

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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CLASS 19 WRITTEN ASSIGNMENT—INSTRUCTOR'S ANSWER

Instructions

Submit by email by 3:30 pm on Thursday, October 30
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 19

Assignment: Calls for a memorandum to a partner (which may be sent to a client)

Dianne Lockhart, the partner with whom you have been working at Able & Baker LLP, has been impressed by the memoranda you have written on recapture and auction unilateral effects. She would now like you to write a memo explaining potential competition theories—both actual potential competition and perceived potential competition—as well as nascent competition. As with your prior memos, she would like you to discuss the general idea behind these theories of anticompetitive harm under Section 7, identify the required elements of each theory, and discuss the factors the agencies consider when deciding whether these theories apply to a particular merger.

If you have any questions, send me an email. See you in class.

ABLE & BAKER LLP

INSTRUCTOR'S ANSWER

To: Dianne Lockhart
From: Dale Collins

Potential and Nascent Competition

Modern Section 7 law recognizes three principal theories of potential anticompetitive harm in the merger context: actual potential competition, perceived potential competition, and nascent competition. Unlike traditional horizontal theories that focus on eliminating existing rivals, these theories address the risk that a merger will remove a firm that could provide future competitive discipline even without current overlap in the relevant market. The assessment is forward looking and asks whether eliminating that source of prospective competition would be timely, likely, and sufficient to result in a substantial lessening of competition; the potential entrant may be either the target or the acquirer.

Each theory centers on a distinct mechanism by which future rivalry may be threatened. For actual potential competition, the inquiry is whether the firm was likely to enter independently, either through de novo entry or by acquiring a small foothold, within a reasonably proximate time and at a competitively meaningful scale. For perceived potential competition, the inquiry is whether a credible threat of entry already constrains incumbents' pricing, output, investment, or innovation. For nascent competition, the inquiry is whether the merger would eliminate or weaken an early stage rival with a realistic potential to develop into a significant competitive constraint.

Actual Potential Competition

The actual potential competition doctrine addresses mergers that remove a firm poised to enter the relevant market in the reasonably near future, whether through de novo entry or the acquisition of a small toehold incumbent. Absent the merger, that entry would likely have increased rivalry and improved market performance; its elimination therefore prevents the realization of that future procompetitive potential. The doctrine took shape in the 1970s, when the Supreme Court acknowledged the concept but reserved judgment on the validity. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-40 (1973); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622-39 (1974). The Court's hesitation reflected the then-prevailing "before-and-after" interpretation of Section 7's effects clause, which focused on whether the merger reduced existing competition. Modern law instead compares expected competition with and without the merger, so that the loss of a likely future competitor violates Section 7's incipency standard if it likely makes the market less competitive on a forward-looking basis. Lower courts and the enforcement agencies have since recognized the theory as cognizable under this modern framework. *See Yamaha Motor Co. v. FTC*, 657 F.2d 971, 978-79 (8th Cir. 1981); *United States v. Siemens Corp.*, 621 F.2d 499, 505-07 (2d Cir. 1980); *FTC v. Atl. Richfield Co.*, 549 F.2d 289, 293-95 (4th Cir. 1977).

Following the early efforts in the 1970s, potential competition enforcement shifted largely to consent resolutions—most often in pharmaceutical and medical device cases where entry was demonstrably near—and litigated cases were rare for decades. Recent challenges revived the doctrine in federal court, but the results underscore its demanding evidentiary requirements. In *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015), the court assumed the theory’s cognizability yet found the record did not show that the putative entrant would probably enter in the reasonably near future, emphasizing the absence of firm customer commitments, significant conversion costs, and commercial risk. *Id.* at 969-78. In *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892 (N.D. Cal. 2023), the court again treated the theory as cognizable but concluded the agency failed to prove available, feasible means of de novo entry and a likelihood of entry within a reasonable timeframe, crediting contemporaneous business records over testimony. *Id.* at 922, 927, 932. The recent case law thus recognizes the doctrine while requiring concrete, objective evidence that entry by the eliminated firm was likely, timely, and competitively meaningful.

