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 25): 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 (2026) 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, that 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 worldwide 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 for customers and reduced rates of innovation.

(1) Two-point lapbelt

(2) Three-point lapbelt

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1 Like most antitrust lawyers, I use the term "mergers" loosely to mean all types of formal structural combinations, including, 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 some basic merger structures in Class 8 (the investment banking class).

2 There are two types of preclass 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

For this class, begin by reading the news release announcing TransDigm's acquisition of Takata's aerospace business (pp. 5-6 in the reading materials) and the DOJ's complaint challenging the acquisition (pp. 7-21). Focus on the transaction, the alleged competitive relationship between AmSafe and SCHROTH, the four alleged markets, and the price and innovation harms alleged by the DOJ. We will examine TransDigm's settlement and the divestiture remedy in Class 2.

Section 7 and the incipiency standard. With the case materials behind you, turn first to the governing statute and the standard it supplies.

The DOJ challenged TransDigm's acquisition of SCHROTH as a violation of Section 7 of the Clayton Act. *See* Compl. ¶¶ 4, 41. Section 7 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.[3]

By its terms, every Section 7 violation has three essential substantive requirements (p. 34 and Unit 1A slides 4-6):

(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")

Beyond the three substantive elements, Section 7 contains an interstate commerce nexus. Read the short note on this nexus following the federal antitrust statutes (pp. 36-37). Given the reach

[3] 15 U.S.C. § 18.

of the Commerce Power in modern Supreme Court jurisprudence, the interstate commerce requirement is rarely contested in antitrust cases.

Other potentially applicable federal statutes. Sections 1 and 2 of the Sherman Act, Section 5 of the Federal Trade Commission Act, and various state antitrust laws may also apply to mergers and acquisitions. As a general matter, however, these provisions are either coextensive with or less restrictive than Section 7, so Section 7 ordinarily remains the binding constraint. A possible exception involves acquisitions of nascent competitors by firms with monopoly power under Sherman Act § 2, which we will examine later in the course.

Read the substantive provisions of these other federal antitrust statutes (pp. 34-35 and Unit 1A slides 7-14). Read Section 7 and the incipiency materials with particular care; the other statutes are included principally so that you understand their relationship to Section 7 and why they ordinarily do not alter the merger analysis.

The common law nature of 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 recognized the diversity and rapidly changing nature of business conduct, the limits of contemporary economic learning, and the likelihood that firms would adapt to regulation. Those considerations made a definitive statutory code 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.

Read the note on the common-law nature of antitrust law (pp. 39–43) with some care. You can skim the excerpt from William Baxter's article (pp. 44-58), which develops the institutional and separation-of-powers implications of treating antitrust as a form of federal common law.

The evolution of merger 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 revised their interpretation of the goals of antitrust law and the operative legal standards and analytical frameworks used to determine whether particular business conduct violates the antitrust laws.

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)[4]

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.

This historical development provides the background for comparing the goals of merger antitrust law expressed in *Brown Shoe* with those expressed in the successive Merger Guidelines. Before making that comparison, however, we need to look at the operational treatment of the consumer welfare standard.

The consumer welfare standard. In the Modern Period, the lower courts and the federal enforcement agencies have treated consumer welfare as the principal interpretive standard for applying the antitrust laws. The basic question is whether the challenged conduct is likely to make consumers—or, more precisely, the customers in the relevant market—worse off. In a downstream market, a merger may harm customers by increasing prices, reducing market output, reducing product or service quality, slowing technological innovation or product improvement, or perhaps reducing valued product choices. The analysis is forward-looking: it compares the likely market outcome with the merger against the likely outcome in the "but for" world without the merger.

The consumer welfare standard is not limited in principle to price effects. Price and output, however, ordinarily receive the most attention because they are more readily measured and predicted. Claims involving quality, innovation, or product diversity usually require especially persuasive evidence that the merging firms compete materially on the relevant dimension, that the merger is likely to eliminate that competition, and that customers will be harmed as a result.

The class notes also distinguish downstream markets, in which the merging firms sell to customers, from upstream markets, in which the merging firms buy from suppliers. In an upstream case, the alleged harm may be a reduction in the prices or other terms offered to suppliers, including workers. The law governing upstream merger effects is considerably less

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

developed, although both the Biden and Trump 2.0 agencies have recognized that such effects may be cognizable under Section 7.

Read Unit 1A class notes on the consumer welfare standard with care (Unit 1A slides 15-26). They explain how the consumer welfare standard operates in practice, the distinction between downstream and upstream effects, and the different emphases of the Biden and Trump 2.0 administrations. At this stage, focus on the basic operational inquiry: whether an identifiable group of customers or suppliers is likely to be worse off with the merger than without it.

With that operational framework in mind, turn to *Brown Shoe* and the Merger Guidelines.

Brown Shoe and the Merger Guidelines. Because the antitrust statutes speak in broad terms, the objectives attributed to Section 7 have been shaped by both judicial decisions and merger enforcement policies announced by the DOJ and the FTC. The agencies periodically issue Merger Guidelines to explain how they interpret Section 7 and how they intend to exercise their prosecutorial discretion. The Guidelines are not legislative rules and do not bind the courts. They are nevertheless important because they are the principal vehicles through which the agencies announce the objectives, analytical frameworks, and evidentiary considerations that will guide merger investigations and enforcement decisions.

