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**Prepared Remarks of Chairman Joseph J. Simons¹
ABA Section of Antitrust Law Fall Forum 2020
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I. Introduction

Good afternoon, everyone. Let me begin by thanking the Antitrust Section of the American Bar Association for inviting me to speak at the Fall Forum. This event is a highlight on my calendar every year, and I am glad to be here with all of you, albeit virtually.

Today, I am going to discuss an important and hotly debated topic in modern antitrust policy: acquisitions of emerging competitive threats by firms with significant market power. Although these types of acquisitions are most frequently discussed in the context of the tech industry, they occur in industries throughout the economy.

Before I do that, however, I first want to give a brief update on the Federal Trade Commission's (FTC) recent antitrust enforcement efforts. In short, the fiscal year that ended in September was incredibly busy and successful. Despite the many challenges created by the ongoing pandemic, the Bureau of Competition (BC) had more merger enforcement actions in FY2020 than any other year in the past 20 years. In addition, BC has a full slate of conduct matters pending before federal courts, with many other important investigations underway.² In

¹ These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.

² See Ian R. Conner, *A Fiscal Year Like No Other*, Competition Matters Blog (Oct. 6, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/10/fiscal-year-no-other>. As BC Director Ian

the last fiscal year, we brought three cases under Section 2 of the Sherman Act, continuing a trend of robust Section 2 enforcement that spans multiple administrations over multiple decades. Staff deserves kudos for their accomplishments under any circumstances, but to achieve these results during such difficult times is truly remarkable. I am extremely proud and very appreciative of all of staff's efforts.

II. Competition that May Occur in the Future is Important, Even When It's Uncertain

Now let me turn to a discussion of acquisitions of nascent competitors.

Before unpacking my legal argument, I first want to explain at a high level why antitrust enforcers ought to be concerned about competition between firms that might not occur until the future, or that might be more significant in the future, as opposed to just being concerned about competition that is already occurring. Successful firms are always looking forward: firms that grow (or stay large) do so in part because they have a plan for getting and staying ahead of the competition. This foresight can help firms develop both procompetitive and anticompetitive strategies. When foresight leads to innovation—better products, smarter technologies, more efficient operations, and so on—the result is more competition and greater consumer benefit. But when it leads to anticompetitive strategies—for instance, eliminating or suppressing competition through acquisitions or unlawful practices—the result is less competition and consumer harm.

And if firms are looking to the future, then antitrust enforcers should too. We must be willing and able to recognize that harm to competition might not be obvious from looking at the marketplace as it stands. If we confine ourselves to examining a static picture of the market at the moment we investigate a practice or transaction, without regard to the dynamic business realities

Conner has noted, “all three of our conduct divisions have undertaken challenging and demanding investigations across an array of industries in the economy.” *Id.*

at work, then we risk forfeiting the benefits of competition that could arise in the future to challenge the dominant firm, even when this future competition is to some extent uncertain.

III. Viewing the Future of Competition through Antitrust Law

So, how should we approach an acquisition of a nascent competitive threat by a monopolist when there is reason to think that the state of competition today may not tell the whole story? Existing law supplies two frameworks through which we can analyze such conduct: Section 2 of the Sherman Act and Section 7 of the Clayton Act. I will discuss each in turn.

When we have concerns that a monopolist may be using means other than competition on the merits to protect its monopoly power, the starting point is often Section 2. One of the leading Section 2 cases on conduct that targets fledgling rivals is, of course, the D.C. Circuit's opinion in *Microsoft*. In that case, the court held that Microsoft had engaged in monopolization by targeting nascent competitive threats to its PC operating system monopoly. Netscape Navigator and Sun's Java were not current competitors of Microsoft's operating system, but Microsoft saw—and feared—that they could become competitors in the future. In rejecting the argument that the plaintiff needed to prove a likelihood that Navigator and Java would in fact have become competitors, the court observed 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.”³

Although there were no mergers at issue in *Microsoft*, it is straightforward to apply this concept to an acquisition by a dominant firm. A merger or acquisition can of course constitute anticompetitive conduct for purposes of Section 2; in fact, in the case of *U.S. v. Grinnell*, three

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

acquisitions were among the identified exclusionary conduct.⁴ From a competition perspective, a monopolist can “squash” a nascent competitor by buying it, not just by targeting it with anticompetitive actions as Microsoft did. In fact, from the monopolist’s perspective, it may be easier and more effective to buy the nascent threat (even if only to keep it out of the hands of others) than to target it with other types of anticompetitive conduct.⁵

Another significant case dealing with nascent threats to competition is the FTC’s case against Actavis, which involved both Sections 1 and 2 of the Sherman Act. The Supreme Court in *Actavis* addressed what has come to be called a reverse-payment settlement, that is, one in which the patent-holder pays off the allegedly infringing generic defendant seeking to compete, and the generic abandons its patent challenge and agrees to forgo entry until some future date. A central question was whether showing harm to competition depended on an assessment of the likely outcome of the patent suit—that is, whether earlier entry was probable. In *Actavis*, the

⁴ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (“The offense of monopoly under § 2 of the Sherman Act has two elements: (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.”). The conduct challenged by the government as unlawful monopolization in *Grinnell* included several acquisitions by the defendant. *Id.* at 576 (holding that the defendant’s “monopoly was achieved in large part by unlawful and exclusionary practices . . . [including, among other things] [t]he acquisitions by Grinnell of ADT, AFA, and Holmes.”).

