransDigm Group announced that it had acquired SCHROTH Safety Products GmbH and Takata Protection Systems Inc. from Takata Corporation for approximately $90 million. SCHROTH specialized in aviation and military safety restraint systems, including seatbelts and airbags for Boeing and Airbus aircraft. At the time, SCHROTH was the only meaningful competitor to AmSafe, a wholly-owned TransDigm subsidiary, which dominated the market for commercial aircraft restraint systems. On December 21, 2017, following a postclosing investigation, the U.S. Department of Justice (DOJ) challenged the acquisition, alleging it eliminated competition in four distinct markets: (1) two-point lapbelts used on commercial airplanes, (2) three-point shoulder belts used on commercial airplanes, (3) technical restraints used on commercial airplanes, and (4) inflatable restraint systems used on commercial airplanes. The complaint alleged that, in each market, the harm to competition would result in higher prices to customers and reduced rates of innovation.

(1) Two-point lapbelt

(2) Three-point lapbelt

[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 6 (the investment banking class).

[2] 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 cover topical areas in the course and often include more content than we can 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.

(3) Technical restraint

(4) Inflatable restraint

Simultaneously with the filing of the complaint, the DOJ filed a Hold Separate Stipulation and Order, along with a proposed final judgment that the DOJ and TransDigm had negotiated during the investigation to settle the case. TransDigm agreed to divest SCHROTH in a management buyout to Perusa Partners Fund 2, L.P. for approximately $61.4 million, restoring SCHROTH as an independent competitor in the market. Pursuant to the settlement agreement, TransDigm closed the divestiture sale on December 26, 2017. The district court entered a final judgment as the parties proposed on March 27, 2018.

With this background, read the news release announcing TransDigm's pending acquisition of Takata's aerospace business (pp. 5-6 in the reading materials[3]), the DOJ's complaint challenging the acquisition (pp. 7-21), TransDigm's news release reporting on the agreement to sell SCHROTH (pp. 22-23), and the DOJ's news release reporting on the settlement agreement (p. 24). Be sure to bring a copy of the *TransDigm* complaint to class. There is no need to read the consent decree papers (pp. 25-62)—those will be part of Thursday's class.

With the case materials behind you, it is time to turn to some institutional details.

Federal merger antitrust statutes. The DOJ challenged TransDigm's acquisition of SCHROTH as a violation of Section 7 of the Clayton Act. *See* Compl. ¶¶ 4, 41.[4] Section 7 of the Clayton Act provides in relevant part:

> 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.[5]

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[3] A reference to "p." or "pp." refers the reading materials for the unit. A reference to "slides" refers to the class notes.

[4] When I refer to paragraphs in the complaint, you should look at the cited paragraphs. You should also become familiar with the proper abbreviations when citing court documents, which can be found in Table BT1 in the Bluebook.

[5] 15 U.S.C. § 18.

By its terms, every Clayton Act violation has three essential substantive requirements:

(1) Proof of the dimensions of a *relevant product market* ("line of commerce")

(2) Proof of the dimensions of a *relevant geographic market* ("section of the country") (together, the relevant product market and relevant geographic market are called the "relevant market")

(3) Proof of a probable *anticompetitive effect* in the relevant market ("where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly")

Section 7 is the primary U.S. antitrust statute governing mergers, acquisitions, and joint ventures in the United States. Sections 1 and 2 of the Sherman Act, Section 5 of the Federal Trade Commission Act, and various state antitrust laws may also apply. However, none of these other statutes are more encompassing than Section 7, so they are largely ignored in practice.[6]

Read the major substantive provisions of the federal antitrust statutes that regulate mergers and acquisitions (pp. 64-65) and the related slides in the Unit 1A class notes (slides 3-17). Obviously, the language of the statutes that create the antitrust violations is fundamental to this course, and you should read them carefully.

The common law approach to antitrust law. The federal antitrust statutes are written in broad, sweeping terms, which by themselves provide little indication of the line between lawful and unlawful conduct. In contrast to most modern statutes regulating microeconomic behavior, the Sherman, Clayton, and Federal Trade Commission Acts were not intended to provide a comprehensive cure for the perceived competition problems of the day. The framers of the antitrust statutes recognized the diversity and rapidly changing nature of business conduct, if not the inadequacy of contemporary economic theory to uncover the root causes of anticompetitive behavior. They also recognized that they could not predict how the trusts would react to attempts to regulate them and what new prohibitions might be required. These factors made an attempt at a definitive statutory cure unwise, if not impossible.

