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# The Concept of Potential Competition – Note by the United States

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More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm

Please contact Mr Antonio Capobianco if you have questions about this document.
[Email: Antonio.CAPOBIANCO@oecd.org].

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# *United States*

## 1. Introduction

1. In the United States (U.S.), the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the Agencies) recognize that firms can face competitive pressure not only from existing competitors, but also from potential competitors. More broadly, incumbent firms often have expectations about competition in the future, and these expectations can affect their competitive strategies in the present. For example, when an industry features innovative firms or firms that make significant expenditures on research and development, the Agencies' concern about conduct directed at potential competitors is acute because the current state of the industry may not be an accurate representation of future competition in the industry. This concern is heightened further in industries characterized by high barriers to entry.

2. The antitrust laws enforced by the Agencies are flexible enough to cover mergers and conduct that target not just current competition and existing competitors, but also future competition and potential competitors.

3. Entry into new markets, either by existing firms or startups, can increase competition in the short-term and spur innovation in a relevant market, both of which benefit consumers. Competition enforcers must be attuned to ways in which an incumbent firm, anticipating such entry, can take steps to prevent or delay such entry, to the detriment of consumers.

4. Given the important role that entry can play in ensuring competitive markets and encouraging innovation, issues related to potential and nascent competition are relevant to all components of antitrust enforcement in the U.S.[1] An agreement involving a potential or nascent competitor can violate Section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade[2]; a monopolist can unlawfully exclude (or attempt or conspire to exclude) a potential or nascent competitor in violation of Section 2 of the Sherman Act, which prohibits monopolization[3]; the acquisition of a potential or nascent competitor can violate Section 7 of the Clayton Act, which prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition or tend to create a monopoly,"[4] and can violate either Section 1 or Section 2 of the Sherman Act; and conduct directed at a potential or nascent competitor can violate Section 5 of the FTC Act, which prohibits "[u]nfair methods of competition."[5]

5. An incumbent firm, acting unilaterally or conspiring with another firm, can engage in anticompetitive conduct (including acquisitions) directed at a potential competitor or at a small rival that threatens its market position. In either scenario, the incumbent may, by

[1] This submission uses the phrase "potential competition" in a general descriptive sense to include a variety of scenarios involving future competition. The term and its variants, as used throughout this submission, are not intended to correspond to how that term is used in judicial opinions by courts in the United States.

[2] 15 U.S.C. § 1.

[3] 15 U.S.C. § 2.

[4] 15 U.S.C. § 18.

[5] 15 U.S.C. § 45(a)(1).

engaging in conduct that is not competition on the merits, limit the future competitive significance of the emerging or potential competitor. Conduct that targets an innovative or disruptive firm that threatens the status quo in a market of established incumbents is particularly concerning.

6. As in other areas of antitrust analysis, except in cases involving conduct that is unlawful *per se*, the Agencies will consider whether conduct or a merger involving a potential competitor has countervailing procompetitive benefits that are specific to the conduct or merger at issue and are verifiable.

## 2. U.S. Law Addressing Potential or Nascent Competition

7. A wide variety of sources demonstrates the concern U.S. law has about potential competition. In particular, case law in the U.S., including precedent from the Supreme Court of the United States, and the Agencies' Guidelines, including the *Horizontal Merger Guidelines*, *Vertical Merger Guidelines*, and *Guidelines for Collaboration Among Competitors,* consistently recognize the importance of potential competition.

8. Courts in the U.S., including the U.S. Supreme Court, have long recognized the significance of potential competition.[6] With regard to Section 1 of the Sherman Act, the Supreme Court has observed that agreements that "deprive the marketplace of . . . actual *or potential* competition" can violate Section 1.[7] With regard to Section 2 of the Sherman Act, the Supreme Court has held for a plaintiff where "prevention of all potential competition is the natural program for maintaining a monopoly here, rather than any program of actual exclusion."[8] With regard to Section 7 of the Clayton Act, the Supreme Court has established that mergers or other transactions involving potential competitors can violate Section 7.[9] This is in addition to the Clayton Act's broad concern with curbing anticompetitive effects "in their incipiency," which incorporates a concern about competition in the future.[10] And with regard to Section 5 of the FTC Act, which prohibits unfair methods of competition, the Supreme Court has observed that "[i]t is obvious that the word 'competition' imports the existence of present *or potential* competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors."[11]

[6] American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (explaining that "[p]revention of all potential competition . . . . [can be] cheaper and more effective than any amount of 'cure'" after a potential competitor enters and becomes an actual competitor); *see also* United States v. Microsoft, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) ("[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological change and frequent paradigm shifts.").

[7] American Needle v. National Football League, 560 U.S. 183, 197 (2010) (emphasis supplied).

[8] American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946).

[9] *See* United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. Falstaff, 410 U.S. 526 (1973); FTC v. Procter & Gamble, 386 U.S. 568 (1967); United States v. Penn-Olin, 378 U.S. 158 (1964).

[10] Brown Shoe v. United States, 370 U.S. 294, 346 (1962).

[11] FTC v. Raladam, 283 U.S. 643, 649 (1931) (emphasis supplied).

