by reaching incipient restraints.[2]” The task of merger review is to predict with some level of confidence – but not absolute certainty – whether the merger’s likely competitive effects based on facts, economic learning, and reasoned analysis require intervention to prevent substantial harm to competition and consumers.

The notion of incipiency imbedded in Section 7 is one of many flexible language choices in antitrust law that can confound business people and provide ample fodder for scholarly debate. These ambiguities have led courts to adopt simplifying rules and burden-shifting to give both sides of a merger case the opportunity to present and rebut evidence bearing on the likely competitive effects.[3] But the Commission’s analysis does not rest on presumptions. Rather, in this world of probabilities, modern merger analysis at the FTC uses a variety of tools, both qualitative and quantitative, to assess the likely competitive outcome of a proposed transaction.[4]

To prevent this forward-looking analysis from veering into mere speculation, the agencies and courts focus on facts. As any antitrust practitioner knows, a change in one or two key facts can alter the outcome of a merger investigation. Markets – and competitors – can and 04 bdbr/b-62s o80 c ator o, to80.-2Ca4(h4j)T4 t;(3)4((o80d(m)-2(H)12M-2CaG)12 §(m)-22

dynamics developnig in real-time that will likely bear on future competition. In markets, the past is not always

evolving nature of the market itself precludes the merger's likely competitive effects."[7] Hopefully, with requisite humility and open-mindedness, antitrust enforcers will instead continue to employ rigorous fact-finding and analysis to sift out likely outcomes from mere wishes or unfounded speculation when predicting what lies ahead.

Assessing What Current Competitors Will Look Like Going Forward

A typical transaction the FTC investigates is the combination of two direct competitors. Both firms currently sell products into the marketplace and affect the competitive dynamic that determines price and output to customers. The central question of merger review in this situation is whether the elimination of that direct competition is likely substantially to lessen competition. As part of that analysis, we look at whether the transaction will affect not only competition on price, but also other dimensions of competition such as quality, service or innovation.[8]

To analyze a merger between two long-standing competitors, we typically start by examining historical facts. We look at what market shares have been in past years, whether the companies have marketed or bid against each other before and what factors influenced the prices they set. In a market where competitive conditions are stable, those historical facts may provide all the information we need to feel comfortable in our predictions of the future. But where the

[7] Id. at 261.

[8] For instance, in the Commission's action against Precision Castparts' acquisition of Wyman Gordon, the Commission alleged that the combination would result in both higher prices and reduced innovation. See Analysis to Aid Public Comment, In the Matter of Precision Castparts Corp. and Wyman Gordon Co., Dkt. C-3904 (November 10, 1999), available at http://www.ftc.gov/sites/default/files/documents/cases/1999/11/pccana.htm. HMG section 6.4 outlines circumstances in which a merger may raise concerns about the ability of the merged firm to unilaterally diminish innovation efforts or reduce product variety. For example, a merger that eliminates a likely future entrant is likely to substantially lessen competition if it puts an end to the output expansion or price competition that would otherwise occur. The acquirer of a would-be innovator to the market may have reduced incentives to develop and commercialize a new competing product as quickly as would have occurred but for the merger, or it may reposition the product once it is brought to market in a way that would minimize cannibalization of its existing product.

fortunes of a competitor are likely to change – for better or for worse – we need to take a closer look.

The classic case in which the past was not an adequate predictor of the future is U.S. v. General Dynamics.[9] Both General Dynamics and the company it acquired, United Electric Coal Companies, had high shares of current coal sales. The Supreme Court found, however, that because United Electric had limited uncommitted coal reserves, its past sales were not an accurate predictor of its future competitive significance. Based on that forward-looking analysis, the Court allowed General Dynamics' acquisition to proceed.

