

ADVANCED ANTITRUST SEMINAR: MERGERS & ACQUISITIONS – LAW 475-001

Antonin Scalia Law School, George Mason University, Fall 2022

Thursdays, 6:05-8:05 pm
Adjunct Professor Mark Niefer

Seminar overview

Description. The goal of the seminar is to help you learn to identify critical antitrust issues related to mergers and acquisitions. We will discuss substantive and procedural issues that have arisen in recent merger cases, as well as recent agency policy developments. Our discussions will be supplemented by visits from guest experts throughout the semester.

Learning Outcomes. This seminar is intended to help you (1) understand the process and substance of contemporary antitrust merger law, policy, and enforcement; (2) identify important issues that may arise during an agency merger investigation and enforcement action; (3) understand the factors that influence an agency's decision to challenge a merger, and (4) understand key issues that bear on a court's determination of the legality of a merger. The seminar is intended to help prepare you for practice with an agency, law firm, or in-house legal team.

Prerequisites. Law 156 Antitrust I: Principles.

Text and reading materials. There is no assigned text. Reading materials and assignments are listed below. The syllabus will be updated during the semester to reflect developing issues of interest or for other reasons.

Availability. I am happy to answer questions via email, generally within 24 hours. I also usually will be available after class.

Course requirements and grading

Grades. Grades will be based on (i) a 30-minute seminar presentation regarding a merger or merger issue of your choice (15%), (ii) participation in seminar discussions (15%), and (iii) a final paper (70%). The presentation will be graded pass/fail. Participation will be based on your contribution to our in-class discussions, especially your engagement with guest experts.

Presentation. You must clear your topic with me a week before your presentation. You should expect to talk for 15-20 minutes and engage with your seminar colleagues for 10-15 minutes.

Participation. As this is a seminar course, you are expected to come to class prepared to discuss required readings.

Paper. Your final papers should be at least 20 pages (double spaced, 12-point font), and relate to merger or acquisitions. You must submit to me a one-paragraph description of a proposed paper for approval by September 29, and a three-page outline of your paper by October 20. The final paper is due on November 22. I encourage you to begin outlining and drafting your paper as soon as possible.

[Note: The following portion of the syllabus will be updated as the semester progresses.]

Class Schedule: Topics, Reading Materials, and Discussion Questions

Note: Supplemental reading materials are intended to help you better understand the required readings; they are optional. Suggested materials are intended to introduce you to commentary that may help you develop a paper topic; they are optional. Discussion questions are intended help you engage with the reading materials; you need not prepare written answers to the questions, but you are encouraged to think through possible answers before class.

1. Current Antitrust Framework for Mergers (August 25)

Required

- The Basics
 - How Mergers are Reviewed, <https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review>
- Merger Guidelines
 - DOJ Merger Guidelines (1968), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf>
 - DOJ/FTC Horizontal Merger Guidelines (2010), https://www.ftc.gov/sites/default/files/documents/public_events/horizontal-merger-guidelines-review-project/100819hmg_3.pdf
 - DOJ/FTC Vertical Merger Guidelines (2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf
- Two Recent Cases
 - Complaint, United States v. Bertelsmann, et al., <https://www.justice.gov/opa/press-release/file/1445916/download>
 - Complaint, United States, et al. v. UnitedHealth and Change Healthcare, <https://www.justice.gov/atr/case-document/file/1476901/download> [Note: Closing arguments at DDC on Sept. 8]

Supplemental

- Statutory Framework
 - Clayton Act §§ 4, 7, 16
 - Sherman Act §§ 1, 2
 - FTC Act §§ 5, 13(b)

Suggested

- Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 Antitrust L.J. 701 (2010), <https://www.law.berkeley.edu/wp->

content/uploads/2015/04/Shapiro-The-2010-Horizontal-Merger-Guidelines-From-Hedgehog-to-Fox-in-40-Years-2010.pdf

