Merger Review

Antitrust
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Kinds of mergers

- Horizontal mergers
- Vertical mergers
- Conglomerate mergers

Potential benefits of mergers

- All kinds of efficiencies
- Economies of scale
- Preserving firms that would fail
- The list is endless ...

Potential problems with mergers

- Unilateral effects – market/monopoly power of the merged firm
- Oligopoly effects – concentration of a market that can cause prices to increase, either through:
  - purely self-interested/independent decision-making of firms, *or*
  - oligopolistic coordination (e.g., legal "conscious parallelism")
- According to research, five significant firms in a market tends to be enough to prevent oligopolistic coordination

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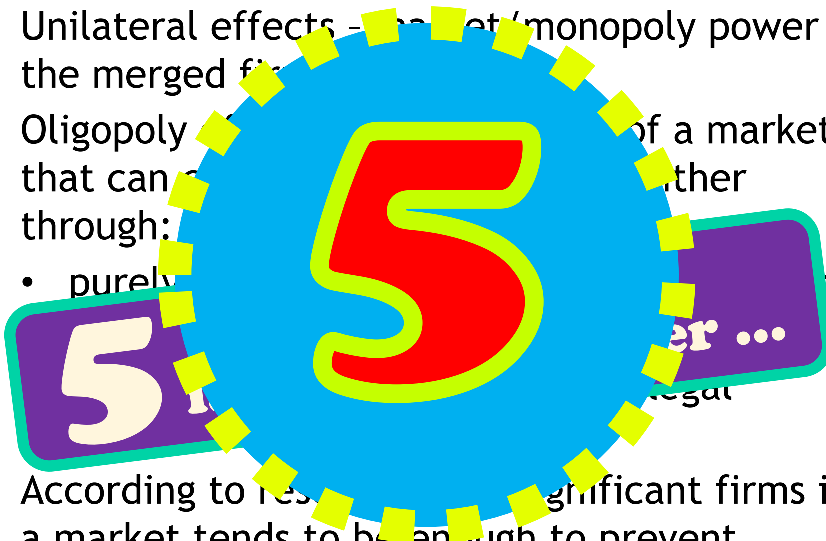
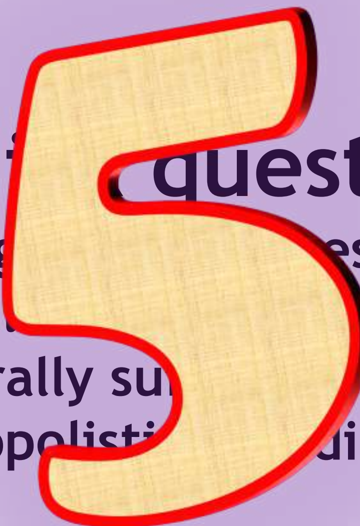


Quick question:

According to market research, how many sellers of significant size are generally sufficient to avoid oligopolistic coordination?



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Applicable law

- Mergers and acquisitions can be challenged under Sherman Act § 1 or § 2, or FTC Act § 5, but generally they are challenged under the Clayton Act § 7.
- Clayton Act § 7 allows the blocking of mergers and acquisitions where "the effect of such ... may be to substantially lessen competition, or tend to create a monopoly."

Hart-Scott-Rodino Act

15 USC § 18a

Per-merger filing with DOJ/FTC is required where:

