

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Class 19 (Thursday, October 29): Potential Competition Mergers (Unit 10)

This class examines mergers that eliminate competition from a firm that has not yet entered the relevant market. Two theories address this harm. The actual potential competition theory protects the competition a firm's independent entry would likely have brought to the market. The perceived potential competition theory protects the competitive pressure that the threat of entry already exerts on incumbents. We will develop both theories, see how the FTC has applied the actual potential competition theory in two pharmaceutical and medical device consent settlements, and then study the FTC's unsuccessful challenge to Steris' acquisition of Synergy Health. In Unit 11, we will turn to Meta/Within and the still-developing concept of nascent competition.

The Two Theories

Both theories rest on the comparison that governs every Section 7 case: competition in the market going forward with the merger versus competition without it. A merger can substantially lessen competition even if it eliminates no current sales and causes no immediate price increase. If a firm probably would have entered on its own, a merger that prevents that entry can leave future prices higher, quality lower, or innovation weaker than they otherwise would have been (slide 4).

The same comparison explains why either merging party can be the potential entrant. An incumbent may acquire a firm that was likely to enter its market, or an outside firm facing a "make or buy" decision may acquire an incumbent instead of entering on its own. Either way, the merger eliminates an independent competitive force. A merger can also combine two firms that are both preparing to enter a market in which neither yet sells.

Both theories almost always fail in contested litigation. Actual potential competition requires a supported prediction of independent entry and its competitive effects, while perceived potential competition requires proof that the threat of entry presently influences incumbent conduct. The Supreme Court has recognized the perceived potential competition theory while reserving judgment on the actual theory, but that difference in doctrinal status has not produced a corresponding difference in results. If anything, plaintiffs have fared slightly better under the actual potential competition theory.

Actual Potential Competition

The actual potential competition theory addresses the loss of reasonably probable independent entry that would deconcentrate the market or produce other significant procompetitive effects (slides 5-8). In *Falstaff* and *Marine Bancorporation*, the Supreme Court reserved whether

eliminating actual potential competition alone can violate Section 7.¹ Some lower courts have accepted the theory, while others have assumed its validity and decided the case on the facts.² In *Yamaha*, the Eighth Circuit upheld the FTC's finding that a joint venture eliminated actual potential competition in the market for outboard motors.³ *Yamaha* remains the only court of appeals decision finding liability under the theory. The agencies nonetheless have used the theory to obtain consent settlements when the market is highly concentrated and the evidence supports reasonably probable independent entry with significant procompetitive effects. In the modern era, the FTC's litigated challenges have failed on the entry elements. In *Meta/Within*, which we will study in Unit 11, the court held that the FTC had not shown that Meta had "available feasible means" of entry other than by acquisition: despite its financial and engineering resources, Meta lacked fitness content capabilities, and de novo entry was not reasonably probable.⁴ In my view, the theory follows from Section 7's comparison of future competition with and without the acquisition (slide 7).

The class notes organize the actual potential competition theory into five elements (slides 9-10):

1. A market operating noncompetitively with room for competitive improvement.
2. A relatively unique potential entrant.
3. Available, feasible means of independent entry.
4. A reasonable likelihood of entry in the near future.
5. A reasonable probability that entry, if it occurred, would have a substantial procompetitive effect.

Courts do not uniformly recite these elements, but each is inherent in the precedent and the theory's economic logic. The fourth and fifth elements call for two distinct predictions: whether and when the firm would have entered, and what its entry would have accomplished.

Guideline 4 of the 2023 Merger Guidelines addresses both theories (pp. 4-9). For actual potential competition, the Guideline condenses the analysis into two questions: whether a merging firm had a reasonable probability of entering other than through an anticompetitive merger, and whether that entry offered a substantial likelihood of deconcentrating the market or producing other significant procompetitive effects (p. 7). The first question combines the third and fourth elements. Concentration appears in the Guideline's introduction (p. 6). The Guideline has no separate uniqueness requirement, although it considers a firm's entry advantages (p. 7) and, for markets whose products have not yet been commercialized, whether there are few equivalent potential entrants (p. 7 n.23). As you read Section 2.4.A, note where the agencies' approach is more favorable to enforcement than the case law. The Guidelines state the agencies' enforcement

¹ *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537-38 (1973); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625-26, 639 (1974).