9. The Agencies' *Horizontal Merger Guidelines*[12] address many issues related to potential competition in the context of evaluating mergers. With regard to identifying market participants, the *Horizontal Merger Guidelines* explain that "[f]irms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP [small but significant and non-transitory increase in price], without incurring significant sunk costs, are also considered market participants. These firms are termed 'rapid entrants.'"[13] With regard to assessing market concentration, the Agencies explain that they use "projected market shares" because "[a] merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others."[14] Potential competition also relates to the issue of whether entry by firms currently outside the market can reduce or alleviate competition concerns with a proposed merger in a timely manner. The Agencies explain that, "[a]s part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers."[15]

10. The Agencies' *Vertical Merger Guidelines* similarly reflect the Agencies' concerns about potential competition in the context of a merger between firms that operate at different levels of the same supply chain: "A vertical merger may diminish competition by allowing the merged firm to profitably use its control of the related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market."[16]

11. Likewise, the Agencies' *Guidelines for Collaboration Among Competitors* address potential competition in the context of joint ventures or other agreements between competitors.[17] As a general matter, these *Guidelines* define the term "competitors" as

[12] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.ftc.gov/sites/default/files/attachments/mergerreview/100819hmg.pdf [hereinafter *Horizontal Merger Guidelines*].

[13] Id., § 5.1.

[14] Id., § 5.3.

[15] Id., § 9 ("The Agencies examine the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ. An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion [], marketing, distribution, and satisfaction of customer testing and qualification requirements.").

[16] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES §4a (2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf [hereinafter *Vertical Merger Guidelines*].

[17] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

"encompass[ing] both actual and potential competitors."[18] In addition, these *Guidelines* explain that "[a] firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement, or that competitively significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter."[19]

## 3. Agency Experience

12. For years, the Agencies have incorporated concerns about potential competition in all areas of their antitrust law enforcement programs, including: criminal and civil enforcement of Section 1 of the Sherman Act; enforcement of Section 2 of the Sherman Act; enforcement of Section 7 of the Clayton Act; and, for the FTC, enforcement of Section 5 of the FTC Act.

### 3.1. Examples of Anticompetitive Agreements Involving Potential or Emerging Competitors

13. The Department of Justice criminally prosecutes price fixing, bid rigging, and market/customer allocation agreements involving potential competition. Such agreements are *per se* violations of Section 1 of the Sherman Act.[20]

14. For example, in a case involving bid rigging at public home-foreclosure auctions in California, a group of real-estate investors agreed not to compete for certain properties and split the resulting savings.[21] One investor approached potential competitors, proposing that they "could all get along and not beat each other up every day."[22] That is how the group eliminated potential competition from one newly arrived investor who joined the conspiracy and was ultimately charged with the rest of the group.[23] Other new arrivals were warned to "stay out" and "don't come back here."[24]

15. In another criminal Section 1 case, two firms provided heir-location services—that is, they identified people who might be entitled to an inheritance from the estate of someone who died without a will, then, for a fee, helped those people secure their inheritance.[25] As

[18] Id., §1.1.

[19] Id., §1.1 n.6.

[20] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶2004d ("Clearly the per se rule against naked price agreements covers actual competitors. Equally clearly, it reaches potential competitors contemplating transactions in which competition is likely or even possible"); id., ¶2030b ("As a general proposition, the per se rule against naked horizontal market-division agreements applies equally to firms that were actual competitors before the division agreement took effect and to firms whose competition was merely potential.").

[21] United States v. Katakis, 796 F. App'x 400 (9th Cir. 2020).

[22] Answering Brief for the United States of America at 8, Katakis, 796 F. App'x 400 (Nos. 17-10487, 18-10027).

[23] Id. at 10.

[24] Id. at 9.

[25] United States v. Kemp & Assocs., 907 F.3d 1264, 1268 (10th Cir. 2018).

part of their conspiracy, they agreed not to compete to sign heirs they both located.[26] Whoever contacted an heir first would get that heir's business, with no competition on fees. The conspiracy applied beyond that initial heir, as well, to other unsigned heirs to the same estate.[27] But for the conspiracy, those unsigned heirs were potential future customers of either firm and could have benefited from their potential competition. The trial court initially rejected application of the *per se* rule in the case, in part because the defendants agreed only to allocate new customers, as opposed to existing ones.[28] On appeal, the United States argued that "[n]ew customers are no less entitled to the benefits of competition, and the harm to competition is no less manifest in an allocation of new customers."[29] The Tenth Circuit signaled its agreement with the United States' position,[30] leading the district court to reverse itself on remand.[31]

16. Section 1 also proscribes unreasonable agreements in restraint of trade involving potential competitors in situations where the *per se* rule does not apply. Some examples are the FTC's cases involving reverse payment agreements between branded and generic pharmaceutical companies.