⁵ This concern has been at the core of several FTC enforcement actions. See FTC Press Release, *FTC Challenges Illumina’s Proposed Acquisition of PacBio* (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio> (“The Commission alleges in an administrative complaint that Illumina is seeking to unlawfully maintain its monopoly in the U.S. market for next-generation DNA sequencing (NGS) systems by extinguishing PacBio as a nascent competitive threat.”); 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> (“We charge that, to maintain its monopoly pricing, [Mallinckrodt] acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition.”). See also FTC Press Release, *FTC Challenges Thoratec’s Proposed Acquisition of HeartWare International* (July 30, 2009), <https://www.ftc.gov/news-events/press-releases/2009/07/ftc-challenges-thoratec-proposed-acquisition-heartware> (“Thoratec currently has a monopoly on the commercial sale of LVADs in the United States, and the FTC’s administrative complaint alleges that Thoratec seeks to maintain its monopoly by acquiring HeartWare, thus eliminating the only significant threat to Thoratec’s continued dominance of the LVAD market.”); FTC Press Release, *Inverness Medical Innovations Settles FTC Charges That it Stifled Future Competition in U.S. Market for Consumer Pregnancy Tests* (Dec. 23, 2008), <https://www.ftc.gov/news-events/press-releases/2008/12/inverness-medical-innovations-settles-ftc-charges-it-stifled> (“According to the Commission’s complaint, Inverness acquired these assets from ACON to maintain its monopoly in the pregnancy test market.”).

Court said no. It explained that the relevant harm there was preventing *the risk* of competition—competition that, *if it materialized*, would benefit consumers through lower prices and more choices, and take sales away from the incumbent.⁶

In both *Microsoft* and *Actavis*, the government was not required to show that, “but for” the challenged conduct, there would have been lower prices or enhanced output or innovation. And in *Microsoft*, the injury to the competitive process itself (including a material reduction in the risk of competition) was the relevant anticompetitive effect. There was no suggestion that the excluded threats were more-likely-than-not to displace Microsoft’s operating system monopoly; in fact, the whole point of Microsoft’s conduct was to target them *before* the point at which they would be likely to do so.

The other legal provision that can be used to challenge mergers that may eliminate a competitive threat to a monopolist is Section 7 of the Clayton Act. Section 7, of course, applies to any market—not just those dominated by a firm with monopoly power. And it is well established that Section 7 is an incipency statute that protects not just actual competition but also potential and nascent competition.

A central issue in potential competition cases is the nature and strength of evidence that the parties will become actual competitors in the future.⁷ Some cases have applied Section 7 narrowly in this context: too narrowly, I think, given that the purpose of Section 7 is to prohibit

⁶ *FTC v. Actavis, Inc.*, 570 U.S. 136, 157 (2013) (“The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm.”).

⁷ This issue of whether there is sufficient evidence to credit future entry typically is raised in “actual” potential competition cases. Another issue, in cases applying the “perceived” potential competition doctrine, is how a potential competitor’s presence is “perceived” by existing competitors in the market. *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625 (1974) (describing perceived potential competition doctrine as focusing on whether one of the merging firms “prompted premerger competitive effects within the target market by being perceived by the existing firms in that market as likely to enter *de novo*”).

acquisitions that “may” substantially lessen competition or “tend” to create a monopoly. Agencies and courts should therefore avoid such narrow interpretations of Section 7. We would not want a legal standard that allowed a party to escape liability, for example, by shutting down development efforts in anticipation of litigation and disavowing its commitment to entry. And we probably do not want a legal standard that would allow a dominant incumbent to acquire nascent competitive threats in their incipiency.

Here is an example of the kind of thing that antitrust law should be able to spot and remedy. Suppose that an incumbent monopolist carefully watched for the emergence of competitive threats and routinely acquired promising ones at an early stage, before their full potential was manifest. To fix ideas, suppose there are four potential entrants, each with a small chance of entering the market and provoking a significant competitive response from the monopolist. Assume, in this scenario, that the chance that at least one of the potential entrants will enter is more likely than not. If the monopolist were to acquire them all, this series of acquisitions would therefore be a problem even under a standard that requires a likelihood of entry.