In applying the actual potential competition doctrine, courts and the enforcement agencies require five interrelated elements:

1. *Non-competitiveness*: The relevant market is not presently competitive such that additional entry would meaningfully improve performance. *See United States v. Siemens Corp.*, 621 F.2d 499, 505-07 (2d Cir. 1980).
2. *Relative uniqueness of the putative entrant*: The firm is relatively unique in its ability and incentive to enter, as opposed to one of many similarly situated potential entrants. *See BOC Int’l, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977).
3. *Available and feasible means of entry*: The firm has an available, feasible path to entry, either de novo or through acquisition of a small toehold incumbent. *See Siemens*, 621 F.2d at 505-07.
4. *Likelihood and timing of entry*: Entry would likely occur in the reasonably near future, shown by objective contemporaneous evidence rather than speculation. Courts frequently articulate a “reasonable probability” standard. *See Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 638 F.2d 1255, 1268-70 (5th Cir. 1981); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 922, 927, 932 (N.D. Cal. 2023); *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 969-78 (N.D. Ohio 2015).
5. *Material procompetitive effect from but-for entry*: The but-for entry would materially enhance competition, for example by improving prices, output, innovation, or service quality. *See Siemens*, 621 F.2d at 505-07; *Steris*, 133 F. Supp. 3d at 969-78.

The 2023 Merger Guidelines frame the same inquiry: whether one of the merging firms had the capability and incentive to enter and whether such entry would have been timely, likely, and sufficient to enhance competition. U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines Guideline 4 and §§ 2.4.A-C (rev. 2023).

Courts give primacy to objective, contemporaneous evidence that the firm would likely enter in the reasonably near future and at a competitively meaningful scale. Credited indicators include approved business plans and board materials that evaluate de novo entry or a toehold strategy; committed resources or capital budgets; prototypes, pilots, or customer pipelines showing near-term commercialization; regulatory readiness and timelines; feasible access to inputs,

distribution, or capacity; and third-party evidence (customers, suppliers, rivals) anticipating entry. By contrast, courts discount vague aspirations, unapproved projects, or testimony offered during litigation that lacks support in regular course documents. *See FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 969-78 (N.D. Ohio 2015) (finding evidence insufficient where customer commitments were absent and conversion costs and commercial risks were substantial); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 922, 927, 932 (N.D. Cal. 2023) (crediting contemporaneous business records over post hoc testimony and finding no available, feasible path to de novo entry).

The FTC's challenge in *Meta Platforms* sought to broaden actual potential competition beyond its traditional focus on imminent, probable entry. The agency argued that Meta's acquisition of Within would eliminate a potential future entrant in virtual reality fitness even though Meta lacked a concrete, near-term plan to enter the market de novo. The court accepted the doctrine's legal validity but held that Section 7 requires a reasonable probability that the firm would enter independently within a reasonably proximate time, not a mere possibility that it could enter. 654 F. Supp. 3d at 922. The FTC also advocated a disjunctive standard under which strong evidence of either incentive or ability to enter could suffice. The court rejected that approach and required persuasive proof of both—available, feasible means of de novo entry and a genuine incentive to pursue that path—because without the conjunction of capability and incentive, future entry by the firm is not reasonably probable. *Id.* at 927, 932. Evaluating the record, the court credited contemporaneous business documents over testimony likely influenced by the pending acquisition, found no feasible path to near-term entry, and deemed the FTC's incentive showing inconclusive. *Id.* at 922, 927, 932. The decision reconfirms that actual potential competition remains a narrow theory of anticompetitive harm that demands objective evidence establishing both capability and incentive to enter within a timeframe and at a scale sufficient to matter competitively.

The burden shifting framework is the same as in other Section 7 cases. The government must first make a prima facie showing that eliminating the potential entrant would be timely, likely, and sufficient to lessen competition. The defendants may then rebut by demonstrating, with concrete evidence, that one or more elements is not met—for example, that the market is presently competitive, that multiple similarly situated firms could enter on comparable timelines (undercutting uniqueness), that the putative entrant lacks feasible means or capability to enter at scale, or that entry is not reasonably proximate in time. They may also offer verified, merger-specific efficiencies sufficient to preserve competition. The burden ultimately returns to the government to prove a violation in light of the whole record. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 983–91 (D.C. Cir. 1990) (burden shifting); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–23 (D.C. Cir. 2001) (efficiencies must be merger specific and verifiable); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 922, 927, 932 (N.D. Cal. 2023) (crediting rebuttal evidence on lack of feasible means and near-term likelihood of entry).

