

MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 11:10 am – 1:10 pm
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CLASS 4 ASSIGNMENT—INSTRUCTOR’S ANSWER

Instructions

Submit by email before class on Thursday, September 7
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 4

Assignment

Time: Early 2014
Calls for a memorandum to the client

Safeway has just been approached by Albertsons with a very attractive purchase offer. Safeway, of course, recognizes that no matter how attractive the purchase price, the Safeway shareholders will receive nothing unless the deal closes.

Alice Smith, the general counsel of Safeway (not really), has asked you (an antitrust attorney at Able and Baker LLP) to send her a short memorandum describing how the antitrust laws might apply to the proposed transaction, the process that the FTC will use in reviewing the merger, and the possible outcomes of the review. Smith wants something short but rigorous that she can share with Safeway’s senior business people.

NOTE: The transaction is very confidential, so it is important that you do not identify the parties in the memorandum and use code names instead. The client told us that the code name for the transaction is Project Ceres and that the codenames for Albertsons and Safeway are Bertie and Alexandra, respectively. Be sure to use them and not the real names in the memorandum. As a general rule, you should always use the codenames that the client supplies. In any event, never include the real name of the counterparty in a confidential transaction in a memorandum or email. If the client did not give you one, make one up.

If you would like further background information on the Albertsons/Safeway deal, see the optional case study on Canvas or AppliedAntitrust.com. There is no need for you to look at these materials unless you are so inclined. All you need to know for the memorandum is that Albertsons and Safeway are major supermarket chains and that they overlap in some cities.

INSTRUCTOR'S ANSWER
(with marginal comments)

ABLE & BAKER LLP

To: Alice Smith, Esq.
General Counsel, Safeway Inc.

FROM: Dale Collins

Project Ceres

You have asked me to provide you with a short memorandum describing how the antitrust laws might apply to the proposed transaction, the process that the FTC will use in reviewing the merger, and the possible outcomes of the review.

The antitrust laws

Section 7 of the Clayton Act, which is the provision in the federal antitrust laws that regulates mergers and acquisitions, prohibits transactions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 15.

By its terms, Section 7 has three elements: (1) a relevant product market (“line of commerce”), (2) a relevant geographic market (“section of the country”), and (3) an anticompetitive effect (“may be substantially to lessen competition, or to tend to create a monopoly”).

The proposed transaction involves a combination of retail supermarket chains, so the relevant product market will be supermarkets. Since retail purchasers are only willing to travel short distances to shop, the geographic markets will be local. Each local market will need to be assessed separately, and a violation in one local market can be the basis for an injunction blocking the entire deal.

As viewed by the courts and the enforcement agencies today, a transaction has the requisite anticompetitive effect under Section 7 if it threatens, with a reasonable probability, to result in harm to any identifiable group of customers through an increase in price, a decrease in market output, a decrease in product or service quality in the market overall, or a decrease in the rate of technological innovation or product improvement. In the retail supermarket business, harm to customers most likely will occur, if at all, through price increases enabled by the reduction of the number of competitors resulting from the transaction.

In assessing a retail supermarket transaction for anticompetitive effect, the investigating agency will rely primarily on two types of evidence.

Documents and statements of the merging parties. If the documents of the parties, including any internal analyses of the transaction or memoranda to the board of directors or the statements of company representatives, suggest that the combined firm postmerger will be able to raise prices to customers in some geographic area, the investigating agency will almost surely regard that area as a relevant geographic market in which the merger will have an anticompetitive effect. Documents or statements to this effect are

almost impossible to impeach, and the agencies consider them conclusive evidence against the transaction.¹

The number of realistic alternative suppliers. In the absence of “bad” documents or statements, the primary determinant of anticompetitive effect will be whether the customers have “enough” realistic third-party alternatives after the closing of the transaction to protect themselves from a price increase. The usual rule of thumb today is that in areas where stores of the two merging parties compete for customers, the customers should have at least four and preferably five realistic alternatives to the combined company to avoid a serious antitrust concern.² If the investigating agency determines that customers in an overlap area do not have sufficient alternatives, you should expect that the agency will seek divestitures of all of the stores of one or the other merging party in that area to preserve the premerger level of competition, if not seek to block the deal in its entirety.^{3,4}