But what if the monopolist acquires only one or two of the potential entrants? This would still reduce the risk of competition to the monopolist, even though it is not *likely* that either one of the acquired firms would have entered the market and provoked a competitive response. In my view, the reduction in the risk of competition in this scenario is nonetheless material and should be actionable under either or both Section 7 and Section 2. Failing that, however, Section 2 may offer a better tool, at least in cases where one party meets the fairly demanding threshold for monopoly power.⁸

⁸ See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 701d (“[W]e would adopt a relatively severe approach to holders of significant monopoly power: the acquisition of any firm that has the economic capabilities for

I also want to suggest that merger review should take seriously, not just the *probability* of possible harm to competition and consumers, but also its *magnitude*. If our goal as merger reviewers is to block transactions that threaten competition, then surely the magnitude of potential harm is also relevant to the inquiry. In fact, the Horizontal Merger Guidelines adopt such an approach.⁹ I believe there is sufficient flexibility in merger law to take a more holistic, effects-based view that accounts not only for the likelihood of entry, but also for market concentration levels and for the degree of benefits that may be realized if entry occurs. This approach can be especially important when the emerging firm is likely to shake up the status quo with a new technology, disruptive pricing, or through a new way of doing business.¹⁰ A myopic focus on the probability of entry creates some very strange and undesirable possibilities. For example, if a court were to decide that the requirements of the potential competition doctrine are satisfied only when entry is “more probable than not,” then the court would block a transaction when there is a 51 percent chance of a \$1 million harm, but not a 49 percent chance of a \$1 billion harm or a 20 percent chance of a \$100 billion harm. That is not a principled outcome, and it does not do enough to protect consumers or deter anticompetitive conduct.

entry and is a more-than-fanciful possible entrant is presumably anticompetitive, unless the acquired firm is no different in these respects from many other firms.”).

⁹ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010) [hereinafter “Horizontal Merger Guidelines”], § 5.3 (“A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition 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.”).

¹⁰ Horizontal Merger Guidelines, § 2.1.5 (“[I]f one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition.”).

I know that some worry that using the law to prohibit some acquisitions of small firms by large firms will reduce innovation.¹¹ Large firms often acquire small firms, and the payout associated with the acquisition may incentivize individuals and small firms to engage in costly and risky innovation in the first place. If the law prohibits all acquisitions of this type, then we might expect a lower amount of such innovation. This concern about how more aggressive merger enforcement affects innovation is perfectly legitimate, and I share it.

But it would be a mistake to say that this concern should lead to some sort of special treatment or immunity under the antitrust laws. It's true that a monopolist, defending its monopoly profits, is often likely to outbid a purchaser that expects no more than competitive returns from an acquisition. But it is simply not valid to assume that enforcing the antitrust laws to prevent monopolists from gobbling up nascent threats means that innovators won't get a fair return for their creativity and investment. For one thing, most acquisition targets—even most acquisition targets for a monopolist—are not competitive threats. And, for another, our antitrust framework already recognizes the importance of efficiencies and procompetitive benefits.

That brings me to one final qualification. Under the approach outlined by the court in *Microsoft*, the acquiring party has an opportunity to defend or justify the transaction, even if it is a monopolist, and even when the target poses some level of competitive threat. The court (as well as the Commission) will be required to consider whether the transaction is likely to produce efficiencies; that is, if the merging parties are able to put forward evidence verifying the claimed benefits and demonstrating that the transaction is necessary to achieve those benefits. However, this is a challenging bar to satisfy: the Horizontal Merger Guidelines teach us that “the antitrust

¹¹ See, e.g., Luis Cabral, *Mergers in High-Tech: A Response to Critics*, Competition Pol’y Int’l (Oct. 12, 2020) (arguing that reversing the burden of proof so that the acquirer must prove in court that the merger is procompetitive “would likely have a significant chilling effect on mergers (which is not surprising) and in turn would likely reduce the rate of innovation (which is more controversial) and ultimately would lower consumer welfare”).

laws give competition, not internal operational efficiency, primacy in protecting customers,” and that “particularly substantial” potential harms require “extraordinarily great” efficiencies.¹² I believe there is ample reason for courts—and the Commission—to apply this rigorous standard to acquisitions of nascent competitors by dominant firms analyzed under Section 2.

IV. Conclusion

In conclusion, I think a major theme of my remarks today has been uncertainty, or at least a specific kind of uncertainty. As I mentioned a few moments ago, what separates monopolists’ acquisitions of nascent competitive threats from ordinary mergers of existing competitors is an added layer of uncertainty created by the fact that, in these cases, current competition isn’t a good guide to future competition.

But uncertainty has always been a feature of the competitive process, even in markets that appear to be simple or traditional, and dealing with uncertainty is all in a day’s work for an antitrust enforcer. I have referred to the *Microsoft* case repeatedly today, so, in closing, let me remind everyone that there was some uncertainty about the future in *Microsoft* as well. The court, in holding that the plaintiff does not and should not bear the burden of “reconstruct[ing] a product’s hypothetical development,” observed that the defendant should appropriately be “made to suffer the uncertain consequences of its own undesirable conduct.”¹³ The same holds when the monopolist has simply chosen to acquire the threat.

¹² Horizontal Merger Guidelines, § 10.

¹³ *Microsoft*, 253 F.3d at 79.