- Carl Shapiro & Howard Shelanski, Judicial Response to the 2010 Horizontal Merger Guidelines (2021), <https://link.springer.com/content/pdf/10.1007/s11151-020-09802-x.pdf>
- Hillary Greene, Guidelines Institutionalization: The Role of Merger Guidelines in Antitrust Discourse (2006), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1172&context=wmlr>
- Kevin Hahn, et al., Recent Private Merger Challenges: Anomaly or Harbinger?, 35 Antitrust 90 (2021)

Discussion Questions

- What major differences do you see between the 1968 Merger Guidelines and the 2010 Horizontal Merger Guidelines? Between the 1968 Merger Guidelines and the 2020 Vertical Merger Guidelines?
- Are there any differences between the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines in terms of their structure or the types of guidance they offer?
- How closely do the *Bertelsmann* and *Change* complaints line up with the merger guidelines? Do the complaints cover all elements of the merger guidelines?

2. Revising the Merger Guidelines (September 1)

Required

- FTC Withdrawal of Vertical Merger Guidelines
 - Press Release, FTC Withdraws Vertical Merger Guidelines and Commentary, <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary>
 - Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca-kelly-slaughter>
 - Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary of Vertical Merger Enforcement (Sept. 15, 2021), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson-regarding-commissions>
- DOJ/FTC Revision of Merger Guidelines
 - Press Release, Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022),

- <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal>
 - Request for Information on Merger Enforcement (Jan. 18, 2022), <https://www.justice.gov/opa/press-release/file/1463566/download>
 - Statement of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-regarding-request-information-merger-enforcement>
 - Jonathan Kanter, Modern Competition Challenges Require Modern Merger Guidelines: Statement Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), <https://www.justice.gov/opa/speech/file/1463546/download>
- Recent Case: FTC v. Meta/Within (2022)
 - Press Release, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within>
 - Complaint, FTC v. Meta/Within (July 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf

Supplemental

- Jonathan Kanter, Protecting Competition, Remarks as Prepared for the Handler Lecture to the New York City Bar Association (May 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>
- Lina M. Khan, Keynote Remarks, International Competition Network (May 6, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20the%20ICN%20Conference%20on%20May%206%202022_final.pdf

Suggested

- Nancy L. Rose & Carl Shapiro, What Next for the Horizontal Merger Guidelines? (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4034923
- Steven C. Salop, A Suggested Revision of the 2020 Vertical Merger Guidelines (Dec. 31, 2021), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3399&context=facpub>
- Edward A. Snyder, The Vast Space in Which the Vertical Merger Guidelines Lived, 67 Antitrust Bull. 424 (2022)

Discussion Questions

- Do you find the FTC's rationale for withdrawing the 2020 Vertical Merger Guidelines convincing? Why?
- Based on the RFI and associated statements by Chair Khan and AAG Kanter, do you anticipate that the new guidelines will depart from the 2010 Horizontal Merger Guidelines in any substantial way? What ways?
- Do you see any hints in the RFI or associated statements that the new guidelines will be more like the 1968 Merger Guidelines than the 2010 Horizontal Guidelines in any way?
- Does the FTC v. Meta/Within press release or complaint contain any hints of the issues raised in the RFI?

3. **HSR Reportability and Filing (September 8)** **[Guest: Kara Kurtitz, Partner, Goodwin]**

Required

- Premerger Process
 - Premerger Notification and the Merger Review Process, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process>
 - What is the Premerger Notification Program?, <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf>
- FTC Suspension of Early Termination
 - Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination>
- Proposed Amendments to HSR Rules
 - Press Release, FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking (Sept. 21, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/09/ftc-doj-seek-comments-proposed-amendments-hsr-rules-advanced-notice-proposed-hsr-rulemaking>
- Recent Case: Biglari Holdings Inc.
 - Press Release, Biglari Holdings Inc. to Pay Civil Penalty for Repeat Violations of Antitrust Pre-Transaction Notification Requirements (Dec. 22, 2021), <https://www.justice.gov/opa/pr/biglari-holdings-inc-pay-civil-penalty-repeat-violation-antitrust-pre-transaction>
 - Complaint, United States v. Biglari Holdings Inc. (Dec. 22, 2021), <https://www.justice.gov/opa/press-release/file/1458211/download>
 - Competitive Impact Statement, United States v. Biglari Holdings Inc. (Dec. 22, 2021), <https://www.justice.gov/opa/press-release/file/1458206/download>

