

**PREPARED STATEMENT OF THE  
FEDERAL TRADE COMMISSION**

**“COMPETITION IN DIGITAL TECHNOLOGY MARKETS:  
EXAMINING ACQUISITIONS OF NASCENT OR POTENTIAL COMPETITORS  
BY DIGITAL PLATFORMS”**

**BEFORE THE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY  
AND CONSUMER RIGHTS  
UNITED STATES SENATE**

**WASHINGTON, D.C.**

**SEPTEMBER 24, 2019**

Chairman Lee, Ranking Member Klobuchar, and members of the Subcommittee, thank you for the opportunity to appear before you today. I am Bruce Hoffman, Director of the Bureau of Competition at the Federal Trade Commission, and I am pleased to testify on behalf of the Commission and discuss the topic of acquisitions of nascent or potential competitors by digital platforms.<sup>1</sup>

Many sectors of the economy have experienced significant disruption—disruption brought about by the widespread use of technology to support new and evolving business models. Consumers have come to expect that “there’s an app for that,” and many technology-enabled businesses, particularly digital platforms, have thrived in the new digital economy. Digital platforms have played a large role in this change. It is easy to see that the manner in which goods and services are marketed and sold across our economy has been altered significantly by digital platforms. Consumers and businesses are reaping enormous benefits from the efficiency and convenience brought about by our new way of commerce. But change of this magnitude makes it all the more critical for the Commission to pay close attention to this space and vigorously enforce the antitrust laws. Otherwise, our country will fail to reap the full panoply of benefits that could be made possible by digital platforms and other technological innovations.

The Commission is committed to examining the effectiveness of its antitrust enforcement efforts, and welcomes robust debate on how best to use antitrust enforcement to promote competition and protect American consumers throughout the economy. Over the past year, the Commission held a series of hearings on competition and consumer protection topics intended to

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<sup>1</sup> This written statement represents the views of the Federal Trade Commission. The oral presentation and responses to questions by Director Hoffman are his own, and do not necessarily reflect the views of the Commission or of any Commissioner.

help refresh a bipartisan consensus on the proper scope and direction of antitrust enforcement and policy. This project, *Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century*, was modeled after a similar effort in 1995 by former FTC Chairman Bob Pitofsky, which established the FTC as a modern center for “competition R&D.” Several panels discussed issues relating to technology and the digital economy, including the acquisition of potential or nascent competitors in the digital marketplace.<sup>2</sup>

The latest round of technology-driven disruption, instigated in significant part by digital platforms, has caused some to question whether our competition laws and enforcement approaches can continue to protect consumers from anticompetitive conduct and mergers in fast-paced markets characterized by technological change. The Commission is cognizant of these concerns and is committed to applying our expertise, economic learning, and the flexibility of the antitrust statutes to ensure that digital platform and other technology markets remain competitive. In fact, the antitrust agencies have successfully applied the antitrust laws to technology companies that engage in anticompetitive conduct so as to maintain their dominant positions, and we are committed to continuing that tradition going forward.<sup>3</sup>

To address the potential challenges posed by digital industries, the Bureau of Competition’s newly formed Technology Task Force (“TTF”) is marshalling resources and expertise from across the Commission. The TTF is actively conducting investigations, and it is

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<sup>2</sup> Materials related to the October 17, 2019 panels discussing Acquisition of Nascent and Potential Competitors in Digital Technology Markets can be found on the FTC website, <https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century>.

<sup>3</sup> See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); *In re Intel Corporation*, Dkt. 9288 (Jun. 8, 1998). At the time the *Microsoft* case was litigated, commenters questioned whether antitrust could address the unique issues posed by the technology markets involved. The Department of Justice was able to utilize the flexible nature of the antitrust laws to confront the dynamic issues at the time. Today’s technology markets also pose highly unique challenges, and the Commission will endeavor to utilize our existing laws to protect American citizens and businesses from anticompetitive conduct.

also deepening our understanding of technology markets and strengthening our ability to protect consumers from anticompetitive conduct and harmful mergers in the digital technology space.