Even where a competitor's long-term prospects look dim, the Commission still must assess whether there is short- to intermediate term competition worth protecting. Imo's 1989 acquisition of Optic-Electronic Corporation is a good example. Both companies produced second-generation image intensifier tubes used in night vision devices used by the Department of Defense. The facts showed that the second-generation product was nearly obsolete and was soon to be replaced by third-generation intensifier tubes and thermal imaging in which the transaction was not likely to cause competitive concerns because Optic-Electronic was not expected to be a significant competitor. Nonetheless, DoD was requesting one final round of bids for products employing second-generation technology. To protect competition in that DoD bid, the Commission challenged the transaction. The district court found that products based on emerging technologies would replace second-generation products, but not for another three to five years. The court pointed to the ongoing DoD bid as important competition worth preserving, and granted the FTC's request for a preliminary injunction.[10] When the DoD bid

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[9] 415 U.S. 486 (1974).

[10] FTC v. Imo Industries Inc., 1992-2 Trade Cas. (CCH) § 69,943 at 68,555 (D.D.C. Nov. 22, 1989) (redacted memorandum opinion).

took place, the winning bid came in much lower than the parties expected, saving DoD an estimated $23 million.[11] Shortly after the bid concluded, the parties again sought to merge. Because there was unlikely to be second-generation competition and no overlap in third-

not currently deriving revenues from the market.[14] Once we determine that a firm is in the market, we must assess the competitive impact it is having or is likely to have on competition.

In contrast to committed entrants, some firms must expend more effort, either in terms of time or sunk costs, to begin making sales in the relevant market. 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.[15]

It is relatively easy to predict the nature of competition going forward when an existing competitor in one geographic market is months away from entering a new geographic market. Pinnacle Entertainment Inc.'s proposed acquisition of Ameristar Casinos presented such a fact pattern.[16] The Commission filed suit in 2013 to block the transaction. In part, the complaint alleged that the acquisition would reduce competition and lead to higher prices and lower quality for casino customers in the Lake Charles, Louisiana market. While Pinnacle already had a casino operating in Lake Charles, Ameristar did not. However, Ameristar had begun building a new casino, Mojito Pointe, that was scheduled to open by the third quarter of 2014.[17] It was not difficult to predict that significant head-to-head competition would exist in the near future absent the acquisition. To settle the allegation concerning Lake Charles, Pinnacle agreed to sell all of

[14] HMG § 5.1.

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the assets associated with the development and construction of the Mojito Pointe casino to an FTC-approved buyer within six months.[18]

In other cases, a more detailed inquiry into whether a company is likely to be a competitor going forward is required. The Commission's recent decision in In the Matter of Polypore discusses the evidence needed to determine whether a firm not currently making sales should nevertheless be considered a market participant. In its Complaint, the Commission charged that Polypore International Inc.'s completed acquisition of Microporous violated Section 7 because it substantially reduced competition in four North American end-use markets for battery separators. In each of the four markets, the Administrative Law Judge found that the elimination of competition would have adverse effects. On appeal, the Commission upheld the decision in three of the markets and reversed in the fourth.

Microporous' participation varied by market. For deep-cycle and motive batteries, Microporous operated one plant in Piney Flatts, Tennessee and was scheduled to open a second plant in Feistritz, Austria the month after the transaction. From its Tennessee plant, Microporous competed head-to-head with Polypore and the evidence showed Microporous became a stronger competitor

Microporous had also begun to develop a third type of separator for use in starter,

in light of substantial barriers to entry that Microporous had not yet surmounted, the Commission determined that Microporous could not be counted as a market participant in the North American UPS separator market. The Commission dismissed that portion of the complaint.

Polypore also provides insight into the Commission's approach to assessing which fringe firms might be considered in the market based on excess capacity or previous sales. Respondent Polypore argued that Entek, a firm that had sold battery separators for industrial uses a decade earlier, could rapidly respond and counter any price increases by re-entering the market. After considering additional post-trial evidence offered by respondent, the Commission found there was no evidence that Entek was in a position to provide a rapid and effective supply response: "More than two years after the acquisition, and despite evidence of Daramic's post-acquisition price increases in the deep-cycle market, there is nothing to suggest Entek has entered the deep-cycle market or even qualified a product. At best, the record shows that Entek is testing product with [two potential customers], which is not enough to show that Entek is a market participant."[22]