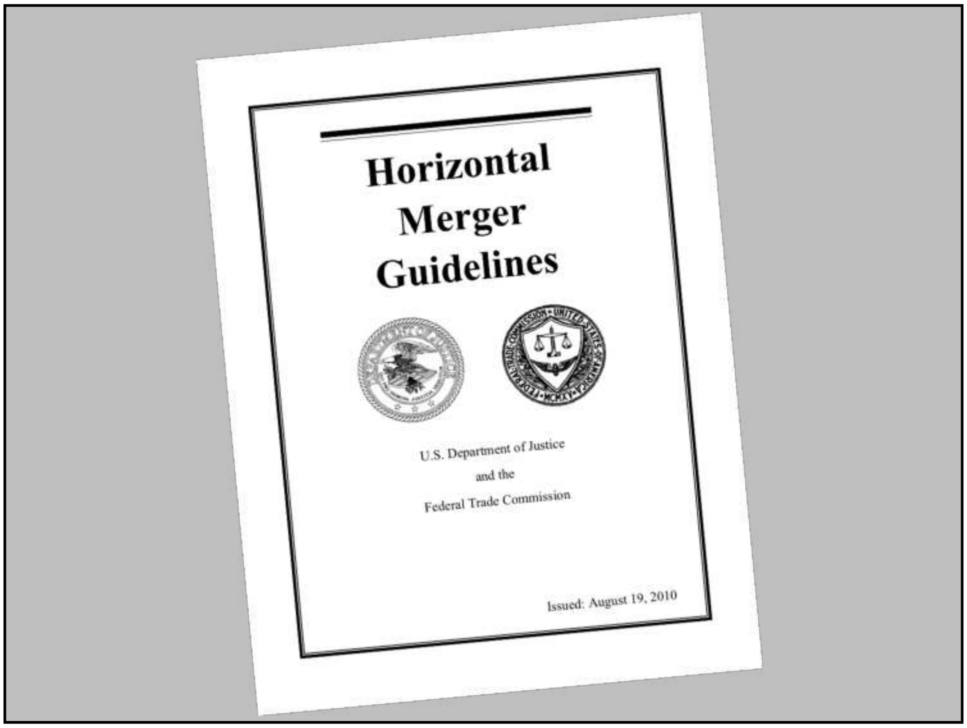
- the stock acquisition value exceeds $50M <u>and</u> the acquirer and target have assets or annual sales in excess of $10M for one and $100M for the other (either way), <u>OR</u>
- the stock acquisition value exceeds $200M

Amounts are in 2004 dollars.

There's a passive investor exception.

DOJ/FTC challenge

- DOJ and FTC split up merger reviews between them.
- After the HSR filing, the agency has 30 days in which to make a "second request" for additional information (15 days for cash tender offers).
  - This happens about 5% of the time.
- The agency then engages in a detailed analysis.
  - Third parties can weigh in.
- To avoid adverse effects on competition, the merging firms can offer to divest themselves of certain assets or bind themselves to certain conduct.
- Often a merger dies if the agency opposes the merger.
- If the agency is opposed and the merging parties want to forge ahead, the dispute goes to court.
- Courts tend to evaluate mergers largely by the DOJ/FTC guidelines(!).


Horizontal
Merger
Guidelines

U.S. Department of Justice
and the
Federal Trade Commission

Issued: August 19, 2010

HHI index

- The Agencies often calculate the Herfindahl-Hirschman Index (“HHI”) of market concentration.
- The HHI is calculated by summing the squares of the individual firms’ market shares and thus gives proportionately greater weight to the larger market shares.
- For example, a market consisting of four firms with market shares of 30%, 30%, 20%, and 20%, has an HHI of

– from the Horizontal Merger Guidelines

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- For example, a market consisting of four firms with market shares of 30%, 30%, 20%, and 20%, has an HHI of 2600.

$$30^2 + 30^2 + 20^2 + 20^2$$
$$= 900 + 900 + 400 + 400$$
$$= 2600$$

– from the Horizontal Merger Guidelines

HHI index

Question:

What would be the HHI of a 100% pure monopoly?

– from the Horizontal Merger Guidelines

HHI index

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What would be the HHI of a 100% pure monopoly?

$$100^2$$

$$= 10{,}000$$

– from the Horizontal Merger Guidelines

HHI index

- The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market).
- Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

– from the Horizontal Merger Guidelines

HHI index

The agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

– from the Horizontal Merger Guidelines

HHI index

The agencies generall... ...ify markets into th...