For nearly 130 years, the antitrust laws have been a central feature of our national economic policy, setting standards for vigorous competition and preventing the undue accumulation of market power that threatens consumer welfare and stymies economic growth. Congress drafted the antitrust laws in general terms specifically to accommodate changing markets and new products.<sup>4</sup> The Clayton Act, in particular, with its emphasis on stopping anticompetitive mergers and business trends in their incipiency, enables antitrust enforcement to account for changing markets and evolving economic analysis.<sup>5</sup>

This testimony describes the basics of antitrust analysis that the Commission can employ to prevent competitive harm in technology markets, including when reviewing acquisitions of nascent and potential competitors by digital platforms. A salient feature of tech companies is their dynamism, but the Commission is cognizant of the fact that digital platforms may have unique characteristics. The Commission also understands that, while the sale to an incumbent represents a valuable exit strategy for startups that encourages investment and innovation, established firms may seek to acquire nascent or potential competitors poised to challenge their market position. And as discussed below, merger analysis under the Clayton Act accounts for

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<sup>4</sup> In 2002, Congress created the bipartisan Antitrust Modernization Commission to determine whether U.S. antitrust law should be modernized. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §11054(h), 116 stat. 1856, 1857 (2002). The Commission concluded, “[t]here is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.” Antitrust Modernization Commission, Report and Recommendations 9 (2007). Nevertheless, through our *Hearings on Competition and Consumer Protection in the 21st Century*, we continue the process of refreshing the bipartisan consensus on the proper scope and direction of antitrust enforcement and policy.

<sup>5</sup> As the Supreme Court noted in *Brown Shoe v. United States*, 370 U.S. 294, 321-22 (1962), in drafting the Clayton Act “Congress used the words ‘may be substantially to lessen competition’ to indicate that its concern was with probabilities, not certainties.” Congress settled on “may be” to mean “reasonable probability” of anticompetitive effects, finding that “[a] requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.” S. Rep. No. 1775, 81st Cong., 2d Sess. 6. *See also* 51 Cong. Rec. 14464 (remarks of Senator Reed).

these incentives as well as any dynamic features of competition among firms already in the market and those seeking to enter the market. In addition to the Clayton Act, the Sherman Act bars a firm from gaining or maintaining a monopoly position through anticompetitive conduct, including acquisitions that exclude nascent and potential threats to its dominance. As explained below, acquisitions by monopolists of nascent competitive threats may violate Section 2 of the Sherman Act when they are “reasonably capable of contributing significantly to the defendant’s monopoly power,” unless outweighed by procompetitive justifications.<sup>6</sup>

### **A. Merger Review and Enforcement**

The Commission vigorously enforces Section 7 of the Clayton Act to prevent mergers that may substantially lessen competition or tend to create a monopoly. To determine which mergers are likely to result in anticompetitive harm—including higher prices, reduced quality, reduced output, or less innovation—the FTC uses a variety of tools, both qualitative and quantitative, to assess the likely competitive effect of a proposed transaction. The FTC’s competitive analysis is driven by facts collected from industry participants and experts, and is mindful that merger analysis is necessarily predictive and deals with likelihoods.<sup>7</sup> Of course, we evaluate every merger based on the credible evidence before us, as do the courts.

For mergers involving two direct competitors already in the market, the antitrust analysis is usually straightforward: will the elimination of one independent competitor create, enhance, or

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<sup>6</sup> *Microsoft Corp.*, 253 F.3d at 59, 79.

<sup>7</sup> In 2010, the FTC and Department of Justice issued revised Horizontal Merger Guidelines to explain the principal analytical techniques, practices, and enforcement policy under U.S. law with respect to mergers involving actual or potential competitors. The Guidelines state that “[m]ost merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.” Dep’t of Justice & Fed. Trade Comm’n, 2010 HORIZONTAL MERGER GUIDELINES (“HMG”) § 1.

entrench market power, or facilitate the exercise of market power? A merger enhances market power if, by eliminating an important competitive constraint, it increases the ability and incentive for one or more firms to raise price, reduce quality, reduce output, diminish innovation, or otherwise harm customers.