² *See, e.g., United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) (assuming the doctrine's validity); *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015) (describing the defendants' argument that the doctrine "has long been disfavored by numerous courts including the Supreme Court" and assuming its validity).

³ *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-81 (8th Cir. 1981).

⁴ *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 938-41 (N.D. Cal. 2023). The court treated the probability of de novo entry as part of the "available feasible means" inquiry rather than as a separate element.

approach; they do not bind the courts. I have found no decision applying Guideline 4's potential competition analysis.⁵

1. *A noncompetitive market.* The actual potential competition theory matters only if entry could improve the market's performance (slides 11-12). The market of concern is the one the potential entrant would have entered: the target's market if the buyer is the potential entrant, and the buyer's market if the target is the potential entrant. *Marine Bancorporation* described the doctrine as applying to markets in which dominant firms engage in interdependent or parallel behavior.⁶ In my view, this should not be a doctrinal restriction. The theory should apply whenever the premerger market is performing noncompetitively and the potential entrant's independent entry is likely to improve its competitive performance substantially. A market with a single supplier, as in *Medtronic/Covidien* below, can perform noncompetitively without any interdependent behavior. High concentration can provide a prima facie showing that a market is a candidate for the theory, but the merging parties may rebut it. Under *Baker Hughes*, the parties' burden should, in my view, be one of production, with the ultimate burden of persuasion remaining on the plaintiff. Evidence that concentration is declining does not necessarily rebut the showing if the market remains concentrated. Although Guideline 4 treats a market as concentrated for this purpose if its HHI exceeds 1,000 (p. 6), case law has not adopted a uniform threshold (slide 12), and an HHI of 1,000 is low compared to the concentration levels in many of the leading potential competition cases.⁷

2. *A relatively unique entrant.* The putative actual potential entrant must be relatively unique in its incentives and ability to enter the relevant market (slide 13). Eliminating one potential entrant matters little if many others have an equal or better incentive and ability to enter. The entrant's significance depends on how its capabilities and incentives compare with those of other likely entrants. Distinctive technology, regulatory progress, distribution, or other advantages can make a firm far more consequential than an outsider with only general resources. The 1984 Merger Guidelines reflected this concern in a screen under which the Department generally would not challenge a merger if three or more other firms shared the entrant's advantages. That historical screen is not a current numerical safe harbor. For markets whose products have not yet been commercialized, Guideline 4 makes a similar comparison when it considers whether there are "few equivalent potential entrants" in assessing likely future concentration (p. 7 n.23). The

⁵ The judicial citations I have found are to Guideline 4's definition of a concentrated market as one with an HHI above 1,000, in mergers between existing competitors. See *FTC v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 458-59 (S.D.N.Y. 2024) (citing Merger Guidelines §§ 2.1, 2.4 n.21 in analyzing a merger between existing competitors); *FTC v. Henkel AG & Co. KGaA*, No. 25 Civ. 10371 (KPF), slip op. at 70, 73 (S.D.N.Y. Aug. 14, 2026) (same).

⁶ *Marine Bancorporation*, 418 U.S. at 630-31.

⁷ See, e.g., *Marine Bancorporation*, 418 U.S. at 607 n.2 (3FCR of 92.3%); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352-53 (2d Cir. 1982) (2FCR exceeding 77%; 4FCR exceeding 90%); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 979 (8th Cir. 1981) (2FCR of 85%; 4FCR of 98.6%, measured by dollar sales); *Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Rsv. Sys.*, 638 F.2d 1255, 1267 (5th Cir. Unit A 1981) (4FCRs of 86.1% and 73.8% in the two relevant banking markets); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 922 (N.D. Cal. 2023) (HHIs of 6,917 by revenue, 6,307 by hours spent, and 3,377 by monthly active users); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 748 & n.38 (D. Md. 1976) (2FCR of 54.3%; 4FCR of 77.5%); but cf. *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 73-76 (10th Cir. 1972) (pre-*Marine Bancorporation* decision upholding the FTC's potential competition analysis in a coal market with a 4FCR of 29.2%, relying on the market's trend toward concentration even though it was not yet a tight oligopoly).

inquiry requires a comparison of capabilities and incentives, not a list of firms that conceivably could enter.

