Antitrust Analysis

Law 252.2
U.C. Berkeley Law School
Fall 2012

Room: 132 Boalt Hall

Time: 6:25 p.m. – 8:15 p.m. Mon./Tues.

Instructor: Prasad Krishnamurthy

Office Hours: 10:30 a.m. -12:00 p.m. Tues./Wed., 685 Simon Hall

Course Description:

This course covers the fundamentals of antitrust law as well as the underlying legal and economic theory. Topics include (i) horizontal restraints of trade among competitors such as cartels, oligopolies, joint ventures, and other cooperative activities, (ii) monopoly and dominant firm conduct, (iii) vertical restraints of trade between suppliers and customers such as resale price maintenance, territorial and customer restrictions, tying arrangements, exclusive dealing contracts, and (iv) horizontal and vertical mergers.

Textbook:

Gavil, Kovacic, & Baker, *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy* (2nd edition, 2008).

Though I have not officially assigned the book, I **strongly recommend** purchasing Professor Mark Lemley's Antitrust Outline from the Gilbert's Series and reading it along with the course assignments. I will include the relevant sections of Professor Lemley's outline along with our reading from the casebook.

Exam:

The exam will be in class and open book. Open book means that students can consult (only) the casebook, any other assigned readings for the course, my lecture notes and their own notes/course outline.

Prerequisites (How much economics should I know?):

There are no prerequisites for the course. Antitrust, more generally, competition law is saturated with economics, so prior knowledge of intermediate microeconomics and

industrial organization[1] will be helpful. More than experience, however, having an interest in areas that combine legal and economic analysis is a better indicator of whether a student will enjoy this course and get something out of it. The economic analysis we will use in this class is modeled on how economics is used in business schools—that is, as an aid to making complex decisions—as opposed to how it is used in economics departments. As a result, the use of economics to inform the legal analysis of specific fact patterns and as a conceptual tool for legal/business decision-making will likely be new even to those who majored in the subject.

Students with no previous background in economics can expect to do well in the course with a reasonable amount of effort. By reasonable amount of effort, I mean that they will have to be proactive about consulting the instructor and outside sources when they encounter unfamiliar concepts.[2] Informal evidence from previous courses reveals little to no relationship between prior economics background and final grade in the class. In the first few weeks, I will also arrange an optional evening lecture in economics as a refresher course for those interested.

Assignments:

There will be three assignments for the class. These assignments are structured so as to keep students on top of the course material *and to provide considerable insurance with respect to grades in the course.*

The first two assignments will consist of two parts (A and B). Part A will be a series of short answer questions based on the previous reading. The questions will be designed to mimic the issues that will appear on the final exam. Students will have about 2 weeks to complete part A of an assignment. Conditional on doing the reading, students should budget about one to one and a half workdays to complete part A of an assignment. Students should submit part A of an assignment electronically through the bspace course page. You should feel free—indeed you are encouraged—to work in groups, but please submit your answers in your own words.

Part B of each assignment will consist of commenting on another student's Part A. If a student completes part A, they will be randomly matched with another student—their partner. Each student should read their partner's assignment part A and make

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[1] Industrial organization is the field of economics that includes the analysis of firms, markets, and regulation.

[2] If students are very concerned about their economics knowledge and/or would like a refresher course on their own, then I recommend reading the chapters on producer theory (theory of supply), competitive markets, and monopoly in any microeconomics textbook. For example Robert Pindyck and Dan Rubinfeld's *Microeconomics*, David Besanko and Ronald Braeutigam's *Microeconomics,* Paul Krugman and Robin Wells's *Microeconomics,* or Greg Mankiw's *Principles of Microeconomics.* Students interested in practicing antitrust law or working in antitrust policy would be well-served owning a copy of Dennis Carlton and Jeffrey Perloff's *Modern Industrial Organization*, which contains analogous chapters. Students with such interests who also have a strong background in economics or math/science/engineering would also profit from Jean Tirole's *The Theory of Industrial Organization*, one of the best economics textbooks I have read.

comments on the text using "track changes" in MS Word. Both students should then get together and discuss at their leisure (Strada, Zeb, even Henry's is ok, but please not the Shattuck Down Low!) Students should budget a few hours to complete part B of an assignment. The purpose of Part B is to work with a colleague who you did not choose yourself and to give them feedback in a **constructive and respectful** way. Students will submit part B of an assignment electronically through the bspace course page. After part B is submitted, I will provide an outline of suggested answers to the questions.