Supplemental

- To File or Not to File: When You Must File a Premerger Notification Report Form, <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide2.pdf>
- Antitrust Improvements Act Notification and Report Form, https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_instructions_9-25-19.pdf
- Kara Kuritz, Unpacking the Proposed HSR Rule Changes (2020), <https://www.goodwinlaw.com/-/media/files/publications/attorney-articles/the-exchange--winter-2020.pdf>

Suggested

- Joe Sims & Deborah P. Herman, The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation, 65 Antitrust L. J. 865 (1997)

Discussion Questions

- What are the arguments for and against HSR reporting? Absent HSR reporting, would agencies be able to police mergers effectively?
- Does the FTC's rationale for the suspension of "early terminations" seem convincing to you? The policy was announced in September 2020; does it seem justified today, two years later?

4. DOJ/FTC Merger Review Process (September 15) [Guest: Nick Widnell, Attorney, FTC]

Required

- Voluntary Submissions
 - FTC, Guidance for Voluntary Submission of Documents During the Initial Waiting Period, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents>
- Second Requests
 - FTC Model Second Request (Oct. 2021), https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_final_october_2021.pdf
 - DOJ Model Second Request (2021), <https://www.justice.gov/atr/file/706636/download>
- Timing Agreements
 - FTC Model Timing Agreement (2018), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf

Supplemental

- 15 U.S.C. §§ 1311, 1312, 1313 – Definitions; Civil investigative demands; Custodians of documents, answers, and transcripts, <https://www.law.cornell.edu/uscode/text/15/1312>
- A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority (May 2021), <https://www.ftc.gov/about-ftc/mission/enforcement-authority>
- Timing is Everything: The Model Timing Agreement (Aug. 7, 2018), <https://www.ftc.gov/enforcement/competition-matters/2018/08/timing-everything-model-timing-agreement>
- FTC, Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence (Mar. 20, 2018), <https://www.ftc.gov/enforcement/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger-negotiations-and-due-diligence>

Suggested

- William E. Kovacic, Downsizing Antitrust: Is it Time to End Dual Federal Enforcement? 41 Antitrust Bull. 505 (1996)
- William E. Kovacic, The Institutions of Antitrust: How Structure Shapes Substance, 110 Mich. L. Rev. 1019 (2012), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1105&context=mlr>
- Malcome B. Coate & Arthur J. Del Buono, A Commentary on Presenting Efficiencies in a Horizontal Merger Review (June 3, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4127486

Discussion Questions

- What incentives do firms have to respond to a Second Request quickly and completely? Do they have incentives to respond slowly?
- What incentives do firms have to enter into a timing agreement with the agencies?
- Is it appropriate for agencies to be able to conduct pre-litigation discovery under the HSR Act, and then conduct additional discovery in litigation?

5. Unilateral Effects (September 22) [Student presentations TBD]

Reading materials to be assigned.

6. Coordinated Effects (September 29) [Student presentations TBD]

Reading materials to be assigned.

7. **Vertical Mergers** (October 6)
[Student presentations TBD]

Reading materials to be assigned.

8. **Mergers in Regulated Industries** (October 13)
[Student presentations TBD]

Reading materials to be assigned.

9. **Potential & Nascent Competition** (October 20)
[Guest: John Newman, Deputy Director, Bureau of Competition, FTC]

Reading materials to be assigned.

10. **Economic Analysis of Mergers** (October 27)
[Student presentations TBD]

Reading materials to be assigned.

11. **Remedies, Consent Decrees, and the Tunney Act** (November 3)
[Student presentations TBD]

Reading materials to be assigned.

12. **International Mergers** (November 10)
[Guest: Patty Brink, Senior Counsel, International and Intergovernmental
Engagement, DOJ]

Reading materials to be assigned.

13. **Merger Litigation** (November 17)
[Student presentations TBD]

Reading materials to be assigned.