Although many matters involve an incumbent and a single prospective entrant, the doctrine also applies when neither merging firm yet competes in the market and both are independently likely to enter. Such mergers foreclose multiple plausible routes of new competition and can be especially problematic in monopolized or highly concentrated markets. Drug and medical device matters are often well suited to this theory because the FDA approval process is lengthy, so likely entrants can be identified well in advance of any possible entry date; relevant markets are typically well defined and highly concentrated; and the high costs of development and regulatory

approval provide objective evidence of a concrete commitment to enter. The FTC has frequently resolved these cases by consent where both firms were in late-stage development with imminent entry, requiring divestitures to preserve at least one pathway. *See Medtronic, Inc.*, 159 F.T.C. 26 (2015) (consent order) (Medtronic/Covidien drug-coated balloon catheters); *Allergan, Inc.*, 141 F.T.C. 246 (2006) (Allergan/Inamed botulinum toxin products); *Glaxo Wellcome plc*, 131 F.T.C. 829 (2001) (Glaxo/SmithKline Beecham vaccines); *Sanofi Synthélabo S.A.*, 137 F.T.C. 561 (2004) (Sanofi/Aventis oncology therapies); *Cephalon, Inc.*, 138 F.T.C. 583 (2004) (Cephalon/CIMA Labs cancer pain drugs). Each involved a merger of firms in late-stage product development or clinical testing where both were expected to enter imminently, and each settlement required asset divestitures to preserve at least one pathway of entry.

Remedies in actual potential competition cases typically aim to preserve the competitive significance of the entry path that would have been eliminated by the merger. Structural relief remains the norm: divestiture of the assets, intellectual property, or personnel associated with the entrant's projected entry plan allows another firm to step into its position. *See Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982); *BOC Int'l, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977). The Federal Trade Commission and Department of Justice have long used such divestitures in pharmaceutical and medical device transactions where the entrant's pipeline product was close to market approval. *See, e.g., Mylan/Perrigo* (2015), *Medtronic/Covidien* (2014), and *Mallinckrodt/Novartis* (2017). Behavioral remedies are rare but may be considered if structural relief would destroy ongoing R&D programs or if replication of the entry effort is infeasible. Consistent with the 2023 Merger Guidelines, agencies evaluate whether the remedy preserves the expected competitive significance of the foregone entry and maintains the probability that future rivalry will occur on a timely, likely, and sufficient basis. U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 7.3 (rev. 2023).

Perceived Potential Competition

Perceived potential competition addresses mergers that remove a firm whose credible threat of entry already constrains incumbent conduct in a concentrated market. The theory rests on the premise that the threat of new entry by one of the merging firms can discipline pricing, investment, and innovation even before entry occurs. When incumbents believe that a capable and motivated firm is poised to enter, they may moderate prices or improve quality and service to deter that entry. Eliminating that perceived entrant through acquisition removes this present competitive constraint and may allow incumbents to relax their defensive behavior.

Perceived potential competition emerged in the 1970s as courts confronted mergers in concentrated markets where incumbents allegedly moderated conduct to deter a credible prospective entrant. The Supreme Court first recognized the theory in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-40 (1973), and *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622-39 (1974). The Court viewed perceived potential competition as more readily compatible with traditional Section 7 analysis than the actual potential competition doctrine, because then-prevailing law compared competition before and after the merger rather than—under today's analytic framework—expected competition with and without the merger. Under that historical approach, the constraint generated by an outsider's credible threat of entry represented a present competitive effect that the merger could immediately remove. Although litigation under this doctrine has remained infrequent, modern cases and the 2023 Merger Guidelines recognize that eliminating an actual or perceived potential entrant in a concentrated

market can substantially lessen competition. See *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 922, 927, 932 (N.D. Cal. 2023); *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 969–78 (N.D. Ohio 2015); U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines Guideline 4 & § 2.4.A (2023).

