ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Tuesdays, 5:30 pm - 7:30 pm
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Week 12: DOJ/FTC Merger Review (Unit 13)

This coming week we will begin the units on merger antitrust procedure. Unit 13 covers an introduction to merger antitrust substance, a model for predicting DOJ/FTC merger review outcomes, and the DOJ/FTC merger review process. In Week 13, we will cover Unit 14, which treats merger antitrust litigation and the settlement of merger antitrust disputes.

For Unit 13, 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 13 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 antitrust risk a transaction presents. But 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 is a very natural way for business people to think about antitrust risk (slides 4-6). 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 merits of the transaction will be seriously examined. Antitrust questions do not materialize out of thin air. Someone has to 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 next unit (Unit 14).
2. *Substantive risk* is the risk that the transaction violates 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. This includes 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 agency or the court—and the associated costs of these restructurings, as well as the possibility that there is no "fix" that would eliminate the antitrust problem.

Assessing substantive antitrust risk. With this idea of antitrust risk in mind, we will turn to assessing substantive risk in mergers and acquisitions (slides 7-24). 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 reached; my model *predicts* what enforcement decisions the agency will make. It turns out that there is a big difference. You may also find it curious that my predictive model makes no reference to market definition, HHIs, diversion ratios, upward pricing pressure or the 2010 DOJ/FTC Horizontal 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 requirements and is not covered by an exemption, the HSR Act imposes two requirements before the parties may consummate the 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. This is the institutional context in which the DOJ and FTC conduct the vast bulk of merger investigations. The reading materials provide a quick overview of the merger review process (pp. 8-9).

Sides 25-68 provide 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 include the merger control filing ("HSR filing") in this stage. The class notes give you some background on the HSR Act (slides 25-30), reportability (slides 31-38), premerger notification (slides 39-43), and waiting periods (slide 44). You should also skim the FTC Introductory Guide I on the premerger notification program (pp. 10-27). 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. 28-58). You can safely skip these materials, but they are there if you would like to glance at them. However, you should read the note on "4(c)" and "4(d)" documents (pp. 59-64). 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 the 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 it 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 $43,792 per day for violations of the act, which can run up surprisingly quickly (about $16.0 million/year), as well as injunctive relief. The class notes cover HSR Act violations (slides 45-49). The *Flakeboard* case in the required reading (pp. 85-117)—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 voluntarily submit some additional information, 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) of customers and competitors in the industry. The slides give some more detail (slides 50-57).

   The investigating agency has three 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"; or (3) convince the merging parties to "pull and refile" their HSR forms to restart a new initial waiting period. It is important to 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 58-62), and the model second request for the DOJ may be found in the reading materials (pp. 65-83).[1]

   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 44).[2] The agencies, with some justification, believe that 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 a 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—

[1] The FTC also has a model second request, which may be found here.

[2] 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?

usually two months, 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 the statutory waiting periods, timing agreements, and front office meetings at the reviewing agency (slides 63-66).

Merger review outcomes. There are four 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, or (4) the parties terminate the transaction. The class notes summarize these outcomes (slide 68).

Interestingly, 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 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 14.

As you can see, we have a lot 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.