ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Tuesdays, 3:30 pm - 5:30 pm
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As we discussed in class, you may approach the reading for this session in one of three ways: (1) complete all assigned readings in accordance with the reading guidance; (2) review only the class notes; or (3) forgo the reading entirely. Tuesday's lecture will be self-contained, so while preparation is encouraged, it is not required if you do not have the time given the press of other business.

Week 13a: DOJ/FTC Merger Review (Unit 6)

On Tuesday, we will cover the units on merger antitrust procedure. Unit 6 contains an introduction to merger antitrust substance, a model for predicting DOJ/FTC merger review outcomes, and the DOJ/FTC merger review process. Unit 7 treats merger antitrust litigation and the settlement of merger antitrust disputes.

For Unit 6, the class notes are the principal reading. As you read the class notes, you can dip into the reading materials for the primary sources.

Antitrust risk. We will start Unit 6 with a brief discussion of how to think systematically about antitrust risk. Lawyers give advice; clients make decisions. The goal is to get the client into a position to make informed decisions about how to proceed (if at all) in light of the transaction's antitrust risk. However, a big problem for practitioners, and hence for clients, is how to convey a meaningful sense of the client's risk. Overall, I find that antitrust lawyers do a terrible job on this.

I find that, by far, the best way to think about antitrust risk is in three nested buckets: (1) inquiry risk, (2) substantive risk, and (3) remedies risk. This framework is a natural way for business people to think about legal risk generally and antitrust risk in particular (slides 3-9). While I will address these risks in the context of a merger, they apply to any situation where antitrust risk of any type is present.

1. *Inquiry risk* is the risk that the transaction's merits will be seriously examined. Antitrust questions do not materialize out of thin air. Someone must have the incentive and the institutional means of raising the question. Inquiry risk can be easily analyzed from this perspective. We will discuss inquiry risk both in the context of DOJ/FTC merger reviews in this unit and in the context of merger antitrust litigation in the following unit (Unit 7).
2. *Substantive risk* is the risk that the transaction will be found to violate the antitrust laws. Substantive risk arises if and only if there is an inquiry. Analysis of substantive risk requires an identification of the possible theories of antitrust liability that could apply to the situation and then a dispassionate evaluation of those theories in light of the evidence to which the parties have access (including their own documents) or can develop (notably expert evidence), as well as a judgment about the evidence that the investigating agency may develop from third parties that is not available to the merging parties (at least absent discovery in the course of litigation).
3. *Remedies risk* reflects the consequences of a finding that the transaction violates the antitrust laws. Remedies risk is analyzed in terms of the possible outcomes of a finding of a violation and their associated probabilities of occurrence. These outcomes include the range of possible "fixes" (restructurings) of a transaction to eliminate the violation or

otherwise negate the concern and the likelihood of their acceptance by the relevant decision maker—the investigating agency or the court—and the associated costs of these restructurings. Remedies risk must also account for the possibility that there is no "fix" that would eliminate the antitrust problem to the satisfaction of the investigating agency.

Assessing substantive antitrust risk. With this idea of antitrust risk in mind, we will turn to assessing substantive risk in mergers and acquisitions (slides 10-16). I suspect that you will find this discussion provides a somewhat different perspective of merger antitrust analysis than you saw in the antitrust survey course. Most of what you see in antitrust courses is how judges and occasionally enforcement officials *explain* the antitrust decisions they have already made; my model *predicts* what enforcement decisions the agency will make before they make them. It turns out that there is a big difference. You may also find it curious that my predictive model does not rely on market definition, HHIs, diversion ratios, upward pricing pressure, or the 2023 DOJ/FTC Merger Guidelines.

The DOJ/FTC merger review process. Next, we will turn to the merger review process employed by the Antitrust Division and the Federal Trade Commission under the Hart-Scott-Rodino Premerger Notification Act. If a merger, acquisition, or joint venture satisfies certain threshold size requirements and is not covered by an exemption, the HSR Act imposes two requirements before the parties may consummate their transaction: (1) the merging parties must file a prescribed Notification and Report Form ("HSR filing") with the Antitrust Division and the Federal Trade Commission, and (2) the parties must observe a specified statutory waiting period before closing their transaction. This is the institutional context in which the DOJ and FTC conduct the vast bulk of merger investigations. Section 7 of the Clayton Act is the primary antitrust statute governing mergers and acquisitions (pp. 4-5), and the reading materials provide a quick overview of the merger review process (pp. 8-10).

