

Antitrust Basics #2 — Mergers and Acquisitions

In the last module, we saw that while two companies may not agree to fix prices, single companies can do so freely. Thus, if two companies each wish to charge the monopoly price, they will be incentivized to merge. For antitrust enforcement to protect consumers from monopoly power, the law must prohibit anticompetitive mergers.

Merger control arose to stop companies from trying to build market power by acquisition. Originally, § 1 of the Sherman Act was used to address mergers. But in 1914, after *Standard Oil*, Congress passed the Clayton Act. Ever since, this Act has been the primary antitrust law governing American mergers.

In this module, we will discuss the substantive case law governing mergers. Yet the most important actors in deciding whether a merger goes through are not the courts, but the antitrust enforcement agencies. If the Department of Justice or Federal Trade Commission decides to challenge a merger, it can delay the transaction for years, and that alone might be enough to scuttle the deal. Thus, the most important reading in this module is not a case, but the agencies' joint merger guidelines—their internal rules for when they will challenge a merger as anticompetitive.

This module will also discuss antitrust procedure. Once a merger happens, it can be hard to unwind the deal. Therefore, large mergers today must be cleared upfront, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Reading

Required reading

Merger basics

Clayton Act § 7, 15 U.S.C. § 18 (as amended by the Celler-Kefauver Amendment in 1950)

Brown Shoe Co. v. United States, 370 U.S. 294 (1962)

Enforcement guidance

Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission

Merger enforcement in practice

United States v. E.I. Du Pont de Nemours & Co. 351 U.S. 377 (1956)

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)

FTC v. Staples Inc. & Office Depot Inc., 190 F. Supp. 3d 100 (D.D.C. 2016)

Complaint, *U.S. v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V.*

Procedure

Hart-Scott-Rodino Antitrust Improvements Act of 1976

Recommended reading

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001)

United States v. Philadelphia National Bank, 374 U.S. 321 (1963)

Vertical Merger Guidelines, U.S. Department of Justice and Federal Trade Commission

Background reading

Rupprecht Podszun, *The Arbitrariness of Market Definition and an Evolutionary Concept of Markets*, *Antitrust Bulletin* (2016), 61(1), 121–32.

United States v. Columbia Steel Co., 334 U.S. 495 (1948)

United States v. General Dynamics Corp., 415 U.S. 486 (1974)

United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011)

Steves & Sons Inc. v. Jeld-Wen Inc., 988 F.3d 690 (4th Cir. 2021)

United States v. E.I. Du Pont de Nemours & Co. 353 U.S. 586 (1957)