After *Falstaff* and *Marine Bancorporation*, the perceived potential competition doctrine remained viable but was seldom litigated because proving its elements has proved exceptionally demanding. To establish liability, plaintiffs must demonstrate that the firm was distinctively positioned to enter, that incumbents actually recognized and reacted to this threat, and that their competitive behavior was constrained as a result. In practice, courts require objective, contemporaneous evidence of both the perception and the reaction—for example, pricing analyses, strategy memoranda, or customer communications reflecting incumbent awareness of a credible entry threat. Speculative assertions, especially those advanced for the first time, in litigation, are insufficient. See *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 922 (N.D. Cal. 2023) (assuming validity of the doctrine but finding no proof that incumbents perceived Meta as a likely de novo entrant or modified conduct accordingly).

Today, courts and the enforcement agencies evaluating a perceived potential competition theory require objective proof of the following elements:

1. *Noncompetitiveness*: The relevant market must already operate noncompetitively—typically an oligopoly in which coordinated or interdependent behavior can sustain supracompetitive outcomes. See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623-28 (1974).
2. *A firm credibly positioned as a likely entrant*. The firm is relatively unique in capability and incentive to enter, and market participants recognize it as such. See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-37 (1973).
3. *Incumbent perception of that entry threat*. Incumbents actually perceive the firm as a likely entrant in the relevant market, not merely as a remote possibility. See *Marine Bancorporation*, 418 U.S. at 623-28.
4. *Observable incumbent reactions*. Because of the perceived threat, incumbents “pull their competitive punches” by moderating price, improving quality or service, expanding capacity, or accelerating innovation to deter entry. See *Falstaff*, 410 U.S. at 533-37.
5. *Likely lessening of competition if the perceived entrant is eliminated*. Removing the perceived entrant through acquisition is likely to relax those defensive constraints and result in higher prices, reduced output, diminished innovation, or otherwise substantially lessen competition. See *Marine Bancorporation*, 418 U.S. at 623-28.

The 2023 *Merger Guidelines* likewise recognize that eliminating an actual or perceived potential entrant in a concentrated market can substantially lessen competition and direct attention to objective evidence of capabilities, incentives, market recognition, and present disciplining effects. U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines Guideline 4 & § 2.4.A (rev. 2023).

Applying the perceived potential competition doctrine turns principally on evidence of market perception and incumbent reaction. Courts and agencies require objective, contemporaneous proof that existing firms actually viewed the potential entrant as a credible threat and that this perception influenced current conduct. Persuasive evidence may include internal pricing or

strategy documents acknowledging the entrant as a likely market participant; board or management materials discussing entry-deterrence strategies; communications with customers reflecting limit pricing or increased service to forestall switching; capacity expansions or product improvements timed to the perceived entry threat; and third-party testimony or market analyses confirming that participants expected the entrant to enter. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-37 (1973); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623-28 (1974). By contrast, speculative assertions, generalized expectations of competition, or testimony prepared in the course of litigation offered without corroboration will not suffice. In *Meta Platforms*, the court credited contemporaneous business records over post-hoc affidavits and found no evidence that incumbents perceived Meta as a potential entrant or altered conduct accordingly. 654 F. Supp. 3d at 922. This evidentiary standard explains why the doctrine, while conceptually sound, has rarely produced liability: without convincing contemporaneous documentation, plaintiffs cannot show that the merger would remove a genuine, observable constraint on current behavior.

Modern enforcement provides little direct guidance on remedies because courts have not found liability, whether solely or in part, on a perceived potential competition theory in recent decades, and the agencies have not announced consent decrees that rest on that theory. Given the nature of the theory, however, effective relief will almost always require enjoining the transaction. In actual potential competition cases, a structural divestiture can preserve the prospect of future independent entry by transferring the pipeline assets, know how, and personnel to a buyer with the capability and commitment to enter. By contrast, in perceived potential competition cases it is the threat of entry, rather than actual entry, that disciplines incumbent firms. It is difficult to see how any relief short of enjoining the transaction could preserve this threat. Accordingly, courts and the agencies will almost surely focus on a blocking injunction when the evidentiary record shows that eliminating the perceived entrant will likely relax incumbents' current constraints and substantially lessen competition.

