

## ADVANCED ANTITRUST SEMINAR: MERGERS & ACQUISITIONS – LAW 668-001

*Antonin Scalia Law School, George Mason University, Spring 2024*

Thursdays, 6:05-8:05 pm

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This syllabus may be revised during the semester to reflect recent events or for other reasons. Please check TWEN throughout the semester for the most recent version to ensure that you read the proper materials.

### **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.

*Learning Outcomes.* The seminar should help prepare you for practice with an agency, law firm, or in-house legal team that handles merger-related matters.

*Prerequisites.* Law 156 Antitrust I: Principles.

*Text and reading materials.* There is no assigned text; we will read and discuss cases, journal articles, and book chapters, among other materials. Reading 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 (1) *participation* in seminar discussions (15%), (2) a 45-minute seminar *presentation* regarding the antitrust aspects of a recent merger of your choice (15%), and (3) a final *paper* (70%).

*Participation.* Participation will be graded based on your familiarity with assigned readings and your contribution to our discussions, especially your engagement with guest experts.

*Presentation.* You must clear your topic with me a week before your seminar presentation regarding the antitrust aspects of a recent merger of your choice, which must take place before or on February 29 on a date of your choosing. You should choose a merger that (1) currently is being investigated or litigated by one of the U.S. antitrust agencies (the FTC or the DOJ's Antitrust Division), (2) is likely to be investigated and/or litigated, or (3) has recently been resolved by one of the agencies through litigation or settlement. An appendix to this syllabus provides a non-exhaustive list of recent mergers

that might make for a suitable presentation. You will be expected to discuss the antitrust issues that typically arise in a merger analysis, including relevant antitrust markets, theories of harm, defenses (e.g., efficiencies or entry); in addition to those issues, you should feel free to cover any other antitrust-relevant issues you find interesting. You should plan to talk for about 30 minutes and engage with your seminar colleagues for another 15 minutes.

*Paper.* Your final paper should be at least 20 pages (double spaced, 12-point font), and relate to the substance and/or process of antitrust mergers or acquisitions. Although there is no page limit on the paper, you should aim for a concise, well-argued, and well-written paper with a clear thesis. You must submit a one-page (minimum) description of a proposed paper to me for approval by 6:00 p.m. on Sunday, February 18; and a four-page (minimum) outline of your paper by 6:00 p.m. on Sunday, March 17. I will schedule a virtual or in-person meeting with you following submission of your proposal and following submission of your outline to provide feedback. Your paper is due by 6:00 p.m. on Monday, April 22. I encourage you to begin outlining and drafting your paper as soon as possible. I am willing to read and comment on your paper at any stage of its development.

### **Seminar schedule and readings**

Required readings will be the primary basis of our weekly discussions. Supplemental readings are intended to help you better understand the required readings, and introduce you to commentary that may help you develop a paper topic; they are optional. We will have several guest speakers toward the end of the semester. I have tried to supply links where readily available; you should be able to find the documents for which I have not provided a link in Westlaw, Lexis, or other electronic databases available via the law library.

#### **1. Statutes & Guidelines (Jan. 18)**

##### **Required**

- [2024 DOJ/FTC Merger Guidelines](#)

##### **Supplemental: Statutes**

- Clayton Act § 7, 15 USC § 18
- Clayton Act § 15, 15 USC § 25
- Sherman Act § 1, 15 USC § 1
- Sherman Act § 2, 15 USC § 2
- FTC Act § 13(b), 15 USC § 53(b)

##### **Supplemental: Agency Statements**

- [2010 DOJ/FTC Horizontal Merger Guidelines](#)
- [2020 DOJ/FTC Vertical Merger Guidelines](#)
- [Press Release, Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers \(Jan. 18, 2022\)](#)

- [Statement of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement \(Jan. 18, 2022\)](#)
- [Jonathan Kanter, Modern Competition Challenges Require Modern Merger Guidelines: Statement Regarding the Request for Information on Merger Enforcement \(Jan. 18, 2022\)](#)
- [Press Release, Justice Department and Federal Trade Commission Release 2023 Merger Guidelines \(Dec. 18, 2023\)](#)