17. In 2009, the FTC sued Solvay Pharmaceuticals, Inc. (later acquired by Abbott), as well as two generic drug makers, alleging that Solvay paid the two potential generic entrants to delay their entry into the market. Solvay marketed a testosterone replacement drug, AndroGel, a prescription pharmaceutical with annual sales in 2009 of more than $400 million. In May 2003, Watson (later acquired by Actavis) and Paddock, which partnered with Par, each filed applications for FDA approval to market generic versions of AndroGel. Solvay's patent on AndroGel had been issued in January 2003, with an expiration date of August 2020. By early 2006, Watson had received final approval to market its generic product. According to the complaint, it was well known that if Watson or Par were to enter with lower-priced generic versions of AndroGel, Solvay's AndroGel sales would plummet and consumers would benefit from the lower prices. The FTC's complaint alleges that Solvay, realizing the devastating effect generic entry would have on its AndroGel franchise, acted unlawfully to eliminate this threat by paying the two generic manufacturers to delay entry until 2015. In 2013, in reviewing the lower courts' dismissal of the FTC's complaint, the Supreme Court in *FTC v. Actavis* reversed and remanded the case to the district court for a trial under the rule of reason. In articulating the harm caused by such agreements between actual and potential competitors, the Court explained that the payment from the branded manufacturer "likely seeks to prevent the *risk* of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm."

18. In 2017, the FTC brought an action alleging that, in 2010, Impax Laboratories and Endo Pharmaceuticals illegally agreed that Impax would not compete by marketing a generic version of Endo's Opana ER, an extended release version of the opioid oxymorphone. Endo agreed to settle the FTC's claims in a stipulated order entered in federal court. The case against Impax was tried before an Administrative Law Judge, who

[26] Id. at 1269.

[27] Id.

[28] *See* id. at 1278.

[29] Opening Brief for the United States of America at 34, Kemp & Assocs., 907 F.3d 1264 (No. 17-4148).

[30] 907 F.3d at 1278.

[31] United States v. Kemp & Assocs., No. 2:16-CR-403-DS, 2019 WL 763796 (D. Utah Feb. 21, 2019).

decided in favor of Impax. On appeal to the Commission, the Commission reversed the ALJ's initial decision, holding that the agreement between Impax and Endo violated Section 1 of the Sherman Act. Impax petitioned the U.S. Court of Appeals for the Fifth Circuit for review of the FTC's decision, which denied the petition and held in favor of the FTC. In affirming the FTC's decision, the Fifth Circuit observed that "[t]he fact that generic competition was possible, and that Endo was willing to pay a large amount to prevent that risk, is enough to infer anticompetitive effect."[32]

19. The FTC has also challenged anticompetitive conduct targeting potential competitors outside of the reverse payments context. In 2006, the FTC filed an administrative complaint against Realcomp II, an association of local real estate boards in southeastern Michigan, in which it alleged that Realcomp II unreasonably restrained competition by restricting the ability of member real estate agents to offer consumers lower-priced alternatives. It did this by refusing to transmit discount real estate listings to its own and other publicly available websites and by excluding such listings from the default searches within its own database. Realcomp II petitioned for review of the Commission's administrative decision, and in denying the petition, the U.S. Court of Appeals for the Sixth Circuit explained that "restricting the online dissemination of home listings is especially pernicious because of the *emerging competitive impact* of the internet and of discounted brokerage services on the residential real-estate market. . . . Substantial evidence shows [] that *the exclusion of nascent threats* such as discount brokerage services and consumer access to online listings is reasonably capable of contributing significantly to anticompetitive effects."[33]

20. The Justice Department has likewise used Section 1 to challenge anticompetitive rules involving real estate listing services targeted at innovative brokers.[34] In October 2007, the United States sued the Multiple Listing Service of Hilton Head Island, Inc. (HHMLS), alleging that HHMLS rules denied consumers in and near Hilton Head Island, South Carolina, the benefits of competition from low-cost or innovative real estate brokers.[35] HHMLS consented to a judgment requiring it to eliminate or modify the challenged rules.[36]

21. In May 2008, the United States sued the Consolidated Multiple Listing Service, Inc. (CMLS), alleging that CMLS rules denied consumers in and near Columbia, South Carolina, the benefits of competition from low-cost or innovative real estate brokers.[37] The complaint alleged that participation in CMLS was critical for brokers to compete in the Columbia area and that CMLS had violated Section 1 by adopting and enforcing rules prohibiting members from offering customized packages of brokerage services for reduced

[32] Impax Lab's v. FTC, No. 19-60395, slip op. at 15 (Apr. 13, 2021).

[33] Realcomp II v. FTC, 635 F.3d 815, 830 (6th Cir. 2011) (emphasis supplied).

[34] *See also* Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees, Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278 (4th Cir. 2012) (Nos. 11-1538, 11-1539, 11-1540, 11-1541) (supplementing Departmental enforcement actions in this area with amicus participation in private litigation).

[35] Complaint for Equitable Relief for Violation of 15 U.S.C. § 1 Sherman Antitrust Act, United States v. Multiple Listing Serv. of Hilton Head Island, Inc., No. 9:07-cv-3435 (D.S.C. Oct. 16, 2007), ECF No. 1.

[36] Final Judgment, Multiple Listing Serv., No. 9:07-cv-3435 (May 28, 2008), ECF No. 16.