The FTC routinely challenges mergers that eliminate direct competition between the merging parties and, therefore, likely would lead to higher prices.<sup>8</sup> The FTC also investigates non-price effects,<sup>9</sup> including a reduction in innovative activity.<sup>10</sup> To analyze a merger between two longstanding competitors, we typically start by examining market shares in past years, whether the companies previously have marketed or bid against each other, and what factors influenced their competitive behavior, including their decisions on price, output, quality, and innovation. In a market where competitive conditions are relatively stable, those historical facts may help predict the likely path of future competition.

In dynamic technology markets and digital platforms in particular, however, we must consider the possibility that past evidence may not tell the whole story of future competition. Where recent or ongoing changes in market conditions indicate that current market shares may overstate or understate a firm's future competitive significance in the relevant market, the

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<sup>8</sup> See, e.g., *FTC v. Wilhelmsen*, No. 1:18-cv-00414 (D.D.C. July 21, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/171-0161/wilhelm-wilhelmsen-et-al-ftc-v> (likely unilateral effects); *In re Tronox Ltd.*, Dkt. 9377 (Dec. 5, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcrystal-usa> (increased risk of coordination). The district court issued a preliminary injunction to prevent the consummation of the merger of Tronox and Cristal, pending the outcome of the Commission's administrative proceedings. *FTC v. Tronox Ltd.*, No. 1:18-cv-01622 (D.D.C. Sept. 5, 2018). After the administrative law judge ruled that the merger was illegal, the companies agreed to divest all of Cristal's North American titanium dioxide assets.

<sup>9</sup> For instance, the FTC sued to block the merger between DraftKings, Inc. and FanDuel Ltd., the two largest online daily fantasy sports platforms. Both platforms were close competitors, and evidence showed that intense head-to-head competition between the digital gaming giants lead to price and non-price benefits to consumers. The Commission alleged that the proposed merger was likely to lead to higher fees and lower quality of the user experience. The parties abandoned the transaction shortly after the FTC filed suit, and the companies continue to compete to offer online daily contests. *In re DraftKings, Inc.*, Dkt. 9375 (complaint filed June 19, 2017).

<sup>10</sup> See Richard J. Gilbert & Hillary Greene, *Merging Innovation in Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1931-32 (2015) (between 2004 and 2014, the FTC challenged 164 mergers and alleged harm to innovation in 54 of them).

Commission will rely on the best available indicators.<sup>11</sup> The Commission is particularly mindful of situations where a technology firm, such as a digital platform, may possess durable market power due to network effects over other would-be competitors. Occasionally, imminent changes in a market may alleviate competitive concerns. But sometimes, to protect the interests of consumers, the Commission will act to preserve short-to-intermediate term competition even when markets are expected to change in the future.<sup>12</sup>

When evaluating mergers in dynamic markets, the Commission pays particularly close attention when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales. Last year, the FTC challenged the merger of market leader CDK Global, and far-smaller competitor, Auto/Mate.<sup>13</sup> According to the complaint, the transaction would have reduced competition in the already-concentrated market for specialized platform business software used by U.S. franchise automotive dealers, known as dealer management systems. Auto/Mate competed with CDK and other larger franchise dealer management system providers and won business 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. Auto/Mate's outsized impact on existing platforms indicated that the merger would dampen competition from a key emerging rival.

The Commission also is mindful that this kind of dynamic analysis may be required when the relevant products involve data. For example, in 2014 the Commission moved to block Verisk

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<sup>11</sup> HMG § 5.2.

<sup>12</sup> For example, in the waning days of brick-and-mortar video rentals, the Commission successfully brought an enforcement action to prevent Blockbuster from proceeding with its acquisition of Hollywood Entertainment Corporation until 30 days after it had complied with the requirements of the Hart-Scott-Rodino Act. *FTC v. Blockbuster, Inc.*, 1:05-cv-00463 (D.D.C.) (Mar. 4, 2005), <https://www.ftc.gov/enforcement/cases-proceedings/blockbuster-inc-et-al>.

<sup>13</sup> *In re CDK Global*, Dkt. 9382 (complaint filed Mar. 20, 2018). Shortly after the FTC issued its complaint, the parties abandoned their proposed transaction.