3. *Available, feasible means of entry.* The potential entrant must have a realistic route into the market other than the challenged merger (slide 14). The cases recognize two: de novo entry and a “toehold” acquisition of a small firm that could grow into a significant competitor. For de novo entry, financial resources matter, but so do the technology, personnel, facilities, and regulatory approvals that the particular market requires, and entry barriers must not be so high as to be preclusive. A toehold theory requires an identifiable firm available for acquisition on reasonable terms that could provide a viable path to significant market presence. The plaintiff must prove this element; it cannot be presumed from the firm’s resources and interest in the market. The ability to buy the proposed merger partner does not, by itself, show a feasible alternative route to entry.

4. *Probable entry in the near future.* But without the acquisition, the putative entrant must have sufficient incentive to enter the market using one of the above means to make entry likely in the near future (slides 15-17). This element is often decisive. Feasibility is not enough. Entry must be attractive enough that the firm probably would have undertaken it without the merger. The analysis therefore considers expected revenues; the costs and risks of entry; the competitive response the entrant would face; and the firm’s alternative uses of its capital. An established business in a related market may make entry easier while still leaving a particular project commercially unattractive. Ordinary course plans, budgets, capital approvals, customer commitments, and experience in comparable markets help connect general capability to an actual business decision.

Both objective and subjective evidence can be relevant. Subjective evidence of an intent to enter is not required if the objective evidence suffices, and an internal aspiration to enter does not show that entry was probable. The weight of management testimony depends on how well it fits the contemporaneous documents and the commercial circumstances. Guideline 4 gives subjective evidence more force: in the agencies’ view, evidence that a firm considered entering on its own as an alternative to the merger “generally suggests” that entry would have been reasonably probable (p. 7). A court may demand more: a manager’s enthusiasm for an idea, or a board’s approval of a strategy for further development, does not show that the firm would authorize the capital needed to carry it out.

The Fifth Circuit describes a probability as a better-than-50% chance and suggests that a “reasonable” probability requires even more (slide 16). Guideline 4, by contrast, adopts a sliding scale: the more concentrated the market, the lower the probability of entry that raises concern (p. 6). That is an agency enforcement position, not a judicial rule. Timing matters as well: a prediction of entry at some indefinite time turns the inquiry into one of “ephemeral possibilities” (slide 16). The cases require a supported estimate of when independent entry would occur. The Second Circuit requires entry in the “near future,” assessed in light of the particular industry’s entry barriers and necessary lead time, but does not require an exact entry date.⁸ The Fifth Circuit emphasizes whether the market can reliably be expected to remain concentrated when

⁸ BOC Int’l Ltd. v. FTC, 557 F.2d 24, 29 (2d Cir. 1977); see FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 934 (N.D. Cal. 2023) (quoting BOC’s temporal requirement).

entry is likely to occur (slide 17).⁹ The estimate must be sufficiently definite to permit that assessment; a prediction of entry in the “reasonably foreseeable future,” without greater specificity, is insufficient.¹⁰ These decisions establish no fixed numerical deadline, and the current Merger Guidelines prescribe none.¹¹

5. *A substantial procompetitive effect.* Assuming it occurred, entry by the actual potential entrant must have a “substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects” (slide 18).¹² In my view, “substantial likelihood” should be read as a reasonable probability. An entrant may be viable but too small, too constrained, or too poorly positioned to improve market performance. Evidence of the entrant’s expected scale, pricing, products, and strategy can support this prediction, which assumes that entry occurs. Keep it separate from the probability of entry: an attractive product does not show that its developer will finance and launch it, and a likely launch does not by itself show a substantial competitive benefit. Guideline 4 treats probable entry into a highly concentrated market as suggesting that the entry’s benefits would be competitively significant unless substantial direct evidence shows that the effect would be de minimis (p. 7).