Nascent competition

The nascent competition theory addresses mergers in which a dominant firm acquires an emerging company whose technology, innovation, or business model could evolve into a meaningful competitive threat. Where actual potential competition concerns entrants whose independent entry is probable and imminent, nascent competition extends Section 7's incipency principle further in time to firms whose technologies are still formative and lack a reasonably predictable path to entry, yet whose innovation trajectory could one day erode the acquirer's market power. The concern is acute in markets with network effects, scale economies, data advantages, or technological lock-in, where an independent or alternative sponsor could develop the innovation into a future constraint. The theory thus focuses on plausible but uncertain future rivalry and the risk that eliminating such a firm will retard innovation and entrench market power.

The concept emerged in the late 2010s and early 2020s as enforcement agencies sought to adapt potential competition principles to the acquisition strategies of dominant technology platforms. During the final years of the first Trump administration and continuing under the Biden administration, the FTC and DOJ publicly expressed interest in challenging acquisitions of nascent competitors by firms with entrenched market positions, particularly in digital markets. Yet despite multiple investigations and policy statements, no court has adjudicated the theory on

the merits, leaving its legal validity uncertain. The DOJ's suit against Visa's proposed acquisition of Plaid in 2020 and the FTC's ongoing litigation over Facebook's acquisitions of Instagram and WhatsApp illustrate the agencies' efforts to apply nascent competition principles to early-stage threats that, while distant, could have meaningfully reduced future competition. The 2023 Merger Guidelines recognize this possibility, noting that eliminating a nascent competitor may substantially lessen competition by removing a plausible source of future innovation or disruption. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 2.4.A & Guideline 4 (2023). The Guidelines, however, reflect agency enforcement policy rather than settled judicial doctrine.

A useful doctrinal analogue appears in *United States v. Microsoft Corp.*, 253 F.3d 34, 79-80 (D.C. Cir. 2001) (en banc), where the court held that Microsoft's efforts to neutralize emerging browser technologies violated Section 2 of the Sherman Act because they threatened to erode Microsoft's operating system monopoly. Although Microsoft arose under Section 2 rather than Section 7, its reasoning supplies the conceptual foundation for nascent competition analysis: the suppression or acquisition of an early-stage technology that could evolve into a significant competitive constraint may constitute an unlawful preservation of dominance. Modern agency policy papers and the 2023 Merger Guidelines reflect this lineage, framing the elimination of nascent innovators as a forward-looking application of Section 7's incipency principle to dynamic, innovation-driven markets.

The nascent competition theory builds on Section 7's incipency principle by extending its reach to acquisitions that may suppress competitive threats still in development. It addresses two distinct but related concerns. First, such acquisitions may eliminate a firm whose continued independent growth could, over time, erode the acquirer's entrenched market power, especially in markets with network effects, scale economies, or data advantages that confer persistent dominance. Second, they may alter the rate or direction of future technological progress by changing the incentives and priorities governing an early-stage innovator, potentially resulting in delay, repurposing, or outright termination of the nascent technology (a so-called "killer acquisition"). Both mechanisms, if they occur, threaten dynamic efficiency and innovation-based rivalry even when the acquired firm is far from posing a near-term price constraint.

Courts have not articulated a formal elements test for nascent-competition mergers, but the theory logically entails several predicates that parallel, and extend, the actual potential competition framework. This suggests that a merger would raise nascent competition concerns when the following conditions are present:

1. *Durable dominance or high entry barriers.* The acquiring firm holds a durable dominant position in a relevant market protected by significant entry barriers, such as network effects, economies of scale, data advantages, or platform control, so that new entry is rare and slow to erode market power.
2. *Plausible path to a competitive constraint.* The target's technology, capabilities, or innovation trajectory could plausibly evolve into a material competitive constraint on the acquirer, whether through the target's own development or through future sponsorship, licensing, or investment by others. Courts may still look for objective markers of plausibility—such as external interest from investors or strategic partners, technical milestones, pilot deployments, or credible commercialization avenues—even if no particular timeline is specified.