Competitive Concerns in Mergers that Eliminate a Future Entrant

Polypore makes clear that employing a forward-looking approach involves a fact-specific inquiry. A firm not currently making sales can nonetheless be in the market as an actual competitor based on evidence that it is already having an effect on the behavior of firms currently making sales. A question of competitive harm also arises in mergers in which one of the firms is in the process of entering the market but has not yet had a meaningful effect on the competitive environment. In this scenario, the acquisition may substantially lessen competition

[22] Id. at 25.

by eliminating a future competitor whose entry, once complete, would have a beneficial impact on competition. Considering the future significance of such a firm involves more than just an assessment that market conditions are conducive to entry, such that one of the merging firms could enter. In Polypore, the firm in question had already identified the market opportunity, and was expending resources to begin to supply customers in the market.

A word here on terminology. There is often no clear line – and often more semantics than analytical difference – between a committed entrant, a likely entrant, a potential entrant and a future entrant. Where companies are taking steps to enter, there can always be some question as to whether they will in fact enter the market. But a fact-based analysis allows us to predict whether a firm is sufficiently likely to enter that its acquisition will harm competition. As noted above, the Commission found both that Microporous was a market participant in the SLI market, although it had not made sales, and that the firm was not likely to enter the UPS market, despite making efforts to do so.

This fact-based approach is also used to determine whether meaningful entry by third parties will be timely, likely and sufficient. We look at such evidence as the circumstances that led to past entry, whether conditions are conducive to entry, and what the most likely entrants say they would do in the face of a changed market environment. In the recent Bazaarvoice decision, the parties argued that a number of formidable firms – Amazon, Facebook, Twitter and Google – had the resources and market position from which to launch a product to compete with Bazaarvoice. Yet, the court dismissed the likelihood of each of these companies' entry into the market, mainly because they had not taken any steps toward entry. As the court summarized, "The companies just discussed have the size and strength to enter virtually any technology

competitive landscape of a market. Moreover, the Commission's experience in studying competition in pharmaceuticals markets provides a sound basis for projecting the likely price effect that the introduction of the next competing product would bring.[26]

Many of our matters occur at a stage in which one of the merging firms has the only branded drug approved by the FDA to treat a particular condition, and the other firm is at some stage in the process of obtaining FDA approval, whether in clinical trials,[27] or, for a generic product, at an earlier stage. Typically, the expiration of patent protection stimulates investment in developing generic formulations of branded drugs, which must be approved by the FDA. As a result, the Commission has required divestitures to preserve future competition from the likely first generic supplier.[28]

In other cases, transactions may combine exi 0 Tw d [(he)4(Lt(tim)6(im)62-4(o)him)6

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sufficient entry by third parties is likely. In many pharmaceutical combinations, there are markets in which we decline to take action because the evidence shows that there will be sufficient other entrants to make competitive concerns unlikely. We will often be able to eliminate a number of possible markets of concern before a Second Request is issued and many others early on in our investigation.

There is an important time element in assessing competitive consequences of a merger and the sufficiency of entry. It is of course easier to obtain evidence on what is likely to occur in the near-term. Nevertheless, where the facts show two firms likely to compete in the future – even if their products will not be on the market for some number of years – we may have concerns that such a combination could adversely affect competition, as we did with Merck & Co.'s acquisition of Schering-Plough Corporation. Merck introduced the first NK1 receptor antagonist for CINV and PONV (side-effects associated with chemotherapy). At the time of the transaction, Merck was the only firm in the United States with an approved drug in the class. A very limited number of other firms, including Schering-Plough, had NK1 receptor antagonists in development. At the time of the proposed acquisition, Schering-Plough was in the process of out-licensing its NK1 receptor antagonist, rolapitant, to a third party. The acquisition would likely have diminished the combined firm's incentive to license the product, in the hands of a competitor, rolapitant's launch – even if years away – would have significantly reduced the revenues for Merck's NK1 receptor antagonist. The Commission charged that the proposed acquisition could therefore delay or eliminate a future entrant into the U.S. market for NK1 receptor antagonists for CINV and PONV, and required a divestiture of all assets relating to rolapitant.[30]

