

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAW 1396
Georgetown University Law Center
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Tuesdays, 3:30 pm - 5:30 pm
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After reviewing this reading guidance, you may approach the reading for this class in one of three ways: (1) complete all assigned readings in accordance with the reading guidance, (2) review only the class notes, or (3) forgo the reading entirely. Tuesday's lecture will be self-contained, so while preparation is encouraged, it is not required if you do not have the time given the press of other business at the end of the semester.

Week 13: DOJ/FTC Merger Review (Unit 6)

On Tuesday, we will cover the units on merger antitrust procedure. Unit 6 contains an introduction to merger antitrust substance, a model for predicting DOJ/FTC merger review outcomes, and the DOJ/FTC merger review process.

For this unit, the class notes are the principal reading. As you read the class notes, you can dip into the reading materials for the primary sources.

Antitrust risk. We will start with a brief discussion of how to think systematically about antitrust risk. Lawyers give advice; clients make decisions. The goal is to put the client in a position to make informed decisions about how to proceed (if at all) in light of the transaction's antitrust risk. However, a big problem for practitioners, and hence for clients, is how to convey a meaningful sense of the client's risk. Overall, I find that antitrust lawyers do a terrible job on this.

I find that, by far, the best way to think about antitrust risk is in three nested buckets: (1) inquiry risk, (2) substantive risk, and (3) remedies risk. This framework is a natural way for business people to think about legal risk generally and antitrust risk in particular (slides 3-9). While I will address these risks in the context of a merger, they apply to any situation where antitrust risk of any type is present.

1. *Inquiry risk* is the risk that the transaction's merits will be seriously examined. Antitrust questions do not materialize out of thin air. Someone must have the incentive and the institutional means of raising the question. Inquiry risk can be easily analyzed from this perspective.
2. *Substantive risk* is the risk that the transaction will be found to violate the antitrust laws. Substantive risk arises if and only if there is an inquiry. Analysis of substantive risk requires an identification of the possible theories of antitrust liability that could apply to the situation and then a dispassionate evaluation of those theories in light of the evidence to which the parties have access (including their own documents) or can develop (notably expert evidence), as well as a judgment about the evidence that the investigating agency may develop from third parties that is not available to the merging parties (at least absent discovery in the course of litigation).

3. *Remedies risk* reflects the consequences of a finding that the transaction violates the antitrust laws. Remedies risk is analyzed in terms of the possible outcomes of a finding of a violation and their associated probabilities of occurrence. These outcomes include the range of possible “fixes” (restructurings) of a transaction to eliminate the violation or otherwise negate the concern and the likelihood of their acceptance by the relevant decision maker—the investigating agency or the court—and the associated costs of these restructurings. Remedies risk must also account for the possibility that there is no “fix” that would eliminate the antitrust problem to the satisfaction of the investigating agency or, in litigation, the court.

Assessing substantive antitrust risk. With antitrust risk in mind, we will turn to assessing substantive risk in mergers and acquisitions (slides 3-9). I suspect that you will find this discussion provides a somewhat different perspective on merger antitrust analysis than you saw in the antitrust survey course. Most of what you see in antitrust courses is how judges and, occasionally, enforcement officials explain the antitrust decisions they have already made; my model predicts the agency’s enforcement decisions before they act. It turns out that there is a big difference. You may also find it curious that my predictive model does not rely on market definition, HHIs, diversion ratios, upward pricing pressure, or the 2023 DOJ/FTC Merger Guidelines, which survey antitrust courses usually treat as important in agency prosecutorial decision-making.

The DOJ/FTC merger review process. Next, we will turn to the merger review process employed by the Antitrust Division and the Federal Trade Commission under the Hart-Scott-Rodino Premerger Notification Act. If a merger, acquisition, or joint venture satisfies certain threshold size requirements and is not covered by an exemption, the HSR Act imposes two requirements before the parties may consummate their transaction: (1) the merging parties must file a prescribed Notification and Report Form (“HSR filing”) with the Antitrust Division and the Federal Trade Commission, and (2) the parties must observe a specified statutory waiting period before closing their transaction. This is the institutional context in which the DOJ and FTC conduct the vast bulk of merger investigations. Section 7 of the Clayton Act is the primary antitrust statute governing mergers and acquisitions (pp. 4-5), and the reading materials provide a quick overview of the merger review process (pp. 8-10).

The remainder of the class notes provides a reasonably detailed treatment of the process, which I think about in three stages.

Prefiling/filing. Prefiling work includes a preliminary antitrust risk analysis for the client, negotiating the merger agreement with the other side (in friendly deals), and preparing the defense.