Read the excerpt from *Brown Shoe*, followed immediately by the excerpts from the 1982, 2010, and 2023 Merger Guidelines (pp. 59-73). *Brown Shoe* provides the Structuralist-era baseline; the successive Guidelines show how different generations of agency officials have described the goals of merger enforcement. These materials provide a relatively straightforward comparison before you turn to the broader debate over those goals in the speeches that follow.

As you read them, consider:

1. What competitive harms does each document identify?
2. What role does each assign to market structure and concentration?
3. To what extent does each focus on customer welfare and economic efficiency?
4. Does the document view mergers as generally beneficial, generally threatening, or neither?
5. What interests, other than the welfare of customers, if any, does it seek to protect?

Brown Shoe reflects the Structuralist Period's concerns with industrial concentration, local control, and the protection of smaller businesses. The 1982 Guidelines marked the beginning of the modern agency approach, emphasizing consumer welfare, economic efficiency, and a more economically disciplined method of analysis. The 2010 Guidelines retained the modern focus on competitive effects and customer harm but moved away from the more algorithmic structure of the earlier Guidelines. The 2023 Guidelines, issued during the Biden administration, renewed the agencies' emphasis on market structure, concentration, dominant firms, labor, and older Supreme Court precedent.

Next, read the class notes on the Merger Guidelines (Unit 1A slides 27-35). They provide a brief history of the Merger Guidelines, explain their legal and practical significance, and identify the principal respects in which the 2023 Guidelines depart from the Guidelines issued since 1982. Although the 2023 Guidelines were issued by the Biden administration, the Trump 2.0 DOJ and

FTC have continued to use them. We will examine the Guidelines' specific tests and their treatment by the courts throughout the course.

The consumer welfare standard debate. With this background, read the Delrahim, Khan, and Slater speeches (pp. 75-99). These speeches move beyond the relatively concise statements in *Brown Shoe* and the Guidelines and present competing views about what the antitrust laws should accomplish.

Delrahim defends the consumer welfare standard as an administrable, economically grounded principle that constrains enforcement discretion and focuses antitrust law on harm to the competitive process and consumers. Khan argues that the consumer welfare framework is too narrow and may exclude concerns that historically animated the antitrust laws, including excessive concentrations of economic and political power and harm to workers, suppliers, and independent businesses. Slater illustrates the developing Trump 2.0 approach, which retains much of the language of consumer welfare while adding populist and "America First" concerns about the effects of large business enterprises on ordinary Americans.

Read the speeches comparatively rather than as isolated policy statements. Ask two questions about each speaker's approach:

1. *Scope*: Would the speaker expand or contract the types of conduct and harms subject to the antitrust laws?
2. *Standards*: Would the speaker make the legal or evidentiary standards governing that conduct more strict or more lenient?

Also consider whether the differences among the speakers concern the governing law, the exercise of prosecutorial discretion, or both. Whatever views agency officials may express, the courts remain responsible for deciding litigated cases under Section 7 and binding judicial precedent.

Antitrust enforcement. You should understand who may enforce the merger laws, the principal forms of relief, the types of proceedings, why the DOJ and FTC bring most merger challenges, and the difference between a DOJ consent decree and an FTC administrative consent order (Unit 1A slides 36-42). The details of TransDigm's consent settlement are reserved for Class 2.

Government organization and decision-making. Next, read the class notes the organization of the Antitrust Division and the FTC (Unit 1A slides 43-55). Focus first on the practical contrast between the Antitrust Division's hierarchical structure and the FTC's collegial structure. At the Antitrust Division, the Assistant Attorney General has complaint authority and ordinarily makes the ultimate enforcement decision, subject to supervision within the Department of Justice and the executive branch. At the FTC, no individual commissioner can authorize enforcement action; a majority of the Commission must vote to act, after receiving recommendations from the Bureau of Competition, the Bureau of Economics, and other staff.

Also pay attention to the slides on the President's removal of Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya and the Supreme Court's decision in *Trump v. Slaughter*.[5] For nearly a century, *Humphrey's Executor*[6] had supported the conventional description of the FTC

[5] Trump v. Slaughter, No. 25-332, 2026 WL 1855612 (U.S. June 29, 2026). You can find the major filings are here.

[6] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

as an “independent” agency whose commissioners could be removed only for cause. *Trump v. Slaughter* held that the statutory restriction on removal violates Article II and that the President may remove FTC commissioners at will. The decision does not change the Commission’s multimember, majority-vote structure, but it eliminates any notion that the FTC is independent of presidential control.

The HSR premerger notification process. Read the short overview of the Hart-Scott-Rodino Act (pp. 101-04 and Unit 1A slides 56-59). Understand why HSR ordinarily gives the agencies notice and an opportunity to investigate before closing, why the statute is not jurisdictional, and why expiration of the waiting period does not immunize a transaction from a later challenge. Do not worry if you do not understand every step in the overview chart; Class 3 will examine the process in detail.

Investigation outcomes. Finally, read the note on investigation outcomes (pp. 106-110). The basic alternatives are that the agency closes the investigation without enforcement action, the parties restructure or settle, the agency litigates, or the parties abandon the transaction. This is the natural stopping point for Class 1: TransDigm closed a nonreportable acquisition, the DOJ later investigated, and the investigation produced a demand for relief. Class 2 begins with how TransDigm responded.

Preparation questions. Use the following questions to organize your reading. They are not a separate homework assignment, and questions concerning the consent decree and divestiture remedy are reserved for Class 2.

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 facie 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?
28. What did the DOJ decide at the conclusion of its investigation?

If you have any questions or comments, send me an email. I look forward to seeing you in class on Tuesday, August 25.

Dale Collins