Grading:

Final grades will be based on a combination of assignments and the final exam.

Assignments will determine each student's *class participation score* in the following way. At the end of the semester, I will randomly select and read through a subset of each student's assignments. If a student completes all 3 assignments *and* the subset of assignments I read indicates reasonable effort, then they will receive an S (satisfactory) for class participation. If either of the two conditions above is not satisfied, then a student receives a U (unsatisfactory) for class participation. I understand that this is a discrete metric with a stark cutoff, but it is designed with the goal that almost everyone will receive an S.

If a student receives an S for class participation:

(1) This guarantees them no worse than a pass (P) in the course as long as their final exam passes a willfully reckless standard of conduct,
(2) They will be bumped up to the next level if they are on the borderline of a grade (P/H or H/HH)
(3) They are eligible for high honors (HH) in the course.

If a student receives a U for class participation:

(1) They may receive a substandard pass (NP) or no credit (NC) if they do poorly on the final exam,
(2) They will be bumped down to the lower grade if they are on the borderline of a grade so that someone with an S can be bumped up
(3) They are not eligible for high honors (HH) in the course.

The choice of curve for the instructor (see Berkeley Law grading policy for upper level courses) will be determined by the number of students who receive an S for class participation. If that number is substantial then 45% of students will receive honors (H) and 15% will receive high honors (HH). If that number is not substantial then 40% will receive honors (H) and 10% will receive high honors (HH).

After taking into account class participation, grades will be determined by final exam scores. In this course, class participation is defined rather exhaustively so as to

give students the opportunity to shift the mean of the grade distribution to the right and truncate the left tail.

Attendance and Call System:

Students are expected to attend every class, and attendance will be taken. If you are unable to attend class, please send me an email in advance and let me know. Missing a substantial number of classes without an appropriate reason—such as illness, job recruitment, family situation, etc.—will result in an Unsatisfactory score for class participation.

I will assign students to be on call for specific days. Call will start during the third week of classes. Students will be notified of their day well in advance so that they can prepare. Please let me know in advance if you are unable to attend class on that day. Alternatively, you can arrange to trade with another student. Please inform me of any such trades so I can update my records. A Satisfactory mark for class participation requires being on call at least one day. The purpose of call is to ensure that our class conversation involves a group of students who have read the materials very carefully. Its purpose is not to be stressful or inquisitorial in any way. If you feel anxious about being on call, for whatever reason, please communicate with me in advance and we will work something out.

Use of Computers/Internet in Class:

I consider it to be unprofessional to use your computer in class for any purpose that is unrelated to the class. This is a view that I believe ought to be a general norm for us as students of the law and as members of the U.C. Berkeley community. As such, I am also unwilling to attempt to enforce it with incentives, for the same reason that our honor code at Berkeley Law turns on ethics as opposed to incentives.

Email/bspace:

My email address is prasad@law.berkeley.edu. I will respond to emails within a day or two, unless traveling. If I do not respond, please do follow up. I am happy to clarify issues that arise in the course, but for weighty, substantive questions, I will usually ask you to come to office hours. If you have a time conflict with office hours, let me know and we can set up a separate time to meet. I will make extensive use of bspace to post class materials, including written discussion of questions that arise in class/office hours that I believe to be of general interest. You may receive up to 3 to 4 emails from me a week, excluding announcements that lecture notes or other items have been uploaded to bspace.[3]

I will be sure to indicate what materials refer to information students are expected to know for the final, and what materials are for students with interests in

[3] This averages out to about 1 email per week per credit hour. This is a small email flow relative to the daily deluge of work emails one receives in a job.

antitrust/competition policy that go beyond the purview of this class. I consider office hours and bspace to be legitimate fora for both these purposes.

