MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2025

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

CLASS 2 ASSIGNMENT—INSTRUCTOR'S ANSWER

Instructions

Submit by email before class on Thursday, August 28 (optional in Week 1)
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 2

Assignment

Time: Late 2014 (The deal was actually signed on January 30, 2015)
Calls for a memorandum to the client

Albertsons has just approached Safeway with a very attractive purchase offer. Safeway recognizes that, regardless of how attractive the purchase price is, its shareholders will receive nothing unless the deal closes.

Alice Smith, the general counsel of Safeway, 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 knows that you have no data on possible store overlaps and have not conducted any analysis. Smith wants something concise yet rigorous that she can share with Safeway's senior business leaders about how the FTC is likely to approach the transaction.

NOTE: The transaction is highly confidential, so it is essential that you do not disclose the parties' identities in the memorandum and instead use code names. The client informed us that the code name for the transaction is Project Ceres and that the code names for Albertsons and Safeway are Bertie and Alexandra, respectively. Be sure to use them, not the actual names, in the memorandum. As a general rule, you should always use the codenames that the client supplies. In any event, never include the actual name of the counterparty in a confidential transaction in a memorandum or email. If the client did not provide one, create one.

> Safeway and Albertsons are two, very large supermarket chains that operate in the United States and overlap in a significant number of geographic areas. Safeway operates 1,335 stores in 20 states and the District of Columbia, 13 distribution centers and 20 manufacturing plants, with approximately 138,000 employees. Albertsons operates 1,075 stores and 14 distribution centers in 29 states, with approximately 115,000 associates. The offer price is over $9 billion.
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> 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.

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ABLE & BAKER LLP

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

FROM: Dale Collins

INSTRUCTOR'S ANSWER
(with marginal comments)

Project Ceres

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

Commented [A1]: Many attorneys like to define terms. I find this silly in memoranda (but not in contracts or court documents) where everyone already knows the terms. But when writing for a partner or a client, use their preferred style.

Commented [A2]: "You have asked me" is a great way to start a memorandum of law responding to a question. Be precise (and concise) in the questions you are answering. I strongly recommend you use this form in this course and in practice. Also, memoranda of law should be formal in style and *not* conversational. Clients pay a meaningful amount of money for these types of memoranda and they should look professional.

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. § 18.

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 a single local market can serve as the basis for an injunction blocking the entire deal.

Commented [A3]: There is no reason why you should know this, but historically mergers in the retail food industry have been reviewed by the FTC, which regularly alleges supermarkets to be the relevant product market. If you were an associate in a law firm, you would learned this having researched which agency has reviewed these types of details by looking at past litigated cases and consent decrees

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 is most likely to occur, if at all, through price increases enabled by the reduction in the number of competitors resulting from the transaction.[1]

[1] A new focus for the FTC in the Biden administration was labor markets. The Biden FTC is aggressively looking for a Section 7 case to challenge on the grounds that it is likely to substantially lessen competition in the input market for employees. We should keep this theory in mind as we evaluate the Ceres transaction, but the downstream competitive consequences of the acquisition almost certainly will be the primary focus of any investigation or litigation.

[**Note to students**: In its complaint challenging Kroger's acquisition of Albertsons in 2024, the FTC included a claim that the transaction would violate Section 7 in certain labor markets. Although the district court preliminarily enjoined the acquisition, it did so on the transaction's likely effects in the downstream sale of supermarket products

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When assessing the anticompetitive effect of a retail supermarket transaction, the investigating agency will primarily rely 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 is almost certain to regard that area as a relevant geographic market in which the merger will have the requisite anticompetitive effect to violate Section 7. Such documents are rarely rebuttable, and the agencies typically view them as conclusive admissions against the transaction.[2]
>
> *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 transaction's closing 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.[3] 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.[4]

Commented [A4]: I really mean *today*. This is an anachronism in the memorandum, since the assignment set the date as 2014 when the standards were aa bit more lenient. If I was true to the 2014 date, I would have said "three and preferably four."

The merger review process

Given its size, this transaction would be subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Act (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 allow 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 each of the merging parties for documents, data, and other information. These second requests

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in local markets and found it unnecessary to rule on the FTC's upstream labor markets count. *See* FTC v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016, at *30-*32 (D. Or. Dec. 10, 2024).]

[**Note to students:** The Trump administration has indicated that labor market effects will remain a key focus in antitrust enforcement. *See* Andrew N. Ferguson, Chairman, Fed. Trade Comm'n, Directive Regarding Labor Markets Task Force (Feb. 26, 2025); Gail Slater, Ass't Att'y Gen., U.S. Dep't of Justice, The Conservative Roots of America First Antitrust Enforcement, Speech at University of Notre Dame Law School (Apr. 28, 2025).]

[2] 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.

[3] In other words, a five-to-four or six-to-five transaction.

[4] 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 is enough. [**Note to students:** We will cover the use of cross-elasticity of demand in merger antitrust analysis in the next unit.]

are voluminous, and compliance typically requires four to eight months to complete. 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 within the 30 days of the initial waiting period and that the FTC will issue a second request to conduct an in-depth 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 a timing agreement. The parties will likely find it in their interest to provide 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 allow the parties to present the best possible defense of the transaction.. The parties will find it in their interest to provide 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 five possible outcomes at the end of the investigation:

(1) *No enforcement action.* The FTC concludes that the transaction does not present competitive concerns in any local area and closes the investigation without enforcement action.

(2) *Consent settlement*. 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 them to divest specified stores (and perhaps distribution centers and other assets) in the problematic areas to one or more third-party buyers acceptable to the FTC to resolve the FTC's antitrust concerns. In the Biden administration, the FTC accepted a relatively small number of consent decrees to settle investigations.[5] Unlike during the Biden administration, the FTC under the Trump 2.0 administration has shown a greater willingness to accept consent decrees to resolve competitive concerns identified in merger investigations.

(3) *Litigation*. 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 the 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 an administrative permanent injunction blocking the transaction. The FTC will not accept a consent decree that fails to resolve all its concerns. The parties defend the original transaction in court on the merits.

(4) *"Litigate the fix."* The FTC challenges the transaction in court, but the merging parties do not defend the original transaction and instead "litigate the fix." When the parties "litigate-the-fix," they defend not the original transaction but a restructured one that

[5] The Antitrust Division of the Department of Justice did not accept any consent decrees to settle investigations during Jonathan Kanter's tenure as head of the Antitrust Division in the Biden administration, although the Division was effectively forced by one court to accept a consent decree to settle an ongoing litigation. [**Note to students**: The Trump 2.0 administration has rejected this approach, and both the DOJ and FTC has already accepted several consent decrees to settle investigations.]

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includes a signed divestiture agreement with a specific divestiture buyer contingent on the closing of the main transaction. The parties then argue in court that this divestiture will eliminate any competitive concerns about the now-restructured transaction. Courts will evaluate the Section 7 legality of the transaction in light of the proposed fix. The divestiture is typically the same one that the parties proposed as a consent decree to the FTC during the second request investigation, which the FTC rejected.

The FTC typically raises three objections to the adequacy of the proposed fix: (a) in some relevant markets, no stores are divested, and the restructured transaction would still violate Section 7 in those markets; (b) in other markets, the number or competitive significance of the divested stores or assets is too small to eliminate the anticompetitive effects, so the restructured transaction continues to violate Section 7 even with the fix in place; and (c) even where the number and identities of the divested stores and assets would be sufficient in the hands of a suitable buyer, the proposed divestiture buyer is inadequate because it lacks the ability or incentive to operate them in a way that preserves premerger levels of competition.

(5) *Terminate the transaction*. 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.

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