MERGER ANTITRUST LAW

LAW 1469 | Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Georgetown University Law Center | Dale Collins
Fall 2026 | wdc30@georgetown.edu
www.appliedantitrust.com

CLASS 2 ASSIGNMENT—INSTRUCTOR'S ANSWER

Instructions

Submit by email before class on Thursday, August 27 (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 code names 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.

ALWAYS include a machine-readable legend on every privileged document you write to an outside party identifying the document as privileged and the applicable privilege(s)

ABLE & BAKER LLP

TO: ALICE SMITH, ESQ.
GENERAL COUNSEL, ALEXANDRA

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").[1]

Based on longstanding FTC practice, the Commission is likely to define the relevant product market as the retail sale of food and other grocery products in supermarkets and to define separate local geographic markets around overlapping stores. Each local market will require separate analysis. A violation in even one local market can support an injunction against the transaction unless the parties provide an adequate remedy for that market.

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 enforcement agencies, a transaction has the requisite anticompetitive effect under Section 7 if it threatens, with a reasonable probability, to harm any identifiable group of customers through an increase in price, a decrease in market output, a decrease in product or service quality, 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 or reductions in service, quality, or choice enabled by the reduction in competition.[2]

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[1] Section 7, which is grounded in the Commerce Clause, also requires a nexus to interstate or foreign commerce. However, the interstate commerce nexus is rarely an issue in antitrust cases given the broad reach of the Commerce Clause under modern Supreme court jurisprudence.

[2] **[Note to students:** A major focus of the Biden enforcement agencies was the potential that mergers would create anticompetitive effects in labor markets. In Kroger/Albertsons, the FTC alleged that the merger would substantially lessen competition for union grocery labor. The district court found no apparent statutory or labor law bar to applying Section 7 to labor markets and tentatively found that union grocery labor in CBA-defined geographic areas was a plausible relevant market. The court also found the FTC's theory—that eliminating competition between

When assessing competitive effects, the FTC will not simply count stores. It will examine which supermarkets actually constrain each party in each local market. Relevant evidence will include ordinary course price checks and pricing policies, internal identification of primary competitors, customer switching when stores open or close, loyalty-card and other customer-location data, and evidence of competition on price, quality, service, assortment, freshness, and convenience. The parties may be important close competitors even if another retailer, such as Walmart, is the largest competitor overall. The FTC will focus on two broad categories 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.[3]
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> *The number and competitive significance of realistic alternatives.* 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 or other anticompetitive effect. 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. 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]

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, each party will have to file a prescribed report form with both the Antitrust Division of the Department of Justice and the Federal Trade Commission. The HSR Act then bars closing for an initial waiting period of

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unionized employers would reduce unions' bargaining leverage and lead to worse compensation and benefits—logical and plausible. It nevertheless held that the FTC had not presented sufficient economic evidence to establish a prima facie labor-market case independently supporting a preliminary injunction. FTC v. Kroger Co., No. 3:24-cv-00347-AN, 2024 WL 5053016, at *30-*38 (D. Or. Dec. 10, 2024).

The Trump 2.0 agencies have continued to recognize labor market effects as cognizable in merger 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).]

[3] The converse is also not true. Company documents stating that the merger will not harm competition are unlikely to carry much weight unless accompanied by a compelling analysis showing why the combined firm will lack the ability or incentive to raise prices or otherwise harm customers.

[4] In close cases, the FTC may use point-of-sale scanner data, loyalty-card data, diversion analysis, and other evidence to assess store-specific competitive significance; store counts alone are not dispositive. [**Note to students:** We will cover the use of diversion and cross-elasticity of demand in merger analysis when we examine the H&R Block/TaxACT transaction in Unit 5.]

30 calendar days to permit a preliminary antitrust review. The FTC is likely to obtain clearance to review the transaction because of its historical experience with supermarket mergers.