Analytics, Inc.’s proposed acquisition of EagleView, alleging that the proposed transaction would result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by insurers to estimate repair costs for property damage claims.<sup>14</sup> Before the merger, EagleView was the leading provider of rooftop aerial measurement products that relied on its proprietary software to analyze aerial images. Verisk provided the leading software platform used by insurers to process roof damage claims, and had recently entered into direct competition with EagleView by developing its own library of high-resolution aerial images. Other firms were only distant competitors. The Commission alleged that the elimination of the firms’ ever-closer competition would likely lead to higher prices and reduced incentives to innovate. After the Commission voted to challenge the acquisition, the companies abandoned their deal.

#### **B. Accounting for Firms Not in the Market: Market Participants and Likely Entrants**

Because Section 7 of the Clayton Act evaluates what is likely to occur if the merger goes forward, the Commission considers 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 in the future. For instance, as the joint FTC and DOJ Horizontal Merger Guidelines note, firms that are committed to entering the market in the near future can be considered market participants even if not currently deriving revenues from the market.<sup>15</sup> 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

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<sup>14</sup> FTC Press Release, “*FTC Challenges Verisk Analytic, Inc.’s Proposed Acquisition of EagleView Technology Corporation*,” (Dec. 16, 2014), <https://www.ftc.gov/news-events/press-releases/2014/12/ftc-challengesverisk-analytics-incs-proposed-acquisition>.

<sup>15</sup> HMG § 5.1.

market may violate Section 7.<sup>16</sup> For example, the Commission blocked the merger of two casino chains where one firm was building a new facility that would compete within a year with the other firm's existing casino.<sup>17</sup> When the acquired firm had nearly completed the process of entering the market, it was not difficult to predict that the acquisition would eliminate imminent head-to-head competition.

Some firms are not as close to entering the relevant market. They might need to expend more effort, either in terms of time or sunk costs, to begin making sales. Although these firms likely would not be viewed as current competitors, we would consider whether their entry would be timely, likely, and sufficient to counteract or deter any anticompetitive effects of a merger.<sup>18</sup> The competitive significance of such firms will depend on how far along they are in the variety of concrete steps needed to begin actual sales, and the likelihood such entry will occur.<sup>19</sup>

### **C. Mergers that Eliminate a Potential Competitor**

A merger may substantially lessen competition in violation of Section 7 if the acquired firm is in the process of entering the market and the merger would eliminate a future competitor whose entry, once complete, would provide competition. In *United States v. Falstaff Brewing*

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<sup>16</sup> 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> (acquired firm was a market participant even though not generating revenues at the time of the merger because it had bid on several supply contracts, and 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).

<sup>17</sup> *In re Pinnacle Entertainment, Inc.*, Dkt. 9355 (May 29, 2013) (Pinnacle had a casino operating in Lake Charles, Louisiana and Ameristar had begun building a new casino that was scheduled to open within a year), <https://www.ftc.gov/enforcement/cases-proceedings/131-0064/pinnacle-entertainment-inc-ameristar-casinos-inc-matter>. The Commission relied on projected revenues to determine the extent of likely future competition between the two casinos. See HMG, § 5.2 (market participants with likely future sales can be assigned market shares that reliably reflect their competitive significance).

<sup>18</sup> HMG § 9.

<sup>19</sup> Section 9 of the HMG identifies various elements of an entry effort: "planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements."

*Corp.*, the Supreme Court stressed that Section 7 extends to “certain acquisitions of a market competitor by a noncompetitor,” such as a merger involving a new entrant “who threatens to . . . upset market conditions,” to the detriment of competition.<sup>20</sup> The Horizontal Merger Guidelines explain that 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.”<sup>21</sup> Concerns about eliminating future market participants can arise where the evidence shows that independent entry would have procompetitive effects that would be lost with the merger. As in any merger investigation, the type and extent of evidence needed to determine whether a firm is a potential competitor will vary with the circumstances.

The Commission has relied on a theory of potential competition to require relief in numerous pharmaceutical markets where one firm had a product on the market while the other merging firm had a product in development that would likely provide important competition in the near future.<sup>22</sup> The Food and Drug Administration must approve pharmaceutical products in specific stages, which provides a degree of transparency and predictability as to the timing of potential entry of a new drug. Moreover, the Commission’s experience in pharmaceuticals markets allows us to project the likely procompetitive effect of a new drug.<sup>23</sup>

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<sup>20</sup> 410 U.S. 526, 531 (1973) (citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578- 80 (1967)).

