MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2025

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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CLASS 11 WRITTEN ASSIGNMENT

Instructions

Submit by email by 3:30 pm on **Thursday, October 2**[1]
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 11

Assignment 1: Calls for answers to questions (not in a memo form). *I encourage you to work in groups on this assignment.*

Consider digital-do-it-yourself (DDIY) tax products again, this time with some different (fictitious) data. Do H&R Block and TaxACT by themselves constitute a relevant product market under the 2023 Merger Guidelines for a 5 percent SSNIP? Do TurboTax, H&R Block, and TaxACT constitute a relevant product market for the same SSNIP? If the DOJ wants to challenge the merger, what market definition should it allege (all things considered) and why?

Here is the data the investigation developed:

Prevailing conditions

	TT	H&R	TaxAct	
Price	55	25	11	
%Margin	0.5	0.4	0.2	
Marginal cost	27.5	15	8.8	(constant marginal costs)
Quantity	1,131	624	855	
%SSNIP	5%	5%	5%	
%Actual loss	-10.00%	-12.50%	-25.00%	

Diversion ratios (for single-product SSNIPs)

	To :			
From:	TT	H&R	TaxACT	Total Recapture
TT	x	30.0%	9.0%	39.0%
H&R Block	30.0%	x	26.8%	56.8%
TaxAct	25.0%	27.7%	x	52.7%

[1] I appreciate that I am late in posting this assignment and that we have three classes this week. Therefore I am giving you an extra week to do this assignment.

Assignment 2. Calls for a memorandum to a law firm partner.

Sonny Rollins, a litigation partner in the firm, is preparing for his first antitrust case. He has been reading the district court's opinion in *FTC v. IQVIA Holdings Inc.*, No. 23 CIV. 06188 (ER), 2024 WL 81232 (S.D.N.Y. Jan. 8, 2024). In its complaint for a Section 13(b) preliminary injunction, the FTC alleged that IQVIA's proposed acquisition of DeepIntent would likely substantially lessen competition in the worldwide market for programmatic advertising to health care professionals (HCPs).

Programmatic advertising is an automated method of presenting targeted advertising, in the form of website-based ads, to a specific cohort—in this instance, doctors, nurses, and other healthcare practitioners. The FTC's alleged market included three primary products—DeepIntent, Lasso (IQVIA's product), and PulsePoint (a third-party competitor's product)—along with some much smaller competitors. While the merging parties agreed that the geographic market was worldwide, they argued that the product market should be expanded to include other forms of advertising, such as social media and digital advertising on medical websites such as WebMD.

In addition to the *Brown Shoe* factors, the district found support for the FTC's alleged market in a "critical loss analysis" performed by Dr. Kostis Hatzitaskos, the FTC's economic expert. Mr. Rollins is not familiar with critical loss analysis and has questions about the court's following explanation:

> [C]ritical loss analysis asks how many customers the hypothetical monopolist would have to lose to alternatives outside the market for the price increase to be unprofitable. [*S*]*ee also FTC v. Swedish Match*, 131 F. Supp. 2d 151, 160 (D.D.C. 2000) (describing critical loss as "the largest amount of sales that a monopolist can lose before a price increase becomes unprofitable"). Dr. Hatzitaskos estimated that a 5% price increase for DeepIntent would result in a critical loss of 10.6%, meaning that the hypothetical monopolist would need to regain 10.6% of the customers switching away from DeepIntent. He also estimated that a 10% price increase for DeepIntent would result in a critical loss of 21.2%. For both calculations, he relied on a margin estimate of 47.3% for DeepIntent.
>
> Dr. Hatzitaskos then compared the critical loss figures to an estimate of the aggregate diversion ratio. "The aggregate diversion ratio for any given product represents the proportion of lost sales that are recaptured by all other firms in the proposed market as the result of a price increase." *H&R Block*, 833 F. Supp. 2d at 63. These sales remain within the proposed market and thus are not lost to the hypothetical monopolist. If the aggregate diversion ratio to products within the proposed market exceeds the critical loss threshold, then a price increase would be profitable for the hypothetical monopolist. *H&R Block*, 833 F. Supp. 2d at 63.;
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> Here, Dr. Hatzitaskos used 79.4% as an estimate of the aggregate diversion ratio. That figure was based on his analysis of actual customer choices, which relied on DeepIntent's internal "win/loss data" and campaign data from Lasso and PulsePoint. He found that 79.4% of customers who considered but did not choose DeepIntent ended up choosing Lasso or PulsePoint. Dr. Hatzitaskos characterized this figure as a conservative estimate of the aggregate diversion ratio because the hypothetical monopolist would control all providers of HCP programmatic advertising in the candidate market rather than just those three firms.

> To reiterate, the ultimate test is whether the aggregate diversion ratio is higher than the critical loss; if it is, then the candidate market passes the HMT. [*S*]*ee also H&R Block*, 833 F. Supp. 2d at 63. The aggregate diversion ratio was 79.4%, while the critical loss was either 10.6% (based on a 5% price increase) or 21.2% (based on a 10% price increase). In both cases, then, the aggregate diversion ratio exceeded the critical loss by a wide margin and thus the HMT was satisfied.

IQVIA, 2024 WL 81232, at *26-27 (record citations omitted).

Mr. Rollins would like you to prepare a memorandum explaining this passage. He asks you to be sure to address the following questions: What is a "hypothetical monopolist" and what is its role in defining markets? What is "critical loss analysis," and why is it relevant to defining markets in antitrust cases? Why is Dr. Hatzitaskos using a 5% and 10% price increase? What is "critical loss," and how did Dr. Hatzitaskos derive his critical loss numbers? What is the 47.3% "margin estimate" for DeepIntent, how did Dr. Hatzitaskos use it in the analysis, and where did Dr. Hatzitaskos get the number? What is an "aggregate diversion ratio," and why did Dr. Hatzitaskos use 79.4% as the estimate of the aggregate diversion ratio for DeepIntent? What is the significance of the finding that the aggregate diversion ratio was greater than the critical loss? Finally, are there any hidden assumptions in Dr. Hatzitaskos' analysis that may limit its generality (e.g., assumptions about constant margins, linear demand, or representative diversion ratios)?[2]

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

[2] Dr. Mark Israel, the defendants' economic expert (who we shall see in other cases later in the course), challenged the Hatzitaskos critical loss analysis. *See IQVIA*, 2024 WL 81232, at *27-28. You may prepare your memorandum without examining Israel's criticisms, but take a look at them if you like and take them into account if you wish.