Actavis/Warner Chilcott illustrates a common application of the theory: a merger between a branded drug manufacturer and a firm with a competing generic product awaiting FDA approval or commercial launch (slide 19). Here the acquirer was the potential entrant into the target’s markets. The FTC alleged that Actavis was likely to be the first generic entrant for Warner Chilcott’s Loestrin 24 FE, for which Actavis already had FDA approval, and was one of a limited number of firms capable of entering in the near future with generic versions of Lo Loestrin FE and Atelvia. For those two products, Actavis also might have been the first and only generic competitor for 180 days, which bore on both its uniqueness and the significance of its entry. The merger threatened to delay or eliminate the price competition that independent generic entry would have produced. The consent order required Actavis to transfer its rights and assets for those products, and a fourth drug in which the parties already competed, to Amneal, with transitional supply for two products. The remedy sought to preserve the entry opportunity through an independent firm capable of completing development and competing.¹³

⁹ *Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 638 F.2d 1255, 1271-72 (5th Cir. Unit A 1981). For the markets before it, the court assumed continued concentration over two to three years absent contrary evidence, required an assessment of market volatility for substantially longer periods, and cautioned that forecasts beyond five years would be supportable only in exceptionally stagnant markets.

¹⁰ *Republic of Tex. Corp. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 649 F.2d 1026, 1047 (5th Cir. Unit A 1981) (calling for a more definite estimate, potentially a range of months or years).

¹¹ U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines §§ 2.4.A, 2.4.C (2023). The two-year benchmark in the 1992 Horizontal Merger Guidelines, as revised in 1997, addressed entry offered to deter or counteract merger harm and generally measured the period from initial planning to significant market impact. *See* U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 3.2 (1992, rev. 1997). The 2010 Guidelines omitted that numerical benchmark. *See* U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 9.1 (2010).

¹² *Marine Bancorporation*, 418 U.S. at 633.

¹³ Complaint ¶¶ 7-10, 12(a)-(d), *Actavis, Inc.*, No. C-4414 (F.T.C. Sept. 27, 2013); Decision & Order §§ II.A, II.E, *Actavis, Inc.*, No. C-4414 (F.T.C. Dec. 4, 2013); *see* Analysis of Agreement Containing Consent Orders To Aid Public Comment at 1, 4, *Actavis, Inc.*, No. C-4414 (F.T.C. Sept. 27, 2013).

Perceived Potential Competition

Perceived potential competition theory concerns present competitive constraints rather than future rivalry (slide 20). Incumbents that regard an outside firm as a credible potential entrant may hold down prices, improve quality, or invest more, in part because doing so makes entry less attractive. A merger that removes the threat can relax that constraint even if the outside firm never would have entered. The source and timing of the competitive benefit distinguish the two theories: the perceived theory protects the incumbents' current response to the threat of entry, while the actual theory protects the future competition that entry would have created. Unlike the actual theory, the perceived theory has been recognized by the Supreme Court.¹⁴ Recognition has not translated into success. *Marine Bancorporation* itself rejected the government's perceived potential competition claim on the facts,¹⁵ and in *Meta/Within* the court found the evidence insufficient both on whether market participants perceived Meta as a potential entrant and on whether its presence tempered their conduct.¹⁶ Plaintiffs have done no better under this theory than under the actual theory. The class notes identify five elements (slides 21-22):

1. A market in which the threat of entry can constrain the incumbents' market power.
2. A potential entrant that incumbents perceive as relatively unique in its ability and incentive to enter.
3. Incumbents' perception of the firm as a likely potential entrant.
4. Incumbents' response to that perception by offering lower prices, higher quality, or other more favorable terms than they otherwise would.
5. Removal or weakening of that constraint by the merger, creating a reasonable probability of a substantial lessening of competition.

The first two elements parallel those of the actual potential competition theory, but the perspective shifts to the incumbents: what matters is whether they regard the firm as a distinctive threat. Objective evidence of the firm's capabilities and incentives helps explain how incumbents perceive it, but the analysis must still connect that perception to their competitive conduct. The firm's size or reputation alone does not supply that link.

Direct evidence of a price reduction, or an admission that an incumbent acted to deter entry, is not required. Incumbents' responses can be shown circumstantially, and maintaining a lower price than would otherwise prevail can be a response even when no price cut is observed (slide 22). Because incumbents' perceptions matter, a firm's private decision not to enter does not eliminate the constraint if incumbents are unaware of the decision and continue to respond to a credible threat. Relief must preserve or restore the lost constraint. Blocking the transaction may be necessary, but the theory does not categorically exclude an effective divestiture remedy (slide 20).

