

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Dale Collins

wdc30@georgetown.edu
www.appliedantitrust.com

Class 17 (October 22): Sysco/U.S. Foods (Unit 8)¹

In Class 17, we will turn to the FTC's challenge to Sysco/U.S. Foods. The reading is extensive, but I have the close reading to the opinion (131 pages) and the class notes (90 slides). Everything else in the reading materials is optional and may be skipped. I encourage you to read more, but this reading guidance, the opinion and class notes will cover you if you don't.

This case introduces targeted buyers and price discrimination, with optional background in Sections 3 and 4.1.4 of the 2010 Horizontal Merger Guidelines (pp. 6-9) and Section 4.3.D.1 of the 2023 Merger Guidelines (pp. 10-12). Other optional background appears in the 2010 Guidelines on geographic markets based on customer locations (§ 4.2.2, pp. 13-15) and bargaining and auctions (§ 6.2, pp. 16-17). Powerful customers are also part of the case, so Section 8 of the 2010 Horizontal Merger Guidelines (pp. 18-19) is also optional background. The 2023 Merger Guidelines do not address the ability of powerful customers to protect themselves from anticompetitive harm as a defense in a merger antitrust investigation. The defense is discussed in the opinion and class notes.

I have included the usual introductory materials (pp. 21-61) in the reading, but since we will only spend one class on the case, feel free to skip these pages altogether. The optional press release and excerpt from the Form 8-K describe Sysco's agreement to sell 11 U.S. Foods distribution centers to the Performance Food Group, conditioned on the consummation of the Sysco/U.S. Foods merger (pp. 62-68). This agreement was signed before the FTC had completed its review, and the FTC filed its petition for a preliminary injunction 17 days later. These documents provide additional background on the proposed fix.

Read the entire Memorandum Opinion (pp. 78-208). The other litigation materials (pp. 69-77) are optional. We will spend the bulk of the class discussing the organization of the opinion, the court's analysis of the evidence, and the arguments justifying its entry of a preliminary injunction. The opinion introduces four concepts that we have not yet discussed: (1) cluster markets in product market definition, (2) targeted customer markets in product market definition, (3) defining geographic markets when suppliers travel to customers, and (4) the auction theory of unilateral effects. The class notes examine each of these concepts in some detail. Read all 90 class note slides, including the appendix, after you have read the opinion.

Shortly after the court entered the preliminary injunction, the parties terminated their acquisition agreement without taking an appeal. The FTC dismissed its administrative complaint (pp. 210-219). All materials on the ruling and aftermath (pp. 209-219) and the Sysco stock chart (p. 220) are optional.

¹ A reasonably complete set of the most important filings in the litigation may be found [here](https://www.appliedantitrust.com) on AppliedAntitrust.com.

Finally, I have included an optional excerpt from the *Bertelsmann* case (Penguin Random House/Simon & Schuster) on targeted sellers (pp. 222-231). It is a very worthwhile read. Enjoy the reading! Email me if you have any questions.