[37] Complaint for Equitable Relief for Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, United States v. Consol. Multiple Listing Serv., Inc., No. 3:08-cv-01786 (D.S.C. May 2, 2008), ECF No. 1.

fees and by adopting and enforcing exclusionary membership criteria designed to prevent aggressive competitors from joining CMLS. Following fact and expert discovery, the United States moved for summary judgment on its Section 1 claims based on the undisputed evidence that CMLS successfully blocked the entry of low-cost and innovative brokers and that major brokers in the Columbia area charged higher commissions to home sellers in that area than they did in other parts of South Carolina.[38] Prior to trial, CMLS consented to a judgment requiring it to eliminate or modify the challenged rules.[39]

## 3.2. Examples of Illegal Monopolization through Conduct Targeting Potential or Emerging Competitors

22. The Justice Department's monopolization case against Microsoft reflects the Department and courts' concern about an incumbent monopolist's response to competition from firms operating outside a relevant market that might in the future grow into a viable alternative. In affirming the district court's holding that Microsoft unlawfully maintained its monopoly in violation of Section 2, the U.S. Court of Appeals for the D.C. Circuit explained that "it would be inimical to the purpose of the Sherman Act to allow monopolist free reign to squash nascent, albeit unproven, competitors at will."[40] The court also observed that "[n]othing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes."[41]

23. In 2012, the FTC filed an administrative complaint against McWane, a manufacturer of ductile iron pipe fittings, as well as its competitor, Star Pipe Products. One claim in the complaint alleged that McWane illegally maintained its monopoly power in the market for U.S.-produced pipe fittings by implementing an exclusive dealing policy with distributors, a crucial way to reach end customers, that prevented those distributors from purchasing domestic pipe fittings from McWane's rivals. On appeal to the Commission, the FTC held that McWane's exclusive dealing policy was illegal because it had the effect of preventing distributors from buying domestically produced pipe fittings from a new entrant into the market, which prevented the entrant from achieving the sales necessary to compete effectively and threaten McWane's monopoly. McWane petitioned for review of the Commission's decision to the U.S. Court of Appeals for the Eleventh Circuit, which denied the petition, reasoning that substantial record evidence supported the conclusion that McWane's exclusivity requirements prevented its potential competitor from achieving "the sales and revenue needed to invest in a domestic foundry of its own" and becoming a viable competitive alternative to McWane.[42]

24. Under certain circumstances, the acquisition of an emerging or nascent competitor may constitute anticompetitive conduct that illegally maintains a monopoly position. For instance, the FTC has filed suit against Facebook alleging that Facebook has engaged in a course of anticompetitive conduct with the aim of suppressing, neutralizing, and deterring competitive threats to its U.S. personal social networking monopoly.[43] The FTC's

[38] *See* Mem. in Supp. of the United States' Mot. for Summ. J. on Liability at 12-17, Consol. Multiple Listing Serv., No. 3:08-cv-01786 (Feb. 17, 2009), ECF No. 38.

[39] Final Judgment, Consol. Multiple Listing Serv., No. 3:08-cv-01786 (Aug. 27, 2009), ECF No. 68.

[40] United States v. Microsoft, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam).

[41] Id. at 59.

[42] McWane v. FTC, 783 F.3d 814, 839 (11th Cir. 2015).

[43] Complaint, *FTC v. Facebook, Inc.*, Dkt. No. 1:20-cv-3590-JEB (Dec. 9, 2020), ECF No. 3.

complaint alleges a single Section 2 count based on three main elements: acquiring Instagram, a developing competitor; acquiring WhatsApp, a competitive threat to enter the personal social networking market; and the anticompetitive conditioning of access to its platform to suppress additional competitive threats. The case is currently being litigated.[44]

## 3.3. Mergers and Acquisitions Involving Potential or Emerging Competitors

25. When reviewing a proposed merger, the Agencies consider whether firms not currently selling products or services in a particular market—including the merging parties themselves, as well as other potential entrants—might nevertheless influence competition for price, quality, and innovation, as well as other attributes, in the future. As the *Horizontal Merger Guidelines* explain, firms that have plans to enter the market in the near future can be considered market participants even if not currently deriving revenues from the market.[45] A firm not currently making sales may already have an effect on the behavior of firms currently making sales, and the acquisition of that entrant by a firm already in the market may violate the antitrust laws.[46]

26. The Agencies have challenged acquisitions where the transaction was likely to delay or thwart future competition against the incumbent, with a particular focus on harms to innovation. Identifying and proving a loss of potential competition is a fact-specific and predictive exercise. In some markets, such as pharmaceutical, medical device, and agricultural technology markets, the regulatory approval process helps identify products in development.

27. The FTC has challenged many mergers between pharmaceutical companies in which an incumbent supplier acquires a firm with a competing product in development, or where both firms are two of only a few potential entrants. Three recent submissions to the OECD include a discussion of potential competition theories in cases involving acquisition by pharmaceutical companies.[47]

### *3.3.1. Challenging an acquisition of a potential or nascent competitor*

28. In 2008, the Commission adjudicated claims that Polypore International's consummated acquisition of Microporous eliminated horizontal competition in four

[44] *See also* paras. 32-33, *infra*.

[45] *Horizontal Merger Guidelines*, supra note 11 § 5.1.

[46] *See, e.g.*, Op. of the Comm'n, In re Polypore International, Inc., Dkt. 9327, at 38 (Dec. 13, 2010), http://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf (even though not generating revenues at the time of the merger, acquired firm was a market participant because it had bid on several supply contracts, it had made meaningful progress to supply two of the largest customers, and Polypore had reduced its prices in response), aff'd, Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012).