To address these conditions, Congress adopted a more fluid and evolutionary approach to federal competition law. Rather than specifying a rigid, detailed regulatory scheme, the draftsmen used sparse, broadly phrased language to describe the key substantive concepts in the new antitrust law—"contract, combination or conspiracy," "restraint of trade," "monopolize," "attempt to monopolize," and "unfair competition"—language that is almost unique among congressional enactments in its constitution-like quality. They employed these terms of art drawn from the common law to empower federal courts to apply a large existing body of competition common law immediately to regulate business conduct. However, the Sherman Act was not intended to codify the common law as it existed in 1890 once and for all. Instead, the framers were explicit that the statutes enabled courts to refine the law and its application to particular courses of conduct over time through the common law process.

Now read the note (pp. 67-71) with some care. You can skim the excerpt of the Baxter article (pp. 72-87).

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[6] An exception may be Sherman Act § 2 when applied to the acquisition by a dominant firm of a nacent competitor. We will examine this in the unit on potential competition later in the course.

The evolution of antitrust law. As time passed, courts gained more experience with business practices and their competitive effects, political and social norms changed, and new learning in economics emerged. Using the common law process established by Congress, courts responded to these developments by revising their interpretation of the goals of antitrust law. Correspondingly, courts modified the operative legal standards and analytical frameworks used to determine whether particular business conduct violates the antitrust laws. The liability rules, burdens of proof, and economic tests applied to evaluate mergers, agreements, and unilateral conduct all evolved to reflect these shifting judicial understandings of antitrust's purposes and methods.

Since the passage of the Sherman Act, antitrust law has evolved through three major periods:

1. The *Classical Period*, which exhibited relative inactivity guided by the principle that markets functioned best with minimal government intervention (1890-1936);
2. The *Structuralist Period*, which exhibited substantially increased antitrust enforcement, focused on stemming the tide of industrial concentration and protecting small businesses (1937-1980).
3. The *Modern Period*, which rejected the structural approach of the prior period and focused instead on promoting productive efficiency, industrial growth, and ultimately consumer welfare (1980–present).[7]

While each period witnessed ebbs and flows in how courts and enforcement agencies interpreted and applied the antitrust laws, each era nonetheless maintained considerable coherence around its defining principles and analytical approaches.

All of the Supreme Court's major cases in merger antitrust law were decided during the Structuralist Period and reflect that era's aggressive interventionist approach. None of these cases has been overruled. However, the case law developed by the lower courts in the Modern Period has largely rejected pure structuralism and focuses instead on consumer welfare effects. This divergence creates a fundamental tension in contemporary merger practice: it is nearly impossible to apply the existing case law effectively unless you understand this doctrinal shift and can navigate between the Supreme Court's structural precedents and the lower courts' consumer welfare focus. Moreover, your arguments as practitioners will be significantly more persuasive if you understand not only what the law requires today, but also why courts moved away from the structural approach that still formally governs through Supreme Court precedent.

With this background, read the *Brown Shoe* excerpts from the Structuralist Period and the 1982, 2010, and 2023 Merger Guidelines excerpts from the Modern Period to see how each expressed the goals of merger antitrust law (pp.86-104).[8]

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[7] This tripartite periodization, together with its labels, are my own. Antitrust historians and commentators divide the laws's evolution in different ways, and no single taxonomy or terminology enjoys general acceptance.

[8] Following the *Brown Shoe* except is a note on appellate antitrust jusidction (pp. 90-96). The reason for this note is to explain the Expediting Act, Act of Feb. 11, 1903, ch. 544, 32 Stat. 823 (1903), which for many years provided that suits in equity initiated by the United States under the antitrust laws would have a direct appeal as of right to the Supreme Court, bypassing the courts of appeal. You should read the introduction and the section on the Expediting Act. You can skim the sections on the federal judicial system in 1890 and the Judiciary Act of 1891, although a sophisticated lawyer should be familiar with this history.

The consumer welfare standard. In the Modern Period, courts have used *consumer welfare* as the interpretative standard. The general idea is that courts 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. Despite much rhetoric challenging the consumer welfare standard in recent years, there has been no material movement away from it in the courts.