<sup>21</sup> HMG § 5.3.

<sup>22</sup> See Fed. Trade Comm’n, *Overview of Action in Pharmaceutical Products and Distribution* (August 2018), list of cases included in Potential Competition Mergers, at 60-67 and Innovation Market Mergers at 67-68:

[https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview\\_pharma\\_august\\_2018.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_august_2018.pdf).

<sup>23</sup> Fed. Trade Comm’n, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* ii-iii (2011), <http://www.ftc.gov/sites/default/files/documents/reports/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission.pdf> (the first generic competitor’s product is typically offered at a 20 to 30 percent discount to the brand product); Fed. Trade Comm., *Pay-For-Delay: How Drug Company Pay-offs Cost Consumers*

Of course, there are always challenges to predicting future entry and convincing a court that entry is likely. In a recent proceeding that relied on a theory of potential competition, the 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 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.”<sup>24</sup> This case is a reminder that future competition cases pose challenges in weighing and assessing evidence, since predictions about entry can often be called into question.<sup>25</sup>

#### **D. Taking Account of Effects on Innovation**

Competition drives firms to innovate, and a merger that eliminates competition may, in addition to cutting off price competition, reduce or eliminate innovative activity that would result in higher quality products or greater product variety. In some cases, a company may acquire an

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*Billions* 8 (2010), <http://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf> (subsequent generic entry creates greater price competition, with discounts of 85 percent or more off the price of the brand name drug).

<sup>24</sup> *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).

<sup>25</sup> In a typical horizontal merger, competitive concerns arise from a merger that eliminates actual and direct competition between the merging parties, which in some markets can be measured with quantitative analysis that predicts effects. In a merger between an established incumbent and a potential entrant, the competitive concern arises from the elimination of the possibility of direct competition that does not currently exist, and will not be realized if the merger proceeds.

innovative upstart rival in an effort to snuff out future innovative competition. The Commission will consider whether a merger would incentivize the merged firm to slow or curtail its innovative efforts below the level that would prevail but for the merger.<sup>26</sup> Specifically, the Commission may consider whether a merger would be likely to diminish innovation competition by reducing the incentive for the merged firm to (1) continue with an existing product development effort or (2) initiate development of new products.

For example, in 2009, the Commission authorized litigation to block Thoratec Corporation's proposed \$282 million acquisition of rival medical device maker HeartWare International, Inc. The Commission charged that the transaction would substantially reduce competition in the U.S. market for left ventricular assist devices ("LVADs"), a life-sustaining treatment for patients with advanced heart failure. HeartWare was engaged in clinical trials for what many considered to be a superior device. Although the path to regulatory approval of these devices is challenging, there was ample evidence that HeartWare's device was the most likely future competitor to Thoratec's device. The few other companies developing LVADs were significantly behind HeartWare in their clinical trials and were unlikely to reach the market as soon as, or be as competitive as, HeartWare's device.<sup>27</sup> The Commission filed a complaint to block the transaction, alleging that no other firm could replace the current and future competition

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<sup>26</sup> The 2010 revisions to the Horizontal Merger Guidelines added a new section to explain how the agencies assess the potential for a merger to reduce innovative activity below the level that would prevail without the merger. A reduction in innovation and product variety is a type of non-price unilateral effect that may arise from a merger. HMG § 6.4.

<sup>27</sup> *In the Matter of Thoratec Corp. and HeartWare Int'l., Inc.*, Dkt. 9339 (July 30, 2009).

eliminated by the merger.<sup>28</sup> The parties abandoned the transaction in the face of the Commission challenge.