### **Supplemental: Commentary**

- [Jonathan B. Baker, The 2023 Merger Guidelines Strengthen Enforcement by Finding Common Ground, ProMarket \(Jan. 9, 2024\)](#)
- [Susan Athey & Aviv Nevo, DOJ and FTC Chief Economists Explain the Changes to the 2023 Merger Guidelines, ProMarket \(Dec. 19, 2023\)](#)
- [Steven C. Salop, \*The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach\*, 80 ANTITRUST L.J. 269 \(2015\)](#)
- [Hillary Greene, \*Guidelines Institutionalization: The Role of Merger Guidelines in Antitrust Discourse\*, 48 WILLIAM & MARY L. REV. 771 \(2006\)](#)
- [Carl Shapiro & Howard Shelanski, \*Judicial Response to the 2010 Horizontal Merger Guidelines\*, 58 REV. IND. ORG. 51 \(2021\)](#)
- [Herbert Hovenkamp & Carl Shapiro, \*Horizontal Mergers, Market Structure, and Burdens of Proof\*, 127 YALE L.J. 126 \(2018\)](#)
- [Francine Lafontaine & Margaret E. Slade, \*Presumptions in Vertical Mergers: The Role of Evidence\*, 59 REV. IND. ORG. 255 \(2021\)](#)

## **2. Efficiencies & Market Power (Jan. 25)**

### **Required**

- [2023 DOJ/FTC Merger Guidelines](#), § 3.3
- *Brown Shoe Co. v. United States*, 380 U.S. 294 (1962)
- *United States v. Anthem*, 855 F.3d 345 (D.C. Cir. 2017)

### **Supplemental**

- [Rachel Calipha, et al., \*Mergers and Acquisitions: A Review of Phases, Motives, and Success Factors\*, in 9 ADVANCES IN MERGERS AND ACQUISITIONS, 1 \(C.L. Cooper & S. Finkelstein, eds.\) \(2010\)](#)
- [Oliver E. Williamson, \*Economies as an Antitrust Defense: The Welfare Tradeoffs\*, 58 AM. ECON. REV. 18 \(1968\)](#)
- [Oliver E. Williamson, \*Economies as Antitrust Defense Revisited\*, 125 U. PENN. L. REV. 699 \(1977\)](#)
- [John Kwoka, \*The Changing Nature of Efficiencies in Mergers and Merger Analysis\*, 60 ANTITRUST BULL. 231 \(2015\)](#)

- [Herbert J. Hovenkamp, \*Appraising Merger Efficiencies\*, 24 GEO. MASON L. REV. 703 \(2017\)](#)
- [Herbert Hovenkamp, \*Brown Shoe Merger Policy and the Glorification of Waste\*, CPI \(Dec. 15, 2023\)](#)
- [William J. Kolasky & Andrew R. Dick, \*The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers\*, 71 ANTITRUST L.J. 207 \(2003\)](#)
- [Nancy L. Rose & Jonathan Sallet, \*The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right\*, 168 U. PENN. L. REV. 1941 \(2020\)](#)
- [John M. Yun, \*Reevaluating Out of Market Efficiencies in Antitrust\*, 54 ARIZ. ST. L.J. 1261 \(2022\)](#)
- [Louis Kaplow, \*Efficiencies in Merger Analysis\*, 83 ANTITRUST L.J. 557 \(2021\)](#)
- [Daniel A. Crane, \*Rethinking Merger Efficiencies\*, 110 MICH. L. REV. 347 \(2011\)](#)

### 3. **Defining Markets & Assessing Effects** (Feb. 1)

#### **Required**

- [2023 DOJ & FTC Merger Guidelines](#), §§ 4.3, 4.4
- [United States v. Philadelphia Nat'l Bank](#), 374 U.S. 321 (1963)
- [United States v. Baker Hughes Inc.](#), 908F.2d 981 (D.C. Cir. 1990)

#### **Supplemental: Commentary**

- [Russell Pittman, \*Three Economist's Tools for Antitrust Analysis: A Non-Technical Introduction\*, in COMPETITION AUTHORITIES IN SOUTH EASTERN EUROPE \(Boris Begovic & Dusan Popovic, eds.\) \(2018\)](#)
- [Douglas H. Ginsburg & Joshua D. Wright, \*Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance\*, 80 ANTITRUST L.J. 201 \(2015\)](#)
- [Herbert Hovenkamp & Carl Shapiro, \*Horizontal Mergers, Market Structure, and Burdens of Proof\*, 127 YALE L.J. 1996 \(2018\)](#)
- [Louis Kaplow, \*Replacing the Structural Presumption\*, 84 ANTITRUST L.J. 565 \(2022\)](#)
- [John Kwoka, \*The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?\*, 81 ANTITRUST L.J. 837 \(2017\)](#)