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But wait!! How do we define the *market*?!?

– from the Horizontal Merger Guidelines

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You got
this! ☺

- from the Horizontal Merger Guidelines

HHI index

The agencies employ the following general standards for the relevant markets they have defined:

- Small Change in Concentration: Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- Unconcentrated Markets: Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- Moderately Concentrated Markets: Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- Highly Concentrated Markets: Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

– from the Horizontal Merger Guidelines

sky lasso

Sky Lasso with 10% of the market wants to buy Acme Aviation Services with 15% of the market.
The current market will go
from 10%, 15%, 20%, 25%, 30%
to 25%, 20%, 25%, 30%.

Will the merger pass agency scrutiny?

$$10^2+15^2+20^2+25^2+30^2$$
$$= 100+225+400+625+900$$
$$= 2250 \text{ pre-merger}$$

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$$= 2550 \text{ post-merger}$$

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- Highly Concentrated Markets: HHI above 2500 ← after

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Vertical mergers

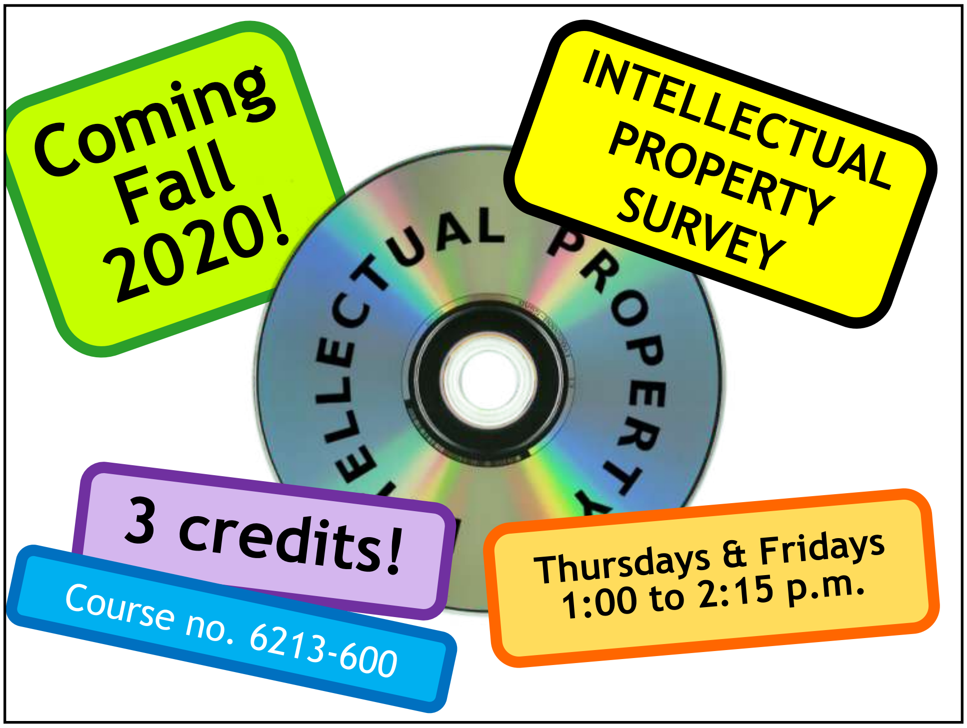
- Lots and lots of efficiencies ...
- Possible anticompetitive effects (according to the 1984 Guidelines):
  - Creating a need for two-level entry
  - Facilitating horizontal collusion ...
    - If upstream firms integrate retail, they can monitor each other's prices for a cartel
    - By eliminating a disruptive buyer that pushes upstream firms to cheat on their cartel
- "[A]ctual U.S. enforcement action against vertical mergers is nearly non-existent." Elhauge (EE^{3d} at 796)
- "[T]here is ... little concrete guidance available about the content of modern U.S. antitrust law on vertical mergers." Elhauge (EE^{3d} at 796)

The

End

Thank

You!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