Calendar:

Week Number	Dates	Class Number	Assignments
Week 1	Aug. 27, 28	1, 2	
Week 2	Sept. 4	3	
Week 3	Sept. 10, 11	4, 5	
Week 4	Sept. 17, 18	6, 7	Assignment 1A*
Week 5	Sept. 24, 25	8, 9	
Week 6	Oct. 1, 2	10, 11	Assignment 1B
Week 7	Oct. 8, 9	12, 13	
Week 8	Oct. 15, 16	14, 15	Assignment 2A
Week 9	Oct. 22, 23	16, 17	
Week 10	Oct. 29, 30	18, 19	Assignment 2B
Week 11	Nov. 5, 6	20, 21	
Week 12	Nov. 13	22	Assignment 3A
Week 13	Nov. 19, 20	23, 24	
Week 14	Nov. 26, 27, 28, 29	25, 26, 27, 28	
Holidays	*Sept. 3, Nov. 12*		

*Assignment dates are approximate

Topics Covered:

Introduction to Antitrust Law

Concerted Action Among Competitors (GKB Chapter 2)
- Per Se Illegality vs. Rule of Reason
- Traditional Per Se Categories
- Rule of Reason
- Structured Rule of Reason

Distinguishing Concerted From Unilateral Action (GKB Chapter 3)
- Inferring Agreement and Cartels
- Inferring Agreement and Invitations to Collude

Distribution Relationships with Collusive Effects (Vertical Intra-Brand Agreements) (GKB Chapter 4)

Mergers Among Competitors (GKB Chapter 5)
- Structural Presumption and Market Concentration
- Market Definition and Market Concentration
- Unilateral Competitive Effects
- Coordinated Competitive Effects
- Efficiencies

Entry
Powerful Buyers

Single Firm Exclusionary Conduct (Monopolization) (GKB Chapter 6)
Non-Price Exclusionary Conduct
Predatory Pricing
Refusals to Deal
Attempt to Monopolize
Remedies

Concerted Exclusionary Conduct (GKB Chapter 7)
Exclusionary Group Boycotts
Tying
Exclusive Dealing
Vertical Mergers

Private Rights of Action and Damages (GKB Chapter 9)

Syllabus:

Class 1-2

Introduction to Antitrust Law[4]
Chapter 1: 2-32, 37-53 (*Andreas; Brunswick; JTC Petroleum*)

Class 3

Introduction to Antitrust Law
Background Reading (by Class 6): 53-80

Concerted Action Among Competitors:[5] **Per Se vs. Rule of Reason**
Chapter 2: 88-106 (*Trenton Potteries*; *Socony*)
Appendix A: 1251 (Sherman Act §1 and §2)

Class 4-5

Concerted Action Among Competitors: Traditional Per Se Categories
Chapter 2: 107-122, 128-153 (*BMI; Maricopa; Topco; BRG; SCTLA*)

Class 6

Concerted Action Among Competitors: Rule of Reason

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[4] See Mark Lemley, Gilbert's Antitrust Summary Chapter II. Federal Antitrust Laws (pg. 13-32)
[5] See Mark Lemley, Gilbert's Antitrust Summary Chapter IV. Collaboration Among Competitors (pg. 57-81)

Chapter 2: 154-165, 168-171, 175-187 (*CBOT, NSPE, NCAA*)

Class 7

Concerted Action Among Competitors: Structured Rule of Reason
Chapter 2: 187-211; 125-128, 211-223 (*CA Dental; Dagher, Polygram*)
Summer 2011 Supp. 3-6
Antitrust Guidelines for Collaborations Among Competitors (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf

Class 8

Distinguishing Concerted From Unilateral Action: Inferring Agreement & Solving Cartel Problems
Chapter 3: 227-47, 251-64, 283-88, 297-301 (*Copperweld, Interstate Circuit)*

Class 9

Distinguishing Concerted From Unilateral Action: Inferring Agreement; Invitations to Collude
Chapter 3: 279-83, 301-11, 335-43, 349-51 (*Twombly*, *Foley, Amer. Airlines*)
Summer 2011 Supp. 8-12 (*In re Text Messaging*)

Class 10

Vertical Intrabrand Agreements
Chapter 4: 352-70, 411 (bottom)-419 (top) (*GTE Sylvania, E&L Consulting*)
Chapter 4: 370-406 (*Leegin*) (read *Leegin* excerpt eventually but can look at headnotes in short term)