The merger review process

Given its size, this transaction would be subject to the reporting and waiting period requirement of the Hart-Scott-Rodino (HSR) Act. 15 U.S.C. § 18a. Before closing, the parties will each have to file a prescribed report form with the Antitrust Division of the Department of Justice and the Federal Trade Commission. The HSR Act then bars the closing of the transaction for an initial waiting period of 30 calendar days to permit the investigating agency to conduct a preliminary antitrust merger review. In the case of supermarkets and other consumer retail businesses, the FTC will be the reviewing agency.

If the FTC decides to conduct a full investigation, it will issue a so-called “second request” to the parties for documents and information. These second requests are voluminous and compliance typically requires several months. Given the size and significance of the parties in this transaction and the large number of local geographic markets in which they both operate, you should expect that the FTC will not be able to finish its investigation in the 30 days of the initial waiting period and that the FTC will issue a second request to continue the investigation. The issuance of a second request extends the waiting period for the time it takes the parties to comply plus an additional 30 calendar days. Moreover, you should expect that the FTC will request, and

¹ The converse is not true. The investigating agencies consider company documents and statements that the merger will not harm competition as self-serving and unreliable unless they are accompanied by a compelling analysis of why the combined firm will either lack the ability or the profit-maximizing incentive to raise prices.

² In other words, a five-to-four or six-to-five transaction.

³ In close cases in a detailed investigation, the investigating agency may analyze the cross-elasticity of demand between the stores of the merging parties in a given area using point-of-sale scanner data from ACNielsen Scantrack Services or IRI Custom Store Tracking, but usually just the number of competitors in the market postmerger are enough. (**Note to students:** We will cover the use cross-elasticity of demand in merger antitrust analysis in a few weeks. I include this footnote just to be complete.)

⁴ **Note to students:** I have to hedge on this. As we will see in the next unit, the Biden DOJ, breaking with several decades of agency practice, is refusing to enter into divestiture consent settlements. Instead, it is forcing the merging parties to choose between voluntarily terminating their transaction or litigating the merits in court. The FTC, which traditionally has reviews supermarket mergers, does accept divestiture consent decrees to “fix” problematic horizontal mergers, although its standards for what amounts to an acceptable settlement are very demanding.

the parties will find it in their interest to give, a commitment not to close the transaction for an additional 30 to 60 days after the waiting period has expired to enable the FTC to complete its investigation and to allow the parties to present the best possible defense of the transaction.

Outcomes of a merger review investigation

There are four possible outcomes at the end of the investigation:

- (1) The FTC concludes that the transaction does not present competitive concerns in any local area and closes the investigation without enforcement action.
- (2) The FTC concludes that there are some local areas where the transaction presents competitive concerns, and the parties negotiate a consent decree with the FTC requiring the divestiture of specified stores in the problematic areas to one or more third-party buyers acceptable to the FTC to resolve the FTC's concerns.
- (3) The FTC concludes that there are some local areas where the transaction presents competitive concerns, the FTC and the parties cannot agree on a mutually acceptable consent decree solution for one or more of these areas, and FTC challenges the transaction by filing a complaint in federal district court seeking a preliminary injunction to block the transaction's closing pending a full adjudication of the merits as well as a permanent injunction blocking the transaction. The FTC will not accept a consent decree that fails to resolve all its concerns.
- (4) The FTC concludes that there are some local areas where the transaction presents competitive concerns, the FTC and the parties cannot agree on a mutually acceptable consent decree, and the parties voluntarily terminate the transaction rather than proceed to litigation.⁵

If you would like, we can prepare an initial document and information request that will enable us to give you a preliminary analysis as to which areas, if any, the FTC is likely to conclude that the transaction presents a substantive antitrust problem and will require divestitures to settle the investigation.

⁵ **Note to students:** I did not include a "fix it first" option. That is because, as we discussed in class, the FTC's view on at least some of geographic overlaps is likely to be unpredictable. Besides, Safeway is the seller, and the seller has no control over a "fix it first" solution.