[47] OECD Global Forum on Competition, *Startups, Killer Acquisitions, and Merger Control – Contribution from the United States* (Jun. 11, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf; OECD Global Forum on Competition, *Merger Control in Dynamic Markets – Contribution from the United States* (Dec. 6, 2019) https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-merger_control_in_dynamic_markets_us.pdf; OECD Global Forum on Competition, *Non-price Effects of Mergers – Contribution from the United States* (Jun. 6, 2018) https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/non-price_effects_united_states.pdf.

markets: deep-cycle battery separators; motive battery separators; automotive starter, lighter, and ignition battery separators (“SLI”), and uninterruptible power supply stationary (“UPS”) battery separators. In its review of an ALJ’s decision finding the acquisition to have eliminated competition in the market for SLI battery separators (used in automotive applications), the Commission rejected Polypore’s argument that Microporous was not a participant in the relevant market.[48] The Commission recognized that although Microporous had not made any sales of SLI battery separators, it was actively competing for contracts, and had made “meaningful progress” towards agreements to supply two large North American automotive battery manufacturers with SLI battery separators. The Commission found that Daramic, Polypore’s battery separator unit, perceived Microporous as a competitor before the merger, and reduced prices in response to this competitive threat. The Commission rejected Polypore’s argument that Microporous’s failure to obtain those supply agreements was evidence inconsistent with a conclusion that Microporous was a market participant.

29. In a case that relied on a theory of potential competition, a U.S. district court held that the Commission had failed to carry its burden when challenging a merger between two firms providing contract sterilization services to health care product manufacturers. The FTC sought a preliminary injunction to prevent the proposed merger (pending an administrative trial) of Steris Corporation, one of only two companies providing sterilization services to medical device firms in the United States, and Synergy Health plc, a British company with plans to expand into the United States with a new, possibly superior, sterilization technology. Synergy had advanced plans to enter, such as securing physical locations for its plant and contracting for the required equipment. But Synergy officials testified at trial that they likely would not have followed through with those entry plans, and the court found the testimony sufficient to conclude that the entry was not “probable.”[49]

30. By contrast, another U.S. district court agreed to block health insurer Aetna Inc.’s acquisition of rival insurer Humana Inc. in 2017.[50] By the time of trial, Aetna had stopped offering insurance through Affordable Care Act exchanges in 17 relevant markets. The court nevertheless concluded that Aetna should be analyzed as a potential future competitor in these markets because it had previously participated in them, it offered similar products in adjacent markets, and there were indications that it planned to reenter them in the near future.[51]

31. In 2016, the Justice Department challenged Westinghouse Air Brake Technology Corporation’s (“Wabtec”) acquisition of Faiveley Transport, which manufactured various freight railcar brake components. Faiveley was developing its own control valve, which is the most highly engineered, technologically sophisticated component in a freight car brake system. The market for control valves had been a duopoly, including Wabtec, for years. Once Faiveley could manufacture a control valve, it could more directly compete with the two incumbents, though full commercialization and approval was likely years away. Wabtec’s acquisition of Faiveley would have eliminated future competition for control valves by preventing Faiveley’s entry into this market. To remedy this concern, the

[48] Op. of the Comm’n, In re Polypore International at 2.

[49] FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015). The Commission later dismissed its administrative complaint. In re Steris Corp., and Synergy Health PLC., Dkt. No. 9365 (May 29, 2015).

[50] United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017).

[51] Id. at 77-78.

companies agreed to divest Faiveley's entire U.S. freight car brakes business to Amsted Rail Company, an employee-owned rail equipment company.[52]

32. The Agencies may consider whether a merger would be likely to diminish competition in innovation by reducing the incentive for the merged firm to (1) continue with an existing product development effort or (2) initiate development of new products.[53] For example, in 2020, the Commission challenged the merger of Össur Hf and College Park Industries, Inc., both makers of prosthetic limbs. The FTC alleged that the transaction, which was not reportable under the Hart-Scott-Rodino Act, was likely to harm U.S. customers of myoelectric elbows. These prosthetic devices, which use electromyographic signals and battery-powered motors, have substantial functional advantages over mechanical elbows because they are easier and more natural to control than mechanical elbows.[54] According to the complaint, the U.S. market for myoelectric elbows is highly concentrated, with College Park as a leading supplier. Prior to the acquisition, Össur was developing its own myoelectric elbow, and absent the proposed acquisition, it would likely compete with College Park for U.S. sales of myoelectric elbows. To settle the charges, College Park agreed to divest all the assets associated with its myoelectric elbow business, including its intellectual property, confidential business information, manufacturing technology, existing inventory, and agreements to manufacture and distribute myoelectric elbows.