[30] In the Matter of Schering-Plough Corporation and Merck & Co. Inc., Dkt. C-4268 (Oct. 29, 2009).

sense of developing something beyond what exists today. A transaction between an existing competitor and a future entrant working on a product that customers would likely view as superior to existing products can be particularly problematic. 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. Thoratec was the only firm with a commercial LVAD in the United States, the HeartMate II. HeartWare was engaged in clinical trials for what many considered to be a superior device, with FDA approval expected by 2012. Although the path to regulatory approval of these devices is challenging, there was ample evidence that HeartWare's device, the HVAD, was the most likely future competitor to Thoratec's HeartMate II. The HVAD was undergoing clinical trials in the United States and was approved and commercially available in Europe. Analysts viewed the product as having "billion-dollar potential" even before it gained approval. The few other companies deor pliniew otheli

future competition eliminated by the merger and filed a complaint to block the transaction.[32] The parties abandoned the transaction in the face of the Commission challenge.[33]

Similarly, in 2007, the Commission filed a complaint charging that Kyphon Inc.'s acquisition of Disc-O-Tech Medical Technologies, Ltd. would reduce competition in the market for minimally invasive vertebral compression fracture (MIVCF) treatment products. These products treat vertebral compression fractures (VCFs), which can cause debilitating pain for some patients. In 1999, Kyphon introduced kyphoplasty as a treatment for VCFs. While similar to other vertebroplasty products, kyphoplasty used technology that reduced the chance of bone cement leakage. Because of its safety advantages and other factors, kyphoplasty became the most widely used MIVCF treatment product in the United States, with an almost 90 percent market share. At the time of the transaction, Disc-O-Tech had just introduced the Confidence system to the U.S. market. Similar to kyphoplasty, the Confidence system method of treating VCFs had a reduced chance of leakage compared to traditional VCF treatments. The evidence showed that the Confidence system would be a closer substitute for Kyphon's product than other vertebroplasty products. The Commission charged that the acquisition eliminated the threat that the Confidence system posed to Kyphon's near-monopoly position and required a divestiture of all assets related to the Confidence system.

In an example outside the health care arena, the Commission obtained relief in a merger between two firms with computer-aided design (CAD) engines for Windows-based personal computers.[35] Autodesk sold the de facto industry standard product and had a 70 percent market share. Softdesk had been working on a competing CAD engine that, unlike other CAD products on the market, would allow users to transfer files generated using Autodesk's CAD engine and applications. At the time of the proposed merger, the product was within months of being introduced. In its Analysis to Aid Public Comment, the Commission explained that the Softdesk product, if brought to market, would have provided direct and significant competition to Autodesk. Indeed, because the Softdesk product offered file compatibility and transferability not available with other products, "some customers ha[d] already altered their buying decisions in anticipation . . . [of Softdesk's product] by delaying or postponing [purchases of]" Autodesk's CAD product.[36]

Of course, there are instances in which the innovation emerges from firms other than the merging parties. In May 2010, the Commission closed its investigation of Google's acquisition of AdMob.[37] Google and AdMob were leading competitors in the then-nascent market for mobile advertising networks. These networks monetize mobile publishers' content by selling publishers' advertising space. During the investigation, Apple acquired Quattro Wireless, the third-largest mobile advertising network at that time and subsequently announced – and launched – its own mobile advertising network, iAd. The Commission closed its investigation because it

[35] In the Matter of Autodesk, Inc. and Softdesk, Inc., Dkt. C-3756 (Mar. 31, 1997). See also In the Matter of Sensormatic Electronics Corporation, 119 F.T.C. 520 (Apr. 18, 1995) (merger of actual competitors in the market for research and development for new systems to prevent retail shoplifting).

[36] Analysis to Aid Public Comment, In the Matter of Autodesk, Inc. and Softdesk, Inc., Dkt. C-3756 (Mar. 31, 1997).

We use a fact-based approach to answer these questions. Ultimately, while we are mindful of limitations on the ability to predict too far out into the future – or in markets that are rapidly changing – Section 7 of the Clayton Act requires that we do as much.