Guideline 4 asks two questions: whether a current market participant could reasonably consider a merging firm a potential entrant, and whether that potential entrant is likely to influence existing competition (p. 8). The first question draws on *Falstaff*, which asked not what the firm's internal decisions were but whether, given its financial capabilities and market conditions, "it would be

¹⁴ *Falstaff*, 410 U.S. at 531-37; *Marine Bancorporation*, 418 U.S. at 624-25.

¹⁵ *Marine Bancorporation*, 418 U.S. at 639-40.

¹⁶ *Meta Platforms*, 654 F. Supp. 3d at 938-41.

reasonable to consider it a potential entrant.”¹⁷ Compare these questions with the elements in the class notes. The Guideline allows objective evidence of the firm’s capabilities, standing alone, to show both that incumbents could reasonably regard it as a potential entrant and that it could likely influence them, without separate subjective evidence of incumbents’ perceptions or direct evidence of their reactions (p. 8). The case law, as summarized in the class notes, still requires proof that incumbents actually respond to the threat, although circumstantial evidence, including economic facts, can supply it (slides 20, 22).

None of Unit 10’s case studies applies perceived potential competition theory, but we will see the theory in Unit 11 as we examine Meta/Within.

Potential Competition and Entry as Rebuttal

Section 2.4.C of the Guidelines distinguishes two easily confused inquiries (pp. 8-9). In a potential competition case, the plaintiff argues that the merger eliminates a merging firm’s prospective entry or the present competitive constraint created by the prospect of its entry. In a merger of existing competitors, the defendants may argue that entry by other firms will replace the competition the merger eliminates. These inquiries concern different competitive losses. A potential entrant’s competitive impact may be attenuated compared with that of an established rival, so eliminating its prospective entry may be harmful even if that entry would not be timely or substantial enough to replace the competition lost when two established rivals combine. The Guidelines also state that the likelihood of entry needed to show that a merger “may” substantially lessen competition generally will not equal the likelihood needed to rebut a demonstrated risk of harm. Do not import the requirements of the entry defense, which we studied earlier, into the plaintiff’s potential competition case.

Applications

The following materials apply the actual potential competition theory in two consent settlements and one litigated challenge. The settlements show how the FTC identifies threatened entry and designs relief to preserve it; *Steris* shows how a court tests an entry forecast against evidence of what the firm probably would have done without the merger. Keep the different procedural settings in mind: allegations supporting a consent order have not been tested in the way the *Steris* court tested the FTC’s entry forecast. Together with *Actavis/Warner Chilcott*, the cases also illustrate each position the potential entrant can occupy (slide 23): the acquirer (*Actavis*), each merging firm in different markets (*Mylan/Perrigo*), both merging firms in the same market (*Medtronic/Covidien*), and the target (*Steris*).

Mylan/Perrigo. Skim the FTC’s news release (pp. 11-12), then read the complaint and the Analysis to Aid Public Comment (pp. 13-21). The proposed takeover ultimately did not close.¹⁸ The materials nevertheless show how an agency identifies different competitive problems within one transaction and designs a product-specific remedy.

The FTC alleged the loss of current competition in four generic drug markets and the loss of future competition in three. In the future competition markets, the threatened entry came from

¹⁷ *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533 (1973); see Guideline 4 § 2.4.B n.26 (p. 8) (citing *Falstaff*).

¹⁸ See Press Release, Fed. Trade Comm’n, [FTC Approves Modified Consent Order for Mylan N.V.](#) (Feb. 22, 2016) (explaining that Mylan abandoned the acquisition after failing to obtain the required number of Perrigo shares).

both sides of the transaction: Perrigo was the likely entrant for generic acyclovir ointment, and Mylan was the likely entrant for generic hydromorphone extended-release tablets and scopolamine patches (pp. 15-16). Read the allegations market by market, noting whether each product was approved, already being sold, or still in development. Those stages need not coincide. For example, Perrigo's clindamycin/benzoyl peroxide gel had recently been approved but was not yet launched, and the FTC treated it as current competition (pp. 15, 19).