3. *Acquirer's incentive to neutralize the threat.* The acquirer recognizes the technology's disruptive potential and has a rational economic motive to neutralize it—by acquiring, delaying, or redirecting the innovation—because successful independent commercialization could erode its dominant position. Evidence of the acquirer's concern that the innovation might be used by someone (whether the target or another sponsor) to undermine its position can itself support an inference of likely competitive harm.
4. *Likely competitive effect.* The acquisition would entrench the acquirer's dominance either by slowing or redirecting innovation in a way that reduces the technology's competitive significance, or by refusing to license or otherwise enable third-party commercialization that would position the technology to compete against the acquirer.
5. *Absence of offsetting efficiencies or procompetitive justifications.* There are no verifiable, merger-specific efficiencies or other procompetitive benefits sufficient to offset the likely reduction in future competition, such as evidence that the transaction would accelerate innovation, expand output, or otherwise enhance competitive performance relative to the but-for world.

Because nascent competition claims turn on forward-looking harms, courts are likely to give substantial weight to objective, contemporaneous evidence over conjecture or litigation testimony, as in actual potential-competition cases. Probative evidence would include: (1) internal acquirer documents acknowledging the technology as a disruptive threat, including build-buy-partner analyses, cannibalization assessments, and strategy or risk memos; (2) target materials that show real momentum, such as funded roadmaps, committed budgets, key technical hires, milestone tracking, pilot deployments, user or developer traction, and credible commercialization avenues; (3) market signals of independent sponsorship, including outreach to strategic partners, investor interest, draft term sheets, licensing inquiries, or data room activity; and (4) integration plans that would predictably slow, redirect, or constrain the technology's competitive significance, such as reprioritization or sunseting proposals, limitations on interoperability, access, or scale, or policies that foreclose third-party commercialization.

The theory faces several analytical challenges. First, and most fundamentally, it requires courts to predict competitive effects at a stage when the target's future trajectory is highly uncertain. If a firm is truly "nascent," objective evidence of its competitive potential may be limited or ambiguous. Yet Section 7 requires a showing of reasonable probability, not mere possibility, that a merger will substantially lessen competition. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623 (1974). Courts have consistently required contemporaneous evidence of the target's capability and incentive to become a significant competitive force, a standard that may be difficult to meet when the target is at an early developmental stage. The evidentiary challenge is not trivial: if the evidence of future competitive significance is sufficiently objective and compelling to satisfy Section 7's reasonable probability standard, the target may not be "nascent" at all but rather an actual potential competitor under established doctrine.

Second, the theory rests on counterfactual assumptions that are inherently difficult to verify. Independent development might lead to vigorous competition—or the target might fail, be acquired by a different incumbent, pivot to a noncompeting business model, or remain a marginal player. Empirical evidence on whether incumbent acquisitions of startups systematically reduce competition or innovation is mixed, with some studies suggesting such acquisitions often accelerate product development, achieve necessary scale, or efficiently

allocate innovative assets. The agencies' theory assumes that independent development is necessarily preferable, but acquisitions can provide capital, distribution, technical resources, and network access that enable emerging technologies to reach scale and consumers. Moreover, the prospect of acquisition by an incumbent can incentivize initial innovation and entrepreneurship by providing a realistic exit strategy for venture-backed startups.

Third, error costs are asymmetric and potentially large. Blocking procompetitive acquisitions (false positives) may deprive consumers of beneficial innovation, chill venture investment, and prevent emerging firms from obtaining resources necessary to compete effectively. Permitting anticompetitive acquisitions (false negatives) may allow dominant firms to entrench market power and suppress future competition. The optimal enforcement policy depends on the relative frequency and magnitude of these errors, as well as the availability of postmerger remedies. Nascent competition theory implicitly assumes that false negatives are more costly than false positives in concentrated digital markets, but this assumption remains empirically unproven and is contested by commentators who emphasize the benefits of incumbent acquisitions for innovation and scale.