### 4. **Unilateral Effects** (Feb. 8)

#### **Required**

- [2023 DOJ/FTC Merger Guidelines](#), § 2.2
- [United States v. H&R Block](#), 833 F. Supp.2d 36 (D.D.C. 2011)
- [ProMedica Health System v. FTC](#), 749 F.3d 559 (6th Cir. 2014)

#### **Supplemental: Commentary**

- [Carl Shapiro, \*Mergers with Differentiated Products\*, 67 ANTITRUST 23 \(Spring 1996\)](#)

- [Gregory J. Werden, \*Unilateral Competitive Effects of Horizontal Mergers I: Basic Concepts and Models\*, in 2 ISSUES IN COMPETITION LAW AND POLICY 1319 \(ABA Section of Antitrust Law 2008\)](#)
- Scott A. Sher & Andrea Agathoklis Murino, *Unilateral Effects in Technology Markets: Oracle, H&R Block, and What it All Means*, 26 ANTITRUST (Summer 2012)
- [Tommaso Valletti & Hans Zenger, \*Mergers with Differentiated Products: Where Do We Stand?\*, 58 REV. IND. ORG. 179 \(2021\)](#)

## 5. Coordinated Effects (Feb. 15)

### Required

- [2023 DOJ & FTC Merger Guidelines](#), § 2.3
- United States v. H&R Block, 833 F. Supp.2d 36 (D.D.C. 2011)
- FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020)

### Supplemental

- [Janusz A. Ordover, \*Coordinated Effects in Merger Analysis: An Introduction\*, 2007 COLUMBIA BUS. REV. 411 \(2007\)](#)
- [William J. Kolasky, \*Coordinated Effects in Merger Review: From Dead Frenchman to Beautiful Minds and Mavericks\* \(Apr. 24, 2002\)](#)
- [Jonathan B. Baker & Joseph Farrell, \*Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement\*, 168 U. PENN. L. REV. 1985 \(2020\)](#)
- [Natalia Fabra & Massimo Motta, \*Assessing Coordinated Effects in Merger Cases\*, in HANDBOOK OF GAME THEORY AND INDUSTRIAL ORGANIZATION, VOL II: APPLICATIONS \(Luis C. Corchon & Marco A. Marini, eds.\) \(2018\)](#)
- Edward B. Rock & Daniel L. Rubinfeld, *Common Ownership and Coordinated Effects*, 83 ANTITRUST L.J. 201 (2020)

## 6. Vertical Mergers (Feb. 22)

### Required

- [2023 DOJ & FTC Merger Guidelines](#), § 2.5
- United States v. AT&T et al., 916 F.3d 1029 (D.C. Cir. 2019)
- Illumina, Inc. and GRAIL, Inc. v. FTC (5th Cir. 2023)

### Supplemental

- Brown Shoe Co. v. United States, 380 U.S. 294 (1962) [refresh from seminar #2]
- [Steven Salop, \*How the Illumina/Grail Opinion Updates Case Law on Vertical Mergers and “Litigating the Fix,” ProMarket\* \(Dec. 18, 2023\)](#)
- [Steven Salop, \*Assessing the Advances Made on Vertical Mergers in the Final Merger Guidelines\*, ProMarket](#) (Dec. 20, 2023)

- Gopal Das Varma, *Towards an Evidence Based Framework for Enforcement of Vertical Mergers*, ANTI-TRUST ONLINE 1 (2023)
- [Carl Shapiro, \*Vertical Mergers and Input Foreclosure: Lessons from the AT&T/Time Warner Case\*, 59 REV. IND. ORG. 303 \(2021\)](#)
- [Dennis W. Carlton, et al., \*Lessons from AT&T/Time Warner\*, CPI ANTI-TRUST CHRONICLE \(July 2019\)](#)
- [Hans Zenger, \*Analyzing Vertical Mergers\*, CPI ANTI-TRUST CHRONICLE 1 \(Oct. 2020\)](#)
- [John Yun, \*Vertical Mergers and Integration in Digital Markets\*, GAI Report on the Digital Economy 8 \(Nov. 2020\)](#)
- [Herbert Hovenkamp, \*Competitive Harm from Vertical Mergers\* \(U. Penn. ILE Research Paper No. 20-51, Oct. 2020\)](#)
- [Roger D. Blair, et al., \*Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies\*, 27 GEO. MASON L. REV. 761 \(2020\)](#)