Relate the allegations to the elements of the actual potential competition theory. The markets were highly concentrated, and the FTC's Analysis explains why the number of suppliers matters: once several generic versions are available, generics compete mainly with one another, and prices keep falling as additional suppliers enter (pp. 18, 20). Each merging firm was "one of a limited number" of likely entrants in the relevant markets, and the FTC alleged that development times and FDA approval requirements would delay other entry by at least two years (pp. 15-16, 20). The predicted effect of entry was lower prices.

The agreed remedy required Mylan, if the acquisition closed, to divest its rights and assets for all seven products to Alvogen, with transitional supply and technical assistance to support Alvogen's independent manufacture of the products (pp. 20-21). The acyclovir remedy deserves particular attention. Because Alvogen could not conduct due diligence on Perrigo's pipeline product, the remedy called for Mylan to divest its own marketed product instead. Mylan would retain a limited license to sell acyclovir until 30 days after Perrigo's product was approved, but for no longer than 3 years. That design was intended to preserve current supply while maintaining Mylan's incentive to bring Perrigo's product to market (p. 21). The *Actavis/Warner Chilcott* consent discussed above similarly paired the divestiture of product rights and assets with transitional supply (slide 19).

Medtronic/Covidien. Skim the transaction announcement and the FTC's news release (pp. 23-26), then read the complaint and the Analysis to Aid Public Comment (pp. 27-33). The relevant product was drug-coated balloon catheters used to treat peripheral arterial disease in the femoropopliteal artery. Bard was the only U.S. supplier, and Medtronic and Covidien were likely to become the second- and third-largest suppliers. Because both merging firms were potential entrants, the merger threatened to eliminate an independent competitor even though neither firm yet sold the product in the United States (complaint ¶ 7, p. 28).

The case maps cleanly onto the actual potential competition theory elements. The market had a single supplier. Medtronic and Covidien were the only potential entrants that had reached the clinical trial stage of the FDA approval process, which distinguished them from more distant prospects. The complaint alleged the loss of future price competition, a possible cancellation or delay of one firm's product launch, and reduced research and development (¶ 9, p. 29). Regulatory and development barriers made the leading projects especially important, but they also left the entry forecasts dependent on the remaining clinical, regulatory, and commercial milestones. Development progress strengthens an entry forecast without removing all uncertainty.

Read the remedy discussion closely (pp. 32-33). Spectranetics was to receive Covidien's drug-coated balloon business, including its intellectual property, the facility where Covidien coated the balloons, and access to confidential information and employees. A supply of balloon catheters and transitional assistance would support the ongoing clinical trials and the move to independent manufacturing. The FTC also relied on Spectranetics' industry and regulatory

experience. The objective was to place the development program with a buyer capable of completing it. Skim the completion announcements (pp. 34-36), which report the closing and Spectranetics' expectation of U.S. commercialization in about 2017, after FDA approval. Compare the resources needed to preserve this development effort with those needed in *Mylan/Perrigo*.

Steris/Synergy Health. This is the primary case study in the unit. Skim the transaction announcement and the FTC's announcement of its challenge (pp. 38-41), then read Judge Polster's entire opinion and order (pp. 42-82). The FTC alleged harm in regional markets for contract radiation sterilization. Synergy already provided sterilization services, including e-beam sterilization in the United States, and the FTC alleged that the acquisition would eliminate potential competition from Synergy's planned introduction of x-ray sterilization in the United States to compete with gamma sterilization, which only Steris and Sterigenics provided. A firm can thus be an established business in the same broad industry as its merger partner and still be a potential entrant for the particular competitive alternative at issue.

The opinion concerns the FTC's motion for a preliminary injunction pending an administrative trial.¹⁹ The FTC described the actual potential competition theory in four parts: a highly concentrated market, probable entry by the potential entrant, procompetitive effects from that entry, and few other firms able to enter effectively (p. 47). Map those parts onto the five elements of the class notes. The court assumed the theory's validity and directed the parties to focus on whether, absent the merger, Synergy probably would have entered the U.S. market by building one or more x-ray facilities within a reasonable time (pp. 47-48). The court held that the FTC had not carried its burden on that question and denied relief. The decision does not reject the doctrine, resolve the other elements, or hold that the merger could have no competitive consequences.