The remainder of the class notes provides a reasonably detailed treatment of the process, which I think about in three stages.

1. *Prefiling/filing*. Prefiling work includes the preliminary antitrust risk analysis for the client, negotiation of the merger agreement with the other side (in friendly deals), and the prefiling preparation of the defense.

   I also included the merger control filing ("HSR filing") at this stage. The class notes give you some background on the HSR Act (slides 18-19), the HSR review process (slides 20-23), reportability (slides 24-32), premerger notification (slides 33-467), and statutory waiting periods (slide 47). You should also skim the FTC Introductory Guide I on the premerger notification program (pp. 11-25). The reading materials contain the full text of the HSR Act, the current inflation-adjusted jurisdictional thresholds, the form for an HSR filing, and the instructions for filling out the form (pp. 26-66). You can safely skip these materials, but they are there if you want to glance at them. However, you should read the note on the "Business Documents" required to be submitted with the HSR filing along with the note on "4(c)" and "4(d)" documents (pp. 67-73). These documents are the most important materials submitted in the HSR filing, and you need to know about them.

   For HSR-reportable transactions, the HSR Act prohibits the acquiring firm from acquiring a beneficial interest in the acquiring firm until the required HSR reports have been filed and the applicable HSR waiting period has ended. This requirement can be violated in several ways:

(a) the parties can simply fail to file;

(b) the parties can invoke an inapplicable exemption (usually in the investment exemption) and not file;

(c) the parties file, but one of their filings can be incomplete (usually because one party failed to include all of its 4(c) and 4(d) documents); or

(d) the parties make their proper filings, but during the waiting period the acquiring firm exercises control or influence over the acquired firm in a manner that indicates that the acquiring firm has already "acquired" the target (often by influencing the target firm's bidding or contracting during the waiting period).

The first three cases are *failures to file*; the last case is commonly called *gun-jumping*. The HSR Act provides for civil penalties of up to $ 53,088 per day for violations of the act, which can run up surprisingly quickly (about $19.4 million/year), as well as injunctive relief. The class notes cover HSR Act violations (slides 48-52). The *Flakeboard* case (pp. 107-33)—which you can skim—provides an example of an enforcement action.

2. *Initial waiting period investigation*. The next stage in the merger process after filing the HSR form is the initial waiting period investigation. The initial waiting period under the HSR Act is 30 calendar days (15 calendar days for all-cash tender offers), which provides the agencies the opportunity to decide whether one or both of them would like to review the transaction, allocate the investigation responsibility to one of the agencies (so that both of them will not be investigating simultaneously—this is called the *clearance process*), and permit a preliminary substantive review. If one of the agencies opens an initial waiting period investigation, the investigating staff will contact the merging parties to introduce themselves, ask the parties to submit some additional information voluntarily (see pp. 75-78),[1] and invite them to give the investigating staff a presentation on why the transaction does not present an antitrust problem. During the initial waiting period investigation, the staff will also conduct interviews (usually by telephone) with customers and competitors in the industry. The slides give some more detail (slides 54-60).

   The investigating agency has four options at the end of the initial waiting period: (1) close the investigation, terminate the waiting period or allow it to expire, and permit the parties to close their transaction without interference; (2) begin a "second request investigation" by issuing a "second request"; (3) convince the merging parties to "pull and refile" their HSR forms to restart a new initial waiting period; or (4) let the initial waiting end without issuing a second request but notify the parties that the investigation is still open and that if the parties close they do so at their own risk.[2] It is important to

[1] I cannot find the model voluntary request letter on the current Antitrust Division web site. During the Biden administration, the Division removed a number of "model" documents from the website, presumably because it believes that it tailors its documents so individually that the model documents are no longer informative. Even so, I have included the Division's most recent model voluntary request letter to give you an idea of what the Division has requested in the past.