33. In December 2019, the FTC challenged the acquisition of an innovative biotech firm, Pacific Biosciences of California, by an established incumbent, Illumina, as a violation of both Section 7 of the Clayton Act and Section 2 of the Sherman Act. The FTC alleged that Illumina's proposed acquisition of PacBio would substantially lessen current and future competition in a market for next-generation DNA sequencing systems, a rapidly expanding technology used in genetic research and clinical testing, and that the acquisition would unlawfully maintain Illumina's monopoly power. Illumina's systems employed short-read sequencing technology, and at the time of the proposed acquisition, it had a market share of more than 90%. PacBio's platforms employed long-read sequencing technology, and, at the time of the proposed acquisition, it had a market share of approximately 2% to 3%. Despite the differences between their respective systems, PacBio had recently made significant technological advances, and, absent the proposed acquisition, competition between Illumina and PacBio would increase substantially in the future. The FTC also alleged that the acquisition constituted unlawful maintenance of Illumina's monopoly in the U.S. market for next-generation DNA sequencing systems, by extinguishing PacBio as a nascent competitive threat. The FTC alleged that the parties could not verify or substantiate any merger-specific efficiencies, that their procompetitive justifications for the acquisition were pretextual, and that any procompetitive effects flowing from the acquisition could be accomplished through means other than the

[52] United States v. Westinghouse Air Brake Technologies Corp., No.1:16-cv-02147 (D.D.C. filed Oct. 26, 2016).

[53] *Horizontal Merger Guidelines*, supra note 11 § 6.4.

[54] In the Matter of Ossur Hf. and College Park Ind., C-4712 (Apr. 7, 2020), https://www.ftc.gov/enforcement/cases-proceedings/191-0177/ossur-hf-college-park-industries-matter.

acquisition.[55] The parties abandoned their merger plans after the FTC filed its complaint.[56] The UK Competition and Markets Authority (CMA) was also reviewing the transaction and had issued provisional findings that the merger was anticompetitive.

34. In another case that alleged violations of both Section 2 of the Sherman Act and Section 7 of the Clayton Act, the United States recently sued to stop Visa's $5.3 billion acquisition of Plaid, a fintech firm developing a payments platform to challenge Visa.[57] The complaint alleged that Visa is a monopolist in online debit, charging consumers and merchants billions of dollars in fees each year to process online payments; that Plaid's platform would challenge Visa's monopoly; and that the transaction would allow Visa to eliminate this nascent competitive threat before it had a chance to succeed. The parties abandoned the merger before trial.

### *3.3.2. Challenging an acquisition using a vertical theory of harm*

35. The Agencies have relied on vertical theories of harm where one of the merging parties supplies a key input for potential competitors of the acquired firm. The FTC recently challenged Illumina's proposed acquisition of Grail, a manufacturer of a non-invasive, early detection liquid biopsy test that can screen for multiple types of cancer in asymptomatic patients at very early stages using DNA sequencing. Illumina is the only provider of DNA sequencing that is a viable option for these multi-cancer early detection (MCED) tests in the United States.[58] The FTC alleges that Grail is racing against several other firms to develop and ultimately commercialize this revolutionary technology.[59] Grail's rivals cannot use any product other than Illumina's next generation sequencing platforms to develop a clinically effective and commercially viable MCED test capable of competing with Grail's test. As the *Vertical Merger Guidelines* explain, a vertical merger may diminish competition by leaving the merged firm with the ability and incentive to use its control of the related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market.[60]As the only supplier of a critical input, Illumina already possesses the ability to foreclose or disadvantage Grail's MCED rivals. Post-acquisition, Illumina will have the ability to monitor each company developing an MCED test using its NGS platform and the incentive to kill or disable any products that appear likely to take significant business away from Grail. The Commission's complaint charges that allowing Illumina to purchase Grail would cause substantial harm to U.S. consumers, who would experience reduced innovation, as well as potentially higher costs and reduced choice and quality for these life-saving products.

36. The Agencies have also challenged vertical transactions that would make it more difficult for potential competitors to enter a concentrated market. For example, in 2018, the

[55] In the Matter of Illumina, Inc. and Pacific Biosciences of California Inc., Dkt. 9387 (filed Dec. 17, 2019).

[56] Pacific Biosciences Press Release, Illumina and Pacific Biosciences Announce Termination of Merger Agreement (Jan. 2, 2020), https://www.pacb.com/press_releases/illumina-and-pacific-biosciences-announce-termination-of-merger-agreement/.

[57] United States v. Visa Inc., No. 3:20-cv-07810 (N.D. Cal. filed Nov. 5, 2020).

[58] FTC Press Release, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail, (Mar. 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

[59] In the Matter of Illumina, Inc., and GRAIL, Inc., Dkt. 9401 (filed Mar. 30, 2021).

[60] *Vertical Merger Guidelines*, supra note 15 § 4.a.

FTC challenged an acquisition by a joint venture ("JV") of three polyethylene terephthalate resin ("PET") resin producers—DAK, Indorama, and FENC—of an unfinished PET and purified terephthalic acid ("PTA") production facility after its original manufacturer filed for bankruptcy.[61] The JV members were three of only four North American PET producers and controlled approximately 90% of North American PET capacity. The JV members DAK and Indorama were two of only three significant PTA producers in North America, and the joint venture gave them an even greater share of PTA market capacity. The Commission recognized that, unless the JV Agreement was modified to require the JV entity to market the plant's unused capacity to third parties, the JV partners would likely not supply PTA to rivals. Thus, "two-tier entry in both the PET and PTA markets would likely be necessary for an entrant to become truly competitive," making entry into the concentrated markets significantly more difficult.