Confronted with these analytical challenges—uncertainty about future rivalry, ambiguous evidence of innovation potential, and asymmetric error costs—proponents of expansive nascent-competition enforcement have proposed an expected value interpretation of Section 7's incipency standard. This approach effectively reinterprets Section 7's "may be" standard in expected value terms, allowing a low probability of competitive harm to satisfy the statute if the potential injury to consumer welfare is large. Proponents argue that Section 7's preventive purpose justifies intervention where eliminating a plausible innovation pathway would impose a meaningful expected cost on consumers, even if success is uncertain. Courts have not adopted this reasoning. Section 7, as interpreted in *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990), requires a showing of reasonable probability, not a mathematical expectation, of substantial competitive harm. Expanding the statute to an expected value framework would invite speculative quantification of hypothetical probabilities and welfare magnitudes that courts are ill-equipped to assess and would risk converting Section 7 from an evidence-based prophylactic rule into an open-ended mandate for agency intervention whenever a dominant firm acts as an acquirer.

Because the competitive harm in a nascent competition merger stems from the redirection or abandonment of an early-stage technology rather than the elimination of an existing market participant, effective relief is almost always limited to prohibiting the transaction before consummation. Once the firms are integrated, divestiture cannot reconstruct lost innovation incentives or restore the foregone threat of future competition. Consequently, courts and the agencies view injunctive relief as the only viable remedy in such cases, with no structural alternative comparable to those available in more conventional potential competition mergers.

Given likely judicial resistance to expanding Section 7 in this manner, proponents have instead looked to Section 2 of the Sherman Act as a supplementary framework for acquisitions where proof under Section 7 falls short. In particular, they rely on Section 2 when the predicted harm to future competition cannot be demonstrated with sufficient probability to satisfy Section 7's reasonable probability standard. When a dominant firm acquires an emerging rival, the competitive harm can be characterized in two related ways. Under Section 7, the concern is that the acquisition may substantially lessen future competition by removing a plausible source of entry or innovation. Under Section 2, the same conduct can be characterized as exclusionary

maintenance of monopoly power: the acquisition of a nascent rival to preserve the acquirer's dominance by preempting a future threat. The factual inquiry overlaps substantially: in both settings, the key questions are whether the target could realistically have developed into a meaningful competitor and whether the acquirer had a rational economic incentive to eliminate that prospect rather than compete on the merits.

The FTC's ongoing litigation against Meta Platforms in *Facebook/Instagram* and *Facebook/WhatsApp* exemplifies this approach. The complaint alleges that Facebook systematically neutralized nascent competitive threats through a "buy-or-bury" strategy, either acquiring or suppressing potential challengers to its social networking dominance. The agency framed this conduct as monopolization under Section 2 rather than as a Section 7 challenge to completed mergers, arguing that the acquisitions maintained Facebook's monopoly by depriving the market of independent, innovative platforms that could have eroded its position. Courts have yet to address the merits of such claims, and significant doctrinal obstacles remain. Mergers are the paradigmatic subject of Section 7, not Section 2; recharacterizing acquisitions as exclusionary conduct may circumvent the procedural requirements, evidentiary standards, and statutory limitations periods that Congress imposed in the Clayton Act. Defendants are likely to argue that allowing Section 2 challenges to completed acquisitions undermines the statutory scheme and invites enforcement actions long after the HSR waiting period has expired and the parties have integrated their operations.

Nevertheless, the Section 2 framing may have strategic advantages for enforcement agencies. It avoids the requirement of proving a relevant market within which competition is substantially lessened, focusing instead on monopoly power and exclusionary conduct. It may also support challenges to serial acquisitions that cumulatively entrench dominance, even where no single acquisition would independently violate Section 7. The theory posits that where prospective acquisitions by dominant firms are not challenged before consummation, Section 2 may provide a backstop against acquisition strategies that systematically foreclose innovation-driven entry. Whether courts will accept this theory remains to be seen, but it highlights the analytical unity between the two statutes: both focus on preventing the foreclosure of competitive rivalry, with Section 7 addressing the risk ex ante and Section 2 providing a potential ex post remedy where conduct has maintained monopoly power by extinguishing emerging threats.

In sum, the nascent-competition theory constitutes a significant extension of Section 7's incipency principle. Its contours and viability remain unsettled, and courts have not yet determined whether it will be recognized under Section 7, Section 2, or both. We may learn more when the *Meta/Instagram/WhatsApp* case is decided.

If you have any questions or wish to discuss this matter in greater detail, please let me know.