I also included the merger control filing (“HSR filing”) at this stage. The class notes give you some background on the HSR Act (slides 10-12), the HSR review process (slides 13-16), reportability (slides 17-24), premerger notification (slides 25-50),¹ and the statutory waiting

¹ This section may be somewhat confusing because it addresses two that were effective at different times. Slides 27-28 describe the form that, with relatively minor amendments, remained in effect from the HSR Act’s effective date in 1978 through February 9, 2025. In October 2024, the FTC and DOJ promulgated a new rule with a new HSR report form that significantly expanded the required information, documents, and data. The effective date of that form was February 10, 2025, after which the prior form could no longer be used. Slides 29-39 describe the new form. On February 12, 2026, however, a district court, in response to a challenge by the Chamber of

periods (slide 45). You should also skim the FTC Introductory Guide I on the premerger notification program (pp. 11-25). The reading materials include the full text of the HSR Act, the current inflation-adjusted jurisdictional thresholds, the HSR filing form, and instructions for completing the form (pp. 26-68). You can safely skip these materials, but they are there if you want to glance at them. However, you should read the note on the “Business Documents” required to be submitted with the HSR filing along with the note on “4(c)” and “4(d)” documents (pp. 69-73). These documents are the most important materials submitted in today’s HSR filings, and you need to know about them.

For HSR-reportable transactions, the HSR Act prohibits the acquiring firm from acquiring a beneficial interest in the target until the required HSR reports have been filed and the applicable HSR waiting period has ended. This requirement can be violated in several ways:

1. the parties can simply fail to file;
2. the parties can invoke an inapplicable exemption (usually in the investment exemption) and not file;
3. the parties file, but one of their filings can be incomplete (usually because one party failed to include all of its 4(c) and 4(d) documents); or
4. the parties make their proper filings, but during the waiting period the acquiring firm exercises control or influence over the acquired firm in a manner that indicates that the acquiring firm has already “acquired” the target (often by influencing the target firm’s bidding or contracting during the waiting period).

The first three cases are *failures to file*; the last case is commonly called *gun-jumping*. The HSR Act provides for civil penalties for these violations. As of January 17, 2025, the maximum civil penalty was \$53,088 per day, which can run up surprisingly quickly (about \$19.49 million/year).² The court may also enter injunctive relief. The class notes cover HSR Act violations (slides 46-50). The *Flakeboard* case (pp. 114-46)—which you can skim—provides an example of an enforcement action.

Initial waiting period investigation. The next stage in the merger process after filing the HSR form is the initial waiting period investigation. The initial waiting period under the HSR Act is 30 calendar days (15 calendar days for all-cash tender offers and certain bankruptcy transactions), which provides the agencies the opportunity to decide whether one or both of them would like to review the transaction, allocate the investigation responsibility to one of the agencies (so that both of them will not be investigating simultaneously—this is called the *clearance process*), and permit a preliminary substantive review. If one of the agencies opens an

Commerce, declared the 2024 rule (and, with it, the new form) invalid under the HSR Act and the Administrative Procedure Act. See *Chamber of Commerce v. FTC*, No. 6:25-CV-9-JDK, 2026 WL 402498 (E.D. Tex. Feb. 12, 2026), stay pending appeal denied, No. 26-40094 (5th Cir. Mar. 19, 2026). Following the Fifth Circuit’s denial of the stay pending appeal, the antitrust agencies returned to the prior form. Within days, however, the agencies renewed their effort to revise the HSR form by launching a joint public inquiry and a request for public comment. Presumably, the agencies will seek to reinstate many of the new additions to the 2024 HSR form. So both forms are relevant in practice: the prior form to see what is required today, and the 2024 revised form to see what is likely to be reinstated in a new rulemaking.

² In early January 2026, the FTC should have published the maximum civil penalty amount for 2026. However, I cannot find it on the FTC web site, the Federal Register, or the Internet. I have submitted an FOIA request to the FTC.

initial waiting period investigation, the investigating staff will contact the merging parties to introduce themselves, ask the parties to submit some additional information voluntarily (see pp. 82-84),³ and invite them to give the investigating staff a presentation on why the transaction does not present an antitrust problem. During the initial waiting period investigation, the staff will also conduct interviews (usually by telephone) with customers and competitors in the industry. The slides give some more detail on the mechanics of initial waiting period investigations (slides 51-60).

The investigating agency has four options at the end of the initial waiting period: (1) close the investigation, terminate the waiting period or allow it to expire, and permit the parties to close their transaction without interference; (2) begin a “second request investigation” by issuing a “second request”; (3) convince the merging parties to “pull and refile” their HSR forms to restart a new initial waiting period; or (4) let the initial waiting end without issuing a second request but notify the parties that the investigation is still open and that if the parties close they do so at their own risk.⁴ It is important to note that the FTC Premerger Notification Office (which is responsible for the administration of the HSR Act) takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement, so that the parties cannot “extend” the initial waiting period to give the agency more time to investigate, even if they so desired.