**7. Mergers Involving Potential Competition and Nascent Competitors (Feb. 29)**

**Required**

- [2023 DOJ & FTC Merger Guidelines](#), § 2.4
- US v. Marine Bancorp., 418 U.S. 602 (1974)
- FTC v. Meta Platforms, Inc., 654 F.Supp.3d. 892 (N.D. Cal. 2023)

**Supplemental**

- [John M. Yun, \*Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust\*, 104 MARQ. L. REV. 613 \(2021\)](#)
- [C. Scott Hemphill & Tim Wu, \*Nascent Competitors\*, 168 U. PENN. L. REV. 1879 \(2020\)](#)
- [A. Douglas Melamed, \*Mergers Involving Nascent Competition\*, \(Jan. 14, 2022\)](#)

**8. Platform Mergers (Mar. 14)**

**Guest Speaker**

- John Newman, Miami Law (former Deputy Director, FTC Bureau of Competition)

**Required**

- [2023 DOJ/FTC Merger Guidelines](#), §§ 2.6, 2.9
- FTC v. Procter & Gamble Co., 386 U.S. 568 (1967)
- FTC v. Microsoft Corp., et al., No. 23-cv-02880-JSC, 2023 WL 47632 (N.D. Cal. Jul. 10, 2023)

**Supplemental: FTC v. Microsoft/Activision**

- [Press Release, Federal Trade Commission, \*FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.\* \(Dec. 8, 2022\)](#)

- [In the matter of Microsoft Corp. and Activision Blizzard, Inc., FTC Dkt. No. 9412, Complaint \(Dec. 8, 2022\)](#)

**Supplemental: Commentary**

- [Geoffrey Parker, et al., \*Platform Mergers and Antitrust\*, 30 IND. & CORP. CHANGE, 1307 \(2021\)](#)
- [Geoffrey A. Manne, et al., \*Technology Markets and the Market for Corporate Control\*, 86 MISSOURI L. REV. 1047 \(2021\)](#)
- [Daniel Minh McCarthy & Kenneth C. Wilbur, \*Platform Mergers and Competition: Descriptive Analyses of 6 Platform Mergers\* \(Oct. 16, 2023\)](#)
- [Elena Argentesi, et al., \*Merger Policy in Digital Markets: An Ex Post Assessment\*, 17 J. COMP. L. & ECON. 95 \(2020\)](#)
- [Anne C. Witt, \*Who's Afraid of Conglomerate Mergers?\*, 67 ANTITRUST BULL. 208 \(2022\)](#)

**9. Rebuttal: Entry & Failing Firms (Mar. 21)**

**Required**

- [2023 DOJ/FTC Merger Guidelines](#), § 3.1., 3.2, 3.3
- *FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019)
- *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969)

**Supplemental**

- *US v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990)
- Louis Kaplow, *Entry and Merger Analysis*, 85 ANTITRUST L.J. 103 (2023)
- Sean P. Sullivan & Henry C. Su, *Antitrust Time Travel: Entry & Potential Competition*, 85 ANTITRUST L.J. 147 (2023)
- [Mariana Lopez-Galdos, \*Comparing the US and the EU Failing Firm Defense: Reflections from an Economic Perspective\*, 28 LOY. CONSUMER L. REV. 297 \(2016\)](#)

**10. Pre-Merger Filing (Mar. 28)**

**Guest Speaker [tentative]**

- Kara Kuritz, Partner, Vinson & Elkins

**Readings TBD**

**11. Government Investigations (Apr. 4)**

**Guest Speakers [tentative]**

- Nick Widnell, Attorney, FTC
- Mike Knight, Partner, Jones Day

**Readings TBD**

**12. International Mergers (Apr. 11)**

**Guest Speaker** [tentative]

- Lynda Marshall, Chief, International Section, DOJ Antitrust Division

**Readings TBD**

**13. Merger Litigation (Apr. 18)**

**Guest Speaker** [tentative]

- Eric Welsh, Chief, Healthcare and Consumer Products Section, DOJ Antitrust Division

**Readings TBD**



## **APPENDIX: SOURCES OF IDEAS FOR YOUR PRESENTATION AND PAPER**

### **Presentation**

Listed below are mergers that may be appropriate for your seminar presentation. The FTC and DOJ Antitrust Division websites, as well as Westlaw and Lexis news databases, can help you identify others that I may have missed.

