

Klick
Antitrust
Final Exam
Summer 2018

You have 24 hours to complete the exam, but the latest the exam can be returned is 5:00 pm on June 16. You may use your casebook, notes, and commercial outlines in the completion of this exam, but you may not confer with anyone else about it during the exam period (i.e. June 15 at 9:00 am through 5:00 pm on June 16). Each question (1 and 2) is equally weighted subject to your choice in question 3. Good luck.

1. During the period 2009 to 2014, LSAT registrations declined from 171,500 to 101,700. According to analysts, this drop was driven by the perception that legal jobs were drying up. During this same time period, advertised tuitions at ABA accredited private law schools rose from an average of \$35,743 to \$43,820. Among the private law schools in the Top 14 specifically, in each of the intervening years, each school raised its advertised tuition by a comparable proportion. Note that there is significant communication among these law schools (e.g., the deans often share comments on a dean's listserve; there is an annual meeting of the Annual Association of Law Schools that has both a scholarly and administrative component; etc) and the advertised tuitions can be found in many places (e.g., the schools' websites; US News; etc). Which of the facts stated here might be relevant for bringing an antitrust action against the top private law schools? What other facts would be helpful in bringing such an action? What difficulties would one face in bringing such an action?

With respect to a collusion claim (e.g., Sherman Act section 1) the parallel price movements are the obvious hook here. That said, a successful collusion claim requires some evidence of an agreement among the competitors and there are no details in the question directly implicating such an agreement. In such a situation, the courts look for so-called plus factors. In the question, the plus factors would be the existence of forums for discussion (e.g., the Association and its meetings; the deans' listserve), the upward pricing trend in the face of some indicators of declining demand (i.e., the reduction in LSAT registrations) which might otherwise suggest that prices should be falling; the seeming ease of monitoring each other's prices via websites and the US News publications, etc.

However, there are obvious difficulties with collusion claims in this setting. First, there are quite a lot of law schools (> 200) and even if the relevant market is the top 14, 14 would seem to be more entities than we generally see in cases of successful cartels (e.g., DOJ cartel prosecutions tend to fall in the 3-5 firm range). Also, the claimed parallel pricing and price monitoring is problematic in this context given the ubiquity and importance of discounting/financial aid. Presumably, the relevant price is not list price (which is what is covered in the data cited above and which is covered on websites and US News), but rather price net of "aid." Monitoring this more relevant price would prove to be very difficult, and there is no evidence provided in the question regarding parallelism in this price measure.

The demand proxy and its interpretation is potentially problematic as well. We would need to know more about how LSAT registrations map onto matriculation before concluding that demand had actually declined in this period of supposedly increasing prices. Further, the cost

structure of law schools (really higher education generally) is fixed cost heavy given tenured faculty (who can't easily be fired or have their pay lowered even if demand does decline), so fewer students could actually be associated with higher prices to cover these fixed costs. Other cost issues need closer inspections as well – while the stipulated price increase is above inflation for the covered period, education does not generally benefit from the productivity gains that have kept prices down economy-wide, so the noted increases could be consistent with normal cost increases during the period. One could examine this possibility by comparing the price increases with increases for other graduate and undergraduate school tuitions.

As for the communication channels, the listserve presumably would not be very secure and any collusive behavior would leave substantial evidence behind (much of it not even requiring access to server records since listserve messages generally get forwarded to broad distribution chains), so it seems unlikely that this venue for communication would be so helpful for illicit coordination.

For all of these reasons, on the merits, it seems a collusion claim would be hard to win. On top of that, the heightened pleading standard for conscious parallelism cases under Twombly make it unlikely that this case would even get past a motion to dismiss.

2. Ancestry.com and 23 & me are both genetic testing services that match customer DNA samples to their existing genetic databases to determine a person's genetic background, providing customers with a wealth of information about where their ancestors came from, as well as potentially providing them information about health risks and other information that is probabilistically predictable on the basis of DNA. That said, the quality and precision of this information is limited by the size of the underlying database which only grows as the customer base grows. As personal use DNA products are relatively new, these markets are small. The only other firm in the US market is Decode Genetics, the market leader. The firms have the following market shares: Decode (50%); Ancestry.com (30%); and 23 & me (20%). Ancestry.com and 23 & me plan to merge. You are the regulatory staffer tasked with preparing the initial memo outlining the government's position on this merger.

First, it should be noted that this is a highly concentrated market with a HHI of $50^2 + 30^2 + 20^2 = 3800$ and the merger would lead to a substantial increase in concentration (from 3800 to $5000 = 1200$). Under both of these criteria, the merger guidelines suggest this merger merits significant scrutiny. Also, although it is not as powerful as it once was, the market shares in this case surely exceed the so-called Philadelphia National Bank presumption, rising above the level at which courts are inclined to view mergers as problematic. That said, perhaps the market has not been defined correctly as other collectors of genetic material (medical labs, etc) might also provide similar services even if they do not generally market themselves as such. Examining the cross price elasticities between the firms mentioned in the question and other providers would be the right approach to examine this issue. If there were a positive cross price elasticity among these firms and other firms in the broader medical testing field, the market share data provided in the question would be misleading.

Concerns about this merger include the unique worries about reducing the market to a duopoly which has been raised as a particular worry by some courts both on coordination grounds and unilateral grounds. While modern economics is skeptical of the idea that there is

some magical difference between going from 4 to 3 vs going from 3 to 2, courts have expressed worries which is worth noting.

Perhaps more importantly, the scale economies inherent in this market (i.e., larger databases lead to higher quality/more accurate products) limit the potential for entry. Given this, merger scrutiny takes on even greater importance because it may not be possible to rely on new entrants to discipline any price increases that occur after the merger. That said, perhaps there are other avenues through which entrants could achieve sufficient scale in their databases (e.g., other medical labs with existing databases might decide to enter this market or other entrants might be able to buy/lease those databases), although this possibility might be limited by privacy law or other contractual provisions. This is worth investigating. Any conclusions on issues like this are necessarily particularly speculative given the newness of this market.

On the pro-merger side, the same scale economies argument mentioned before provides an efficiency justification for this merger. Combining the two firms' databases will provide consumers with more reliable results. Recall that while we tend to focus on P & Q in merger (really antitrust generally) analysis, things like quality also are to be considered. Further, this merger will create a stronger counterweight to the market leader (Decode Genetics).

3. Please choose one question (1 or 2) to count double or indicate you want each question to count equally. Please be clear in your choice.