37. Related to the two preceding cases, the United States sued when a consortium of cable companies attempted to acquire satellite assets that were uniquely suited to entering their market.[62] The complaint alleged: "The proposed acquisition . . . would allow the dominant firms to control a key asset that could and would have been used to compete against them thereby preventing entry into the market or more effective competition by existing competitors." In other words, "their strategy is to keep this scarce asset out of the hands of any firm that would compete vigorously against their cable operations." The complaint included claims under both Sections 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act. The parties abandoned the acquisition before trial.

### *3.3.3. Acquisitions involving disruptive firms*

38. The Agencies have also challenged proposed mergers between established incumbent firms and disruptive firms that already compete in a relevant market, including where the potential for even more vigorous competition exists. For example, the FTC challenged two proposed mergers in the razor industry—one between Harry's and Edgewell and one between Procter & Gamble and Billie—contending that the two target companies, though already competing head-to-head with the acquiring firm, served as disruptive forces in the marketplace. In Harry's/Edgewell, the FTC's complaint charged that Harry's was the first internet-based razor company to place its product in brick-and-mortar stores.[63] Any new entrant would have lacked Harry's early-mover advantage in the crowded shelves of brick-and-mortar retailers. In P&G/Billie, the FTC charged that the proposed merger would have stopped Billie's expansion beyond internet sales as it was on the cusp of expanding into brick-and-mortar retail stores, which would have greatly heightened the competition between the two companies.[64] The parties to both mergers abandoned the transactions following the FTC's complaints.

39. In addition, in 2018, the FTC challenged the merger of CDK Global and Auto/Mate.[65] CDK was the market leader in specialized platform business software for franchise automotive dealers. Auto/Mate was a much smaller competitor with an innovative

[61] In the Matter of Corpus Christi Polymers LLC et al., FTC File No. 181-0030, https://www.ftc.gov/enforcement/cases-proceedings/corpus-christi-polymers-llc-et-al-matter.

[62] United States v. Primestar, Inc., No. 98-cv-01193 (D.D.C. filed May 12, 1998).

[63] In the Matter of Edgewell Personal Care Company and Harry's, Inc., Dkt. 9390 (filed Feb. 2, 2020).

[64] In the Matter of The Procter & Gamble Co., and Billie, Inc., Dkt. 9400 (filed Dec. 8, 2020).

[65] In the Matter of CDK Global, Dkt. 9382 (filed Mar. 20, 2018).

business model that was winning business from larger firms by offering lower prices, flexible contract terms, low fees for third-party apps participating on the platform, free software upgrades and training, and high-quality customer service. Although Auto/Mate was already competing in the market, the FTC was concerned that the acquisition would eliminate its future competitive significance. Auto/Mate's impact on existing platforms indicated that its preacquisition market share underrepresented its future market significance and the FTC concluded that the acquisition would have eliminated competition from a key emerging rival. The parties terminated their acquisition agreement shortly after the FTC issued its complaint.

40. In 2011, the Justice Department sued under Section 7 to block the $287.5 million acquisition of TaxACT by H&R Block Inc. The United States alleged that the proposed acquisition would reduce competition in the growing U.S. digital do-it-yourself tax preparation software market, resulting in higher prices and reduced innovation. H&R Block and TaxACT were, respectively, the second- and third-largest providers of such software, and TaxACT had a track record of being a disruptor, through aggressive price competition and innovations like free federal filing. Following a nine-day bench trial, the trial court agreed to enjoin the merger.[66]

41. Also in 2011, the Justice Department sued under Section 7 to block the $39 billion acquisition of T-Mobile USA Inc. by AT&T Inc.[67] The proposed acquisition would have combined two of the four nationwide providers of mobile wireless telecommunications services, which accounted for more than 90% of mobile wireless connections. It also would have eliminated from the market T-Mobile, a firm that had historically offered particularly aggressive pricing and innovation. The United States considered T-Mobile a disruptor in the market, as it was responsible for a number of "firsts" in the industry, such as the Android headset, Blackberry wireless email, the Sidekick, and unlimited service plans. The partied abandoned the proposed acquisition before trial. (T-Mobile subsequently merged with Sprint.[68])

42. In 2019, the Justice Department sued under Section 7 to block Sabre Corporation's $360 million acquisition of Farelogix, Inc., a deal that would have allowed the largest airline booking services provider in the United States (Sabre) to eliminate a disruptive competitor that had introduced new technology to the travel industry and was poised to grow significantly (Farelogix). The United States alleged that Sabre used outdated technology and resisted innovation, while Farelogix had pioneered new tools that allowed airlines to make a wider array of offers to travelers who book tickets through travel agencies. Farelogix's presence also allowed airlines to negotiate lower fees with Sabre and to reduce their reliance on its services. At trial, the United States presented evidence that Sabre had a history of trying to undermine and delay the adoption of Farelogix's technology. The court found that "Sabre viewed the acquisition of Farelogix as way to neutralize [a] perceived threat," that "Sabre has resisted change while Farelogix has been a pioneering innovator and disruptor," and that "Sabre will have the incentive to raise prices . . . and stifle innovation" following the acquisition.[69] The merging parties prevailed at trial despite these findings, but they abandoned their deal soon after, leading to vacatur

[66] United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011).