As of the date of this syllabus, the FTC and DOJ were seeking to block the following mergers:

- FTC v. Microsoft/Activision (gaming)
- US v. JetBlue/Spirit (airlines)
- FTC v. Welsh Carson, Anderson & Stowe (anesthesia practices)

Merger cases recently settled or likely to be settled include:

- FTC v. Amgen/Horizon (pharmaceuticals)
- FTC v. ICE/Black Knight (mortgage tech)
- FTC v. Illumina/Grail (cancer screening tests)

Recently litigated cases yielding a court opinion (on a PI motion or on the merits) include:

- FTC v. IQVIA/Propel Media (advertising)
- US v. UnitedHealth/Change (commercial health insurance)
- US v. Assa Abloy/Spectrum (door locks)
- US v. US Sugar/Imperial Sugar (sugar)
- US v. BoozAllen/Everwatch (signals intelligence)
- FTC v. Meta/Within (virtual reality apps)
- FTC v. Altria/Juul (electronic cigarettes)
- US v. Bertelsmann (publishing)
- US v. American/JetBlue (airlines)

Proposed mergers, for which neither the FTC or DOJ have filed suit, include:

- Abbvie/Cerevel Therapeutics (pharmaceuticals)
- Chevron/Hess (retail gasoline)
- Exxon/Pioneer (oil)
- Amazon/iRobot (robotic vacuum cleaners)
- Alaska Airlines/Hawaiian Airlines (airlines)
- Kroger/Albertsons (grocery stores)
- PGA Tour/LIV Golf (professional golf)
- Nippon Steel/US Steel (steel)
- Warner Bros. Discovery/Paramount Global (movie studios)

- Wyndham/Choice (hotels)

## Paper

You should feel free to be creative in your paper topic choice, as long as the topic relates to the process or substance of the antitrust analysis of mergers. In the past, seminar participants have written about the effects of mergers on labor, specific merger cases, and the empirical literature regarding the competitive effects of mergers. Given that the DOJ and FTC merger guidelines are being revised, there are many issues related to the history, purpose, and application of merger guidelines that would make for suitable topics. But please try to find a topic that truly interests you. This is a chance for you to become knowledgeable about one merger-related issue, which may help advance your career after law school.

As I am sure you know, several electronic databases contain articles from law, economics, and policy journals that publish articles related to merger antitrust. In addition to Westlaw and Lexis, Gale and HeinOnline databases contain articles that may help you develop presentation or paper ideas. Google Scholar also may help you identify relevant articles. The law library may be able to help you identify other useful databases.

Several journals publish articles by academics and practitioners that may give you some sense of antitrust issues regarding mergers, which may in turn help you develop paper ideas. You might want to browse the table of contents and skim articles in the following journals to help you develop ideas.

- Antitrust Law Journal
- Antitrust Magazine
- Antitrust Bulletin
- Journal of Antitrust Enforcement

Searchable databases of academic working papers, including antitrust-related works, are available at:

- SSRN.com
- [SSRN.com/link/IO-Regulation.html](https://ssrn.com/link/IO-Regulation.html) (a subset of SSRN papers focused on antitrust)

There are several blogs that frequently post commentary or links to articles related to merger antitrust. Although the commentary often is off-the-cuff, it may give you some insight into hot issues in mergers that might make for a suitable presentation and/or paper topic. Here are a few:

- ProMarket
- Antitrust & Competition Policy Blog
- Truth on the Market
- Network Law Review
- The Platform Law Blog

Several websites and news services publish articles and commentary related to current issues in antitrust, including mergers. You should be able to gain access to many of them through the law library. Among the most prominent are:

- Competition Policy International
- Global Competition Review
- Competition Law 360
- MLex
- The Capitol Forum

Finally, law firms that specialize in antitrust often publish “client alerts” or other documents concerning recent merger-related developments (see, e.g., [this](#) law firm publication regarding the new merger guidelines). A search of major antitrust law firms may turn up similar publications that may suggest paper topics to you.