

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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Class 17 (October 23): Sysco/U.S. Foods (Unit 9)¹

On Thursday, we will turn to the FTC's challenge to Sysco/U.S. Foods. Sysco/US Foods introduces targeted buyers and price discrimination, so carefully read Sections 3 and 4.1.4 of the 2010 Horizontal Merger Guidelines (pp. 6-9) and Section 4.3.D.1 of the 2023 Merger Guidelines. Powerful customers are also part of the case, so review Section 8 of the Guidelines (pp. 13-14) of the 2010 Horizontal Merger Guidelines. The 2023 Merger Guidelines do not address the ability of powerful customers to protect themselves from anticompetitive harm as a defense in a merger antitrust investigation. But the defense is part of the case law and you should know it.

I have included in the reading the usual introductory materials (pp. 16-56), but given that we are only going to spend one class on the case, feel free to skip these pages altogether. Please read the press release and excerpt from the Form 8-K on Sysco's agreement to sell 11 US Foods distribution centers to the Performance Food Group, conditioned on the consummation of the Sysco/US Foods merger (pp. 57-63). This agreement was signed before the HSR waiting period had expired (or at least before the timing agreement had expired), and the FTC filed its petition for a preliminary injunction 17 days later. Be prepared to discuss your thoughts in class as to why Sysco entered into this agreement.

Read the materials on the litigation (pp. 64-203), focusing on the Memorandum Opinion. We will spend the bulk of the class discussing the organization of the opinion, the court's analysis of the evidence, and the arguments justifying its entry into a preliminary injunction. The opinion introduces four concepts that we have not yet discussed: (1) cluster markets in product market definition, (2) targeted customer markets in product market definition, (3) defining geographic markets when suppliers travel to customers, and (4) the auction theory of unilateral effects. The class notes examine each of these concepts. I would read the class notes straight through after you have read the opinion.

Shortly after the court entered the preliminary injunction, the parties terminated their acquisition agreement without taking an appeal. The FTC dismissed its administrative complaint (pp. 205-14). Again, feel free to skip these materials if you are running out of time. The Sysco stock chart, however, is worth a glance (p. 215).

Finally, I have included an excerpt from the *Bertelsmann* case (Penguin Random House/Simon & Schuster) on targeted sellers (pp. 217-26). It is a very worthwhile read.

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

¹ A reasonable complete set of the most important filings in the litigation may be found [here](http://www.appliedantitrust.com) on AppliedAntitrust.com.