Class 11

Mergers Among Competitors: Structural Presumption and Market Concentration
Chapter 5: 431-468, 499-507 (*Brown Shoe*, *Philadelphia Nat'l Bank*, *Gen'l Dynamics*, *Baker Hughes*, *Heinz*)
U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines (2010): 15-18 (§5.1-5.3) *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf
Summer 2011 Supplement: 20-22 (covering §§5.1 & 5.2 of Guidelines)
Appendix A: 1256 (Clayton Act §7)

Class 12

Mergers Among Competitors: Market Definition and Market Concentration
Chapter 5: 472-499, 507-517 (top) (*du Pont (Cellophane), Cardinal Health*)
Summer 2011 Supplement 19-20, 31 ("Critical Loss")

U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines (2010): 7-15 (§§4.1&4.2)

Class 13

Mergers Among Competitors: Unilateral Competitive Effects
Chapter 5: 517-18, 535-54 (*Staples*)
Chapter 8: 926-32, 934-37
U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines (2010): 1-6 (§§2.1&2.2), 20-24 (§§6.1-6.4)
Summer 2011 Supp. 22-26, 31 (definitions)

Class 14-15

Mergers Among Competitors: Coordinated Competitive Effects & Efficiencies
Chapter 5: 517–535, 568-73 (*HCA, Staples*)
U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines (2010): 24-27 (§§7.1&7.2)
Summer 2011 Supplement: 26-28

Class 16

Mergers Among Competitors: Entry and Powerful Buyers
Chapter 5: 559-566, 455-62 (*Waste Management, Baker Hughes*)
Chapter 8: 983-87
U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines (2010): 27-29 (§9.1-9.3)
Summer 2011 Supplement: 28-29

Class 17

Mergers Among Competitors
Hospital Merger Fact Pattern (Lecture Slides)
Chapter 5: 577-578 (Chic Shampoo)

Class 18

Single Firm Exclusionary Conduct: Monopolization[6]
Chapter 6: 582-618 (*Lorain Journal, Alcoa*)
Appendix A: 1251 (Sherman Act §2)

Class 19

Monopolization: Non-Price Exclusionary Conduct
Chapter 6: 618-40 (*Aspen Skiing*)

Class 20

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[6] See Mark Lemley, Gilbert's Antitrust Summary Chapter III. Monopolization (pg. 37-55)

Monopolization: Non-Price Exclusionary Conduct
Chapter 6: 640-57 (*Microsoft*)
Chapter 8: 941-65

Class 21

Monopolization: Predatory Pricing
Chapter 1: 81-86
Chapter 6: 659-680, (*Brooke Group*)

Class 22

Monopolization: Non-Price Exclusionary Conduct vs. Predatory Pricing
Monopolization: Refusals to Deal
Chapter 6: 680-699, 706-718 (*Cascade*, *Trinko*)
Optional reading: 699-706 (Sidebar 6-4)
Summer 2011 Supp. 37-38

Class 23

Monopolization: Attempt to Monopolize & Remedies
Chapter 6: 747-762 (*Spectrum Sports*)
Paul Krugman, "Microsoft: What Next?"
(http://www.pkarchive.org/column/42600.html)
Chapter 6: 762 (Problem 6-1 "Amerinet")

Class 24

Concerted Exclusionary Conduct: Exclusionary Group Boycotts
Chapter 7: 765-88 (*Northwest Wholesale Stationers, Visa*)
Chapter 8: 905-909

Class 25

Concerted Exclusionary Conduct: Tying
Chapter 7: 788- 808, 810-22, 875-78 (*Jefferson Parish, Microsoft*)

Class 26

Concerted Exclusionary Conduct: Exclusive Dealing
Chapter 7: 823-51 (*Jefferson Parish*, *Omega*)
Appendix A: 1254 (Clayton Act §3)

Class 27

Private Rights of Action & Damages
Optional Reading - Chapter 9: 1086-1106, 1128-1135, 1137-48

Vertical Mergers (will not appear on Final Exam)
Chapter 7: 851-73 (top) (*Brown Shoe*, *O'Neill*)