[2] This fourth option was introduced in the Biden administration first by the FTC and then followed by the DOJ. The notification is derisively called by some a "bedbug letter." It is unclear what the agencies hope to accomplish with this fourth option other than trying to create uncertainty in the minds of the merging parties in the hope that they might abandon their deal. By allowing the initial waiting period to end, the investigating agency deprives itself of the ability to issue a second request and extend the waiting period. Moreover, the letter has little, if any, legal effect. The expiration of the HSR Act waiting period without enforcement action does not immunize the deal. The agencies can—and have—opened merger investigations and challenged transactions that previously "cleared" the HSR review process. The most likely reason for the investigating agency taking the fourth option is that the deal is not obviously anticompetitive and the press of other investigations and litigations the agency is straining the agency's limited

note that the FTC Premerger Notification Office (which is responsible for the administration of the HSR Act) takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement so that the parties cannot "extend" the initial waiting period to give the agency more time to investigate even if they so desired.

3. *Second request investigations*. Before the end of the initial waiting period, if the reviewing agency decides that an in-depth investigation is warranted, the agency will issue a Request for Additional Information and Documentary Material (more fondly known as a "second request"). The slides give a brief overview (slides 58-68), and the model second request for the FTC may be found in the reading materials (pp. 79-105).[3]

   If the reviewing agency issues a second request before the end of the initial waiting period, the waiting period is extended for the period of time that it takes for the merging parties to comply with their respective second requests plus an additional 30 calendar days (10 days for an all-cash tender offer) (see slide 65).[4] With some justification, the agencies believe this is too little time for the staff to complete its review of the second request submissions and prepare its recommendation as to the outcome of the review and for the ultimate decision-makers within the agency to make an enforcement decision. As a result, the investigating agency almost always asks the parties to enter into a "timing agreement" that commits the parties not to close their transaction until some time—usually 60 days, but it can be much longer—after the statutory waiting period expires. If the parties do not agree to an extension, the agencies typically go into "litigation mode" and threaten to cease talking to the parties about the merits or possible settlement. So the parties almost always give the agency a timing agreement. See the class notes for timing agreements and front office meetings at the reviewing agency (slides 66-68).

Merger review outcomes. There are five possible outcomes of a full investigation: (1) the agency closes the investigation without taking enforcement action, (2) the parties settle the investigation through a consent decree (which typically will require the divestiture of assets or businesses), (3) the agency commences litigation to block the transaction, (4) the parties terminate the transaction, or (5) the agency does not close the investigation but allows the waiting period to expire and notifies the parties that if they choose to close, they do so at their own risk. The class notes summarize these outcomes (slides 75-77).[5]

Significantly, unlike the European Commission, neither the DOJ nor the FTC has the authority on its own to block a pending transaction (although the FTC can challenge a consummated transaction and order appropriate relief, including divestiture). Rather, to block a pending

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resources, but the agency wants to signal that it still has some concerns about the transaction. It remains to be seen, but unless the agencies obtain a massive increase in their respective budgets, they will likely continue to be pressed for resources in the foreseeable future. Consequently, the resources may never free up sufficiently to continue the investigation of the transaction in question. I know of no transaction that has received such a letter where the agency appears to be actively continuing its investigation. There have not been any no enforcement actions taken against such any transaction.

[3] The Antitrust Division has removed the model second request from its web site. You may find the prior version here.

[4] Note that the investigating agency can give each merging party only one second request and the length of time the agency will have to complete the investigation will depend on the length of time it takes the parties to assemble and submit their responses to the second request. What incentive does this provide to the investigating agency in deciding what to include in a second request?

[5] This fifth option is analogous to the fourth option at the end of the initial waiting period. To the best of my knowledge, although the FTC has utilized this option in a number of deals, it has yet to file file a complaint against any of them.

transaction, both the DOJ and the FTC must obtain a preliminary injunction from a federal district court. We will examine this procedure next week in Unit 7.

As you can see, we have much to cover in this unit. We will not be able to cover everything in class, so be sure to have any questions on the materials ready for class.

As always, send me an email if you have any questions.