The class notes (slides 18-30) provide an operational perspective on how the consumer welfare standard is applied in practice. Read them with care.[9]

In recent years, the consumer welfare standard has been attacked as too narrow. Proponents of change argue that other values—such as the 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, traction for their arguments has only gained momentum in the last five years or so. In a dramatic departure from the last four decades, the three most important officials in competition policy in the Biden administration—Lina Khan, the chair of the Federal Trade Commission; Jonathan Kanter, the assistant attorney general in charge of the Antitrust Division; and Tim Wu, special assistant to the president for technology and competition policy—all were long-standing critics of the consumer welfare standard as the sole objective of the nation's antitrust laws. Even so, they largely recognized that to win cases in court, they had to present their cases under the consumer welfare standard. As a result, very little of their critique of the consumer welfare standard was operationalized during their tenure in office. The second Trump administration (which I will call "Trump 2.0") is likely to be somewhat more traditional in its view of the consumer welfare standard, although some divergences are already apparent (see slides 28-29).[10]

Merger guidelines. To inform the business community (and, for that matter, the enforcement agency staff) on how the agencies will exercise their prosecutorial discretion in challenging mergers, the Department of Justice Antitrust Division and the Federal Trade Commission have issued merger guidelines that they revise periodically. We will consider these guidelines in detail throughout the course, but the class notes will introduce you to their brief history and provide some essential background (slides 31-40). You should read those slides with care.

As you know, the Biden administration had a view of what the antitrust laws should prohibit that was dramatically different from the views of past Democrat and Republican administrations for the last 40 years. On December 18, 2023, the DOJ and the FTC released revised merger

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[9] The slides depict downward-sloping demand curves. A demand curve describes 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—or conversely, the lower the supply, the higher the market-clearing price. 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 economics topic you do not understand, take a few minutes and search the web for good treatment.

[10] Most notably, senior Trump-aligned antitrust officials have suggested that content moderation by dominant social media platforms—particularly practices perceived as suppressing conservative viewpoints—may constitute antitrust violations. *See* Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Files Statement of Interest on Suppression of Competition in the Marketplace of Ideas Through Deplatforming of Rival Viewpoints (July 11, 2025); Statement of Interest of the United States, Children's Health Defense, Trialsite, Inc. v. WP Co., No. 1:23-cv-2735 (TJK) (D.D.C. July 11, 2025) (giving the DOJ's view on explains how the antitrust laws protect viewpoint competition in news markets).

guidelines to replace the 2010 Horizontal Merger Guidelines issued by the Obama administration and the 2020 Vertical Merger Guidelines issued by the Trump 1.0 administration and to introduce some theories of anticompetitive harm that are novel in modern antitrust law.[11] Surprisingly, the heads of the DOJ and FTC in the Trump 2.0 have said they will continue to use the 2023 Merger Guidelines. We will be attentive throughout the course where the 2023 Merger Guidelines depart from established modern judicial precedent.

I have not included a copy of the 2023 Merger Guidelines in the reading materials, but you can download it here from the Antitrust Division website. At this point in the course, there is no need for you to study the 2023 Guidelines in any detail. For now, just read the short Overview carefully (pp. 1-4 in the document). I also encourage you to skim the rest of the document (especially the headings and subheadings) to get a sense of the structure, but I recommend doing so after you have finished the remainder of the reading. You will have plenty of opportunities to study the 2023 Merger Guidelines in detail throughout the rest of the course.

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 current 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 therefore are not binding on the courts. Regardless of what the 2023 Merger Guidelines say, the courts have interpreted the Clayton Act to 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 sustained in court in the Biden administration—which has the worst win-loss record in prosecuting mergers since the early 1970s, if not before—resulted 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. The Biden agencies' difficulties in merger litigation appear to stem less from novel theories and more from their evidentiary shortcomings under established legal standards..

The institutional setting. Next, read the slides on the institutions of antitrust law enforcement in general and merger antitrust law enforcement in particular (slides 40-46) as well as the organization of the Antitrust Division and the FTC (slides 47-57). 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) usually 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—former 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. 106-33 and slides 58-61). We will explore merger investigations under the HSR Act in greater detail later in the course, but it is essential to understand the basics of the process as we begin the case studies. Do not worry if you do not understand all the cells in the overview chart (slide 61). We will cover them as the course progresses.

[11] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023) ("2023 Merger Guidelines").

Final thoughts. 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):[12]

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?
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?

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

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 26.

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