### **E. A Merger of Two Potential Competitors in Emerging Markets**

The Commission also has experience analyzing mergers involving two firms both with innovative products in development, either one of which would be the first product of its kind.<sup>29</sup> Where a merger of potential competitors in a future market may delay competition by bringing separate development efforts under common control, the Commission may require a divestiture of one product under development. In some cases, however, the Commission may determine that the merger is beneficial on balance because neither of the merging parties' products is likely to come to market without the merger, and the combined development effort is more likely to yield a successful product.<sup>30</sup>

In markets beyond the pharmaceutical arena, the Commission has applied a similar analysis where neither of the merging firms has a commercially available product, but both are among only a few likely entrants into a future market. For example, in the 2013 merger involving Nielsen and Arbitron, both companies were developing cross-platform measurement services to measure viewership across TV, the Internet, and other platforms. Both firms had developed

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<sup>28</sup> FTC Press Release, *FTC Challenges Thoratec's Proposed Acquisition of HeartWare Int'l.*, (July 30, 2009), <http://www.ftc.gov/news-events/press-releases/2009/07/ftc-challenges-thoratecs-proposed-acquisition-heartware>. The parties abandoned the transaction in the face of the Commission challenge.

<sup>29</sup> See, e.g., *In re Pfizer, Inc.*, Dkt. C-3957 (Jun. 19, 2000), <https://www.ftc.gov/enforcement/cases-proceedings/0010059/pfizer-inc-warner-lambert-company>. Pfizer and Warner were the two companies furthest along in developing Epidermal Growth Factor receptor tyrosine kinase ("EGFR-tk") inhibitors for the treatment of solid cancerous tumors. In requiring the divestiture of Pfizer's development efforts to its partner, the Commission alleged that the proposed merger was likely to create anticompetitive effects in the EGFR-tk inhibitor market by potentially eliminating one of the few research and development efforts in this area, allowing the combined entity to unilaterally delay, terminate, or otherwise fail to develop one of the two competing EGFR-tk drugs, resulting in less product innovation, fewer choices, and higher prices for these drugs.

<sup>30</sup> See FTC Press Release, *FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc.* (Jan. 13, 2004), <https://www.ftc.gov/news-events/press-releases/2004/01/ftc-closes-its-investigation-genzymecorporations-2001>.

plans, invested money, and reached out to customers to begin marketing beta versions of those products. Customers believed that Nielsen and Arbitron would compete—and that the two companies were best positioned to develop a new cross-platform measurement product. Based on these independent efforts, customers believed that Nielsen and Arbitron eventually would compete directly to provide national syndicated cross-platform measurement services. The Commission concluded that each company could be considered a likely future entrant, and that the elimination of the future offering of one would likely result in a lessening of competition.<sup>31</sup>

Although investigations involving future markets present challenges to developing an evidentiary record of likely future competition, the Commission will look to the same sources of evidence that inform the contours of competition in existing markets.

#### **F. Application of Sherman Act Standards to Prevent Acquisitions and other Anticompetitive Conduct by Monopolists**

Because the FTC Act prohibits conduct that also violates the Sherman Act,<sup>32</sup> the Commission may use existing standards under the Sherman Act to prevent a large incumbent from impeding nascent threats to its market position. As the U.S. Court of Appeals for the D.C. Circuit stated in the *Microsoft* case, “it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will . . . .”<sup>33</sup>

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<sup>31</sup> *In re Nielsen Holdings, N.V. and Arbitron Inc.*, Dkt. C-4439 (Sept. 20, 2013), <https://www.ftc.gov/enforcement/cases-proceedings/131-0058/nielsen-holdings-nv-arbitron-inc-matter>. The Commission approved the divestiture of Arbitron’s cross-platform audience measurement services to comScore, Inc.

<sup>32</sup> Violations of Section 2 of the Sherman Act also constitute “unfair methods of competition” under Section 5 of the Federal Trade Commission Act. *See Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953). The Commission relies on case law and other authority applying the Sherman Act for its analysis.

<sup>33</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam). *Microsoft* did not involve a merger or acquisition. But this statement appears in the part of the opinion that addresses the appropriate standard of causation under Section 2 generally, and would therefore apply with equal force if a monopolist attempts “to squash nascent, albeit unproven, competitors” via a merger or acquisition.