One additional set of issues arises in the preparation and defense of a reportable transaction: the attorney-client privilege, the work product doctrine, and the common-interest doctrine (see slides 61-71). The attorney-client privilege protects confidential communications made for the purpose of seeking, obtaining, or providing legal advice. Significantly, the privilege is limited to protecting communications, not underlying facts. The work product doctrine separately protects trial preparation materials prepared in anticipation of litigation, including documents and tangible things, and, in some circumstances, other forms of attorney or investigator work product. In practice, merger investigations by the DOJ and the FTC usually provide reasonable grounds to anticipate litigation and invoke work product protection. At the same time, the merging parties ordinarily will want to share and coordinate their legal analysis and defense of the transaction. Absent an exception, sharing attorney-client communications with the other side would destroy confidentiality and waive the attorney-client privilege. The common interest doctrine addresses this problem by permitting parties with a common legal interest to share privileged communications without waiving the attorney-client privilege. The practical implication is that the parties may coordinate their antitrust analysis and defense strategy, but they should be careful to frame those discussions as part of a common legal strategy and not as

³ I cannot find the model voluntary request letter on the current Antitrust Division web site. During the Biden administration, the Division removed a number of “model” documents from the website, presumably because it believes that it tailors its documents so individually that the model documents are no longer informative. Even so, I have included the Division’s most recent model voluntary request letter to give you an idea of what the Division has requested in the past.

⁴ This fourth option was introduced in the Biden administration first by the FTC and then followed by the DOJ. The notification is derisively called by some a “bedbug letter.” It is unclear what the agencies hope to accomplish with this fourth option other than trying to create uncertainty in the minds of the merging parties in the hope that they might abandon their deal. By allowing the initial waiting period to end, the investigating agency deprives itself of the ability to issue a second request and extend the waiting period. Moreover, the letter has little, if any, legal effect. The expiration of the HSR Act waiting period without enforcement action does not immunize the deal. The agencies can—and have—opened merger investigations and challenged transactions that previously “cleared” the HSR review process. I know of no transaction that had received such a letter where the agency actively continued its investigation. There have not been any no enforcement actions taken against such any transaction.

negotiations over their divergent commercial interests. Knowledge and proper use of these doctrines are essential in practice, and you should not leave law school without knowing them thoroughly.

Second request investigations. Before the end of the initial waiting period, if the reviewing agency decides that an in-depth investigation is warranted, the agency will issue a Request for Additional Information and Documentary Material (more fondly known as a “second request”). The slides give a brief overview (slides 72-77), and the model second request for the DOJ (last revision in December 2025) may be found in the reading materials (pp. 86-112).⁵

If the reviewing agency issues a second request before the end of the initial waiting period, the waiting period is extended for the period of time that it takes for the merging parties to comply with their respective second requests, plus an additional 30 calendar days (10 days for an all-cash tender offer and certain bankruptcy transactions) (see slides 78-81).⁶ With some justification, the agencies believe this is too little time for the staff to complete its review of the second request submissions and prepare its recommendation as to the outcome of the review and for the ultimate decision-makers within the agency to make an enforcement decision. As a result, the investigating agency almost always asks the parties to enter into a “timing agreement” that commits the parties not to close their transaction until some time—usually 60 days, but it can be much longer—after the statutory waiting period expires. If the parties do not agree to an extension, the agencies typically enter “litigation mode” and threaten to stop discussing the merits or a possible settlement with the parties. So the parties almost always enter into a timing agreement with the agency. See the class notes for timing agreements and front office meetings at the reviewing agency (slides 82-84).

Merger review outcomes. There are five possible outcomes of a full investigation: (1) the agency closes the investigation without taking enforcement action, (2) the parties settle the investigation through a consent decree (which typically will require the divestiture of assets or businesses), (3) the agency commences litigation to block the transaction, (4) the parties terminate the transaction, or (5) the agency does not close the investigation but allows the waiting period to expire and notifies the parties that if they choose to close, they do so at their own risk. The class notes summarize these outcomes (slides 85-86).⁷

Significantly, unlike the European Commission, neither the DOJ nor the FTC has the authority on its own to block a pending transaction (although the FTC can challenge a consummated transaction and order appropriate relief, including divestiture). Rather, to block a pending transaction, both the DOJ and the FTC must obtain a preliminary injunction from a federal district court.

As you can see, we have much to cover in this unit. We will not be able to cover everything in class, so be sure to have any questions on the materials ready for class.

As always, send me an email if you have any questions.

⁵ The latest version of the FTC model second request, last revised in January 2024, may be found [here](#).

⁶ Note that the investigating agency can give each merging party only one second request and the length of time the agency will have to complete the investigation will depend on the length of time it takes the parties to assemble and submit their responses to the second request. What incentive does this provide to the investigating agency in deciding what to include in a second request?

⁷ This fifth option is analogous to the fourth option at the end of the initial waiting period.