The factual narrative reconstructs how Synergy decided whether to make a major investment. Follow the company's approval process: a business unit develops an idea; a business case goes to the Senior Executive Board; the corporate finance team conducts a "black hat" financial and commercial review; and the PLC Board must approve any investment over £10 million (pp. 49-55). Synergy also required take-or-pay contracts from customers before committing significant capital. In September 2014, the Senior Executive Board approved the x-ray strategy, but the business plan never received a black hat review or reached the PLC Board, which approved only deposits to secure exclusive access to IBA's equipment (pp. 57-60, 68-69). Keep these stages distinct. Enthusiasm for a project and approval of a strategy show serious consideration; they do not show that the investment was likely to be made.

The court's analysis of the evidence follows the factual narrative (pp. 68-81). The first phase of the project required more than \$40 million, enough to consume Synergy's entire annual discretionary capital budget. Yet no customer would sign a take-or-pay contract, and only about six of the 185 companies Synergy targeted signed even a nonbinding letter of interest (pp. 58, 69-70). Customers had reasons to hesitate. Sterilization accounted for only about 3% of a

¹⁹ The opinion mistakenly refers to Section 13(b) of the Clayton Act (pp. 42, 46) and attributes authority under 15 U.S.C. § 25 to the FTC (pp. 46-47). The FTC sought preliminary relief under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b). Section 25 authorizes Clayton Act injunction proceedings under the Attorney General's direction. Note also that the court recited the standard that the FTC must raise questions going to the merits "so serious, substantial, difficult and doubtful" as to warrant further investigation (p. 47), but concluded that the FTC had failed to show "by a preponderance of evidence" that it was likely to succeed (p. 82).

medical device's cost, while converting a product from gamma to x-ray sterilization was estimated to cost \$250,000 to \$500,000 and required testing, regulatory approvals, and validation that could take years (pp. 72-73). The business plan also failed every financial metric Synergy used: its projected internal rate of return was 6.51%, or 3% after correcting a double-counting error, against a 15% target, and its 7.7-year payback period exceeded the five-year target (pp. 76-77). Meanwhile, the dual x-ray/e-beam machine on which the plan depended did not exist at the required power level (pp. 63-65, 76). Read the testimony together with the contemporaneous plans and financial analyses. The useful distinction is not between favorable and unfavorable documents, but between evidence that a firm was exploring an investment and evidence that the investment probably would satisfy the firm's own commercial requirements.

The FTC argued that the merger caused Synergy to abandon its plans and that evidence created after the merger was announced deserved skepticism (p. 68). The court drew the opposite inference from the chronology. Work on the x-ray project continued for four months after the merger was announced in October 2014. The team kept courting customers, scouting sites, seeking local incentives, and negotiating with IBA until the project was terminated in February 2015 (pp. 60-63, 80-81). The court concluded that the obstacles that had existed since 2012, the lack of customer commitments and the inability to reduce capital costs, explained the termination (p. 81). Because the question is what Synergy probably would have done without the merger, a project's termination after the merger's announcement does not by itself show that the merger caused the abandonment. Read the court's conclusion with that counterfactual in mind (p. 82).

Skim the FTC's dismissal announcement and order (pp. 83-85), and read the Commission's statement (pp. 86-87). The Commission continued to express competitive concerns but concluded that further administrative litigation would not serve the public interest. Its principal reason was practical: because Steris provided gamma sterilization, the merged firm probably would not continue Synergy's x-ray effort, making it unlikely that any asset or business could be divested to recreate the competition that likely would have emerged without the merger, at least for the foreseeable future (p. 87). The statement is the Commission's assessment of enforcement and remedial consequences, not a reversal of the district court's findings.

Compare *Steris* with the two consent settlements. In *Mylan/Perrigo* and *Medtronic/Covidien*, the remedies were designed to transfer identifiable product rights and development assets to a buyer capable of taking the potential entrant's place, with transitional assistance. In *Steris*, the Commission doubted that later relief could recreate the lost entry opportunity. Identifying the lost competition and identifying a workable remedy are therefore related inquiries.

By the end of the assignment, you should be able to distinguish the two theories, apply the elements of each, identify the evidence needed to support each prediction that the actual potential competition theory requires, and explain why a consent remedy and a litigated entry forecast present different analytical tasks. We will build on this foundation in Unit 11.

Enjoy the reading! Email me if you have any questions.