A claim of monopolization under Section 2 of the Sherman Act requires “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>34</sup> As the Supreme Court underscored in *Spectrum Sports, Inc. v. McQuillan*, “[t]he law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”<sup>35</sup> This imposes a stringent requirement—the existence of monopoly power or the dangerous probability of its acquisition—along with a somewhat relaxed causation requirement (as compared to the causation requirements imposed under Section 1 of the Sherman Act or Section 7 of the Clayton Act).<sup>36</sup>

Note that Sherman Act liability does not turn on proof that the potential entrant would have improved competitive conditions in the market or that the entry would have actually occurred. Rather, as the *Microsoft* court pointed out, the question is “whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued market power” (and that the effect of eliminating such entry is not outweighed by procompetitive justifications).<sup>37</sup> The court further commented that “it 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 advance and frequent paradigm shifts.”<sup>38</sup>

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<sup>34</sup>*United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

<sup>35</sup>*Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

<sup>36</sup> See Bruce Hoffman, “Antitrust in the Digital Economy: A Snapshot of FTC Issues,” Remarks at GCR Live Antitrust in the Digital Economy, Palo Alto, CA (May 22, 2019).

<sup>37</sup> *United States v. Microsoft*, 253 F.3d 34, 59, 79 (D.C. Cir. 2001).

<sup>38</sup> *Id.*

Under certain circumstances, the acquisition of an emerging or nascent competitor may constitute anticompetitive conduct that illegally maintains a monopoly position. In 2017, the FTC charged that Questcor illegally maintained its monopoly in the United States for a drug called Acthar that treated infantile spasms and other conditions. Outside of the United States, another drug, Synacthen, was sold in direct competition with Acthar. Questcor (later acquired by Mallinckrodt) bought the U.S. rights to Synacthen, outbidding several other companies for those development rights. The anticompetitive effects of this conduct were substantial because it deprived consumers of the chance that a competitor to an extraordinarily expensive lifesaving drug would emerge but for the acquisition, and, according to the complaint, Questcor had no legitimate business purpose for buying Synacthen other than eliminating a nascent competitor that threatened its Acthar monopoly. The Commission ordered Mallinckrodt to pay \$100 million in monetary equitable relief in addition to requiring the divestiture of the Synacthen assets.<sup>39</sup>

In 2008, the Commission charged Inverness Medical Innovations, Inc., the leading maker of popular consumer pregnancy tests, with seeking to maintain its 70 percent market share by acquiring the assets (including IP rights) of a smaller competitor that was developing a new consumer pregnancy test.<sup>40</sup> The Commission alleged that Inverness' 2006 acquisition of certain assets of ACON Laboratories, Inc. protected its monopoly power in digital consumer pregnancy tests by weakening future competition and stalling the development of tests using a different technology. Inverness agreed to settle the charges by divesting assets related to ACON's water-

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<sup>39</sup> FTC Press Release, *Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it>.

<sup>40</sup> *In re Inverness Medical Innovations, Inc.*, Dkt. C-4244 (Dec. 23, 2008), <https://www.ftc.gov/enforcement/cases-proceedings/061-0123/inverness-medical-innovations-inc-matter>.

soluble dye products, and not interfering with ACON's joint venture to develop competing digital consumer pregnancy test products.

The Commission's latest monopolization case, *FTC v. Surescripts LLC*,<sup>41</sup> alleges that Surescripts employed both vertical and horizontal restraints to maintain at least a 95 percent market share in two electronic prescription markets: routing and eligibility. Doctors and other prescribers usually access e-prescribing using their electronic health records software ("EHRs"). According to the complaint, Surescripts set out to keep customers on both sides of the market for e-prescription routing (EHRs and pharmacies) and eligibility (EHRs and pharmacy benefits managers) from using additional e-prescribing platforms (a practice known as multihoming) via anticompetitive exclusivity agreements, threats, and other exclusionary tactics. The litigation is still in its early phase, but the case is nonetheless indicative of the FTC's willingness to rely on Sherman Act standards to challenge anticompetitive conduct of technology firms.

## **G. Conclusion**

As demonstrated by FTC actions in technology and other dynamic markets, current law provides the Commission with several potential avenues to counter anticompetitive conduct by large technology firms to thwart nascent and potential threats by acquisition or other means. Given the importance of these markets to consumers and to the economy, the Commission is committed to vigorous enforcement of the antitrust laws to promote current and future competition in critical technology markets.

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<sup>41</sup> *FTC v. Surescripts LLC*, 19-cv-01080-JDB (D.D.C. complaint filed Apr. 24, 2019).