[67] Amended Complaint, United States v. AT&T Inc., Civil Action No. 11-01560 (ESH) (D.D.C. Sept. 16, 2011).

[68] *See* Paragraph 44, *infra*.

[69] United States v. Sabre Corp., 452 F. Supp. 3d 97, 146 (D. Del. 2020).

of the trial decision.[70] The U.K. Competition and Markets Authority (CMA) separately reviewed the transaction, found that it would reduce innovation, and declared it anticompetitive. Sabre appealed the CMA's decision, and the Competition Appeal Tribunal dismissed all grounds for appeal. *See* https://www.catribunal.org.uk/sites/default/files/2021-05/1345_Sabre_Judgment_210521.pdf.

43. Also in 2019, the Justice Department sued under Section 7 to block Novelis, Inc.'s proposed acquisition of Aleris Corporation in order to preserve competition in the North American market for rolled aluminum sheet for automotive applications, commonly referred to as aluminum auto body sheet.[71] Novelis had long been one of only a few aluminum body sheet suppliers in North America, while Aleris was a relatively new and disruptive competitor that, in Novelis's own words, was "poised for transformational growth." The United States and the defendants agreed to arbitrate the dispositive issue of market definition. After a ten-day, first-of-its-kind arbitration proceeding, the arbitrator ruled against the merging parties, holding that aluminum auto body sheet constitutes a relevant product market. As a result, Novelis was required to divest Aleris's entire aluminum auto body sheet operations in North America.

### *3.3.4. Mergers where potential competition from a non-merging party was important to the outcome*

44. In *FTC v. Staples*, the merging parties (Staples and Office Depot) argued that Amazon Business, as well as local and regional office supply companies, would expand to provide large business-to-business (B-to-B) customers with competitive alternatives.[72] The Commission contended that other office supplies vendors, including Amazon Business, regional vendors, distribution consortia, and vendors of adjacent products, such as janitorial/sanitation products or breakroom supplies, could not meaningfully constrain a combined Staples-Office Depot. These office supply vendors generally had some combination of higher costs and thus higher prices, limited geographic footprints, and/or logistical and coordination challenges for large B-to-B customers. One key obstacle to expansion by regional firms or consortia was developing a large enough geographic footprint to serve large B-to-B customers. Creating a national distribution network comparable to Staples or Office Depot would have been time and resource intensive. As a result, the Commission alleged that other office supply vendors would not constrain Staples' and Office Depot's market power post-merger.[73] The district court agreed that the entry and expansion from these alternate sources would not be sufficient to erode the merger's likely anticompetitive effects.

45. The settlement allowing Sprint and T-Mobile to merge required a substantial divestiture package designed to enable a viable competitor (Dish) to enter the market.[74] By the terms of the settlement, T-Mobile and Sprint had to divest Sprint's prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to Dish Network Corp., a Colorado-based satellite television provider. The settlement also compelled the divestiture

[70] United States v. Sabre Corp., No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

[71] Complaint, United States v. Novelis, Inc., No. 1:19-cv-02033-CAB (N.D. Ohio Sept. 4, 2020), ECF No. 1.

[72] FTC v. Staples, Inc., 190 F. Supp. 3d 100, *133 (D.D.C. 2016).

[73] In the Matter of Staples and Office Depot, Dkt. 9367 (complaint filed Dec. 7, 2015).

[74] United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. filed July 26, 2019).

of certain spectrum assets to Dish and required T-Mobile and Sprint to make available to Dish at least 20,000 cell sites and hundreds of retail locations. T-Mobile also must give Dish access to the T-Mobile network for seven years while Dish builds out its own 5G network.

46. In the FTC's investigation of the proposed merger between Roche Holding and Spark Therapeutics, the Commission closed its investigation in part due to the existence of third party potential competitors.[75] A key question in the investigation was whether Roche would have the incentive to delay or discontinue Spark's developmental gene therapy for hemophilia A. The evidence collected showed that Spark was only one of several other companies in the process of developing a gene therapy treatment for hemophilia A. The Commission concluded that, as the other companies attempted to bring those gene therapies to market, Roche would have the incentive to accelerate Spark's gene therapy to compete for patients.

## 4. Conclusion

47. Antitrust law enforcement in the U.S. reflects significant concern—both by the Agencies and by courts—about potential competition. This concern about potential competition applies broadly across the different sources of law the Agencies enforce and the courts interpret. Accordingly, issues related to potential competition and potential competitors are relevant to criminal and civil enforcement of the antitrust laws, as well as the merger review process.

48. The Agencies' concern about potential competition are especially heightened when an industry features high barriers to entry, innovative firms, or substantial expenditures on research and development. The Agencies will continue to make vigorous and effective use of all tools available to protect competition, including competition provided by firms that are potential competitors in a relevant market.

[75] FTC, Statement of the Federal Trade Commission In Re Roche Holdings/Spark Therapeutics (Dec. 16, 2019), https://www.ftc.gov/system/files/documents/public_statements/1558049/1910086_roche-spark_commission_statement_12-16-19.pdf.