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 are voluminous, and compliance typically requires five to nine 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 the transaction presents competitive concerns in some local areas, and the parties negotiate an administrative consent order requiring divestitures to one or more buyers acceptable to the Commission. The FTC will assess not only the number and location of stores to be divested, but whether the entire package and proposed buyer(s) will create a viable, independent competitor capable of restoring the premerger level of competition. Depending on the circumstances, the package may need to include banners, private-label rights, distribution assets, information technology, loyalty-program data, personnel, pharmacies, fuel centers, and other supporting capabilities. Extensive or long-term dependence on the combined company through transition arrangements may cause the FTC to reject an otherwise sufficient store package.[5]

(3) *Litigate*: The FTC concludes that the transaction presents competitive concerns that cannot be resolved by agreement. The Commission issues an administrative complaint and seeks a preliminary injunction in federal district court to prevent closing while the

[5] **[Note to students:** The actual Safeway/Albertsons settlement required divestiture of 146 stores to Haggen, a relatively small regional grocery retailer. Haggen subsequently sold 27 stores and filed for bankruptcy, and Albertsons later reacquired 54 of the divested stores. In Kroger/Albertsons, the district court treated that experience as relevant evidence of the risk that a supermarket divestiture may fail even though the specified stores are transferred as required. *See* FTC v. Kroger Co., No. 3:24-cv-00347-AN, 2024 WL 5053016, at *3, *25-*30 (D. Or. Dec. 10, 2024).]

administrative case proceeds.[6] If the FTC ultimately prevails in the administrative adjudication, the Commission may enter a final cease-and-desist order prohibiting the transaction. The FTC will not accept a settlement that fails to resolve all of its concerns.

(4) *"Litigate the fix"*: Rather than litigate the merits of the original deal, the parties may "litigate the fix." Here, the parties defend a restructured transaction that includes a signed divestiture agreement with a specific buyer contingent on closing and the court evaluates the legality of the transaction as restructured. The "fix" is usually a consent decree proposal that the investigating agency has rejected. If we litigate the fix, we should expect the FTC to raise three types of objections: (a) no stores are divested in some problematic relevant markets, so the restructured transaction would still violate Section 7 there; (b) in other markets, the number or competitive significance of the divested stores or assets is insufficient to eliminate the anticompetitive effects; and (c) even where the assets would be sufficient in the hands of a suitable buyer, the proposed buyer or package is inadequate because it will not preserve the premerger level of competition.[7]

(5) *Terminate the transaction.* The FTC concludes that the transaction presents competitive concerns, the parties cannot agree on an acceptable consent settlement or other restructuring, and the parties voluntarily terminate the transaction rather than proceed to litigation.[8]

If you would like, we can prepare an initial document and information request to identify the local areas in which the FTC is likely to find a substantive antitrust problem and seek divestitures.

[6] [**Note to students:** This dual litigation approach was in effect in 2014. In the Trump 2.0 administration, however, the FTC has adopted a policy to litigate both the preliminary injunction (if necessary) and the permanent injunction in federal district court as does the Antitrust Division. We will examine merger antitrust litigation in Class 4.]

[7] [**Note to students:** Kroger/Albertsons illustrates all three objections. The court found that some allegedly problematic markets contained no divested store; that numerous markets would remain presumptively unlawful even if every divested store retained all of its sales; and that the proposed buyer and asset package might not preserve competition. In assessing the third issue, the court examined the buyer's retail experience and past performance, the mix of stores and banners, rebannering risks, private-label rights, distribution facilities, information technology, loyalty-program data, transition services, independence from the merged firm, and purchase price. The court emphasized that the relevant question was whether the buyer would restore competitive intensity—not merely whether the buyer had performed adequate financial diligence or could operate the assets profitably. FTC v. Kroger Co., No. 3:24-cv-00347-AN, 2024 WL 5053016, at *24-*30 (D. Or. Dec. 10, 2024).

The *Kroger* court treated the proposed divestiture as rebuttal evidence and placed on the defendants the burden of showing that it would sufficiently mitigate the merger's effects so that the restructured transaction was no longer likely to substantially lessen competition. The proper placement and allocation of burdens for a litigated fix remain contested issues that we will examine later in the course.]

[8] Another approach is to "fix it first." Here, the merging parties negotiate a restructuring of the transaction to eliminate those parts the agency believes is anticompetitive by leaving them with the original seller to divesting them to a third party.