CLASS 2 SLIDES

Unit 2. Predicting Antitrust Enforcement Challenges

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Thinking Systematically about Antitrust Risk

The setup

- You are counsel to TransDigm
  - Prior to signing the purchase agreement, TransDigm's management seeks your advice on—
    1. Whether the antitrust authorities will investigate the transaction?
    2. Whether the DOJ or FTC will challenge the transaction on the merits?
    3. Whether the merging parties can successfully defend on the merits?
    4. If unsuccessful, what will be the consequences?

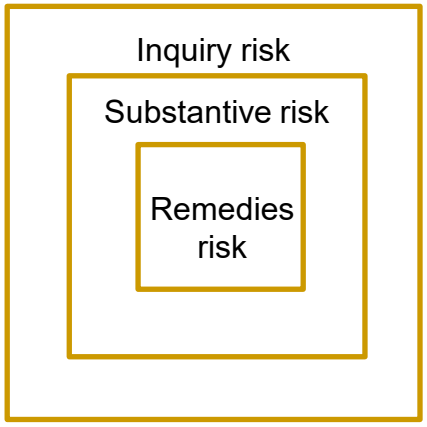
These are the fundamental questions every client asks at the beginning of a deal

These are questions about antitrust risk. How can we best explain to a client what is the antitrust risk in a deal?

Three types of antitrust risks

1. Inquiry risk
   - The risk that legality of the transaction will be put in issue
2. Substantive risk
   - The risk that the transaction is anticompetitive and hence unlawful
3. Remedies risk
   - The risk that the transaction will be blocked or restructured

Risks are nested



Assessing Substantive Risk

Focus first on substantive risk

- Inquiry risk comes first chronologically in a deal
  - Inquiry risk depends largely on—
    1. The *likelihood* that the challenger will prevail,
    2. The *reward* that the challenger will obtain from a successful challenge, *and*
    3. The *costs* to the challenger of raising the challenge

    all compared to doing nothing

In other words, inquiry risk depends on the expected value *to the challenger of raising the antitrust question*

- The first factor is a function of the substantive risk—so we need to study that first

Substantive risk

- Definition
  - The risk of being unable to successfully defend the transaction on the merits
- Can be defined in relation to either—
  - The outcome of a DOJ/FTC merger investigation, *or*
  - The outcome of litigation on the merits

Substantive risk: Costs

- There are costs associated with substantive risk incurred in defending a transaction regardless of the outcome—
  1. Delay/opportunity costs
  2. Expense of investigation/litigation and other out-of-pocket costs
  3. Management distraction costs
- But there is no reputational cost
  - Everyone views merger antitrust reviews as *regulatory*
  - *Not* as an indication that the merging parties may be breaking the law

Assessing probabilities of substantive risk

- Substantive risk depends on a *prediction* on whether the parties will be able to successfully defend their transaction on the merits

So how do we make that prediction?

First, an important distinction

- Basic distinction #1
  - *Decision making*: How the agencies ***decide*** a merger is anticompetitive
  - *Explanation*: How the agencies ***explain*** why they believe that the merger is anticompetitive
- Why is this distinction important?
  - How the agencies (or the courts) explain their decisions often does not reveal *why* they decided on that particular outcome
  - What you read in judicial opinions may only be the justification of an outcome that the judge reached for other (unexplained) reasons

A fundamental task in effective advocacy is recognizing this distinction and making your argument appeal simultaneously to the "heart" and "mind" of the decision-maker

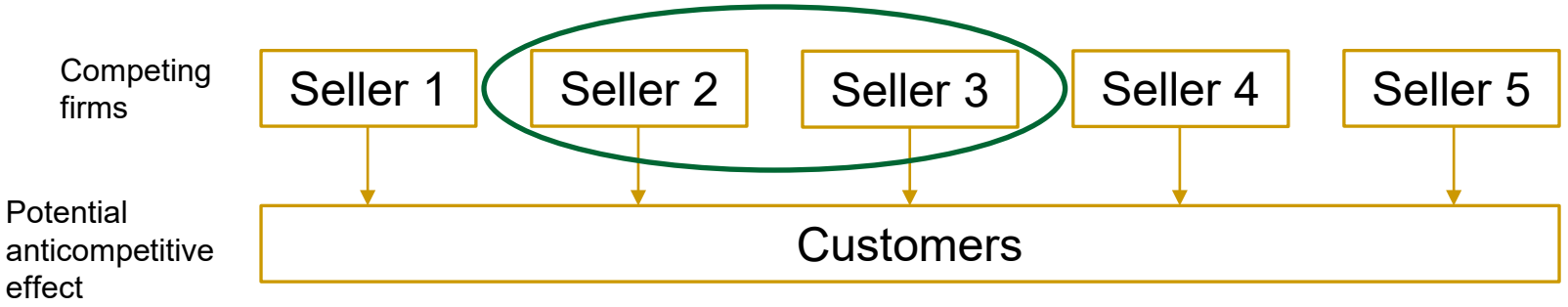
Overview: Theories of anticompetitive harm

- "Conventional" theories of anticompetitive harm
  1. Elimination of horizontal competition in output/downstream/seller markets
  2. Elimination of potential competition
     a. Actual potential competition
     b. Perceived potential competition (essentially a dormant theory)
  3. Vertical harm
     a. Input foreclosure
     b. Output foreclosure
     c. Anticompetitive information conduit
- "New" theories of anticompetitive harm being tested
  1. Elimination of horizontal competition in input/upstream/buyer markets
  2. Dominant firm entrenchment
     a. Elimination of nascent competition (an extension of actual potential competition)
     b. Modern entrenchment

See the Appendix for a little more detail

Overview: Theories of anticompetitive harm

- The vast bulk of challenges involve the *elimination of horizontal competition in output/downstream/seller markets*



  - In this example, Sellers 1 and 2 merge
    - Reduces the number of firms competing against each other in the sale of products from five to four (a "5-to-4 merger")
  - *Potential anticompetitive effect:* Will the decrease in the number of independent firms in the market reduce competition in the downstream market?

    The vast bulk of merger antitrust challenges invoke this theory. This class—and most of the course—will focus on this theory.

A predictive model for horizontal mergers

- We are going to look at a model that *predicts* merger antitrust outcomes for horizontal mergers in downstream markets
  - We will tweak the model as necessary to account for any DOJ or FTC challenges that depart from modern historical practice
- The model does *not purport to describe* how the investigating agency in fact decides merger outcomes
- The model's only purpose is to predict enforcement outcomes, not to describe the agency's decision-making process

Assessing substantive antitrust risk

- So how do the DOJ/FTC decide whether a merger is anticompetitive?
  - Recall that the purpose of merger antitrust law under the *consumer welfare standard* is to prevent harm to customers in the market through—
    - Increased prices
    - Reduced market output
    - Reduced product or service quality
    - Reduced rate of technological innovation or product improvement
    - [Maybe] reduced product variety

*Under the consumer welfare standard, modern antitrust law looks to effects on customers**

* Under an "expanded" consumer welfare theory, antitrust law also looks at effects on suppliers (i.e., anticompetitive effects in upstream markets).

Assessing substantive antitrust risk

- The predictive model—Four important rules
  1. Absent compelling evidence of significant customer harm on other dimensions, only ***price increases*** count
  2. The merger is anticompetitive if it is likely to result in a price increase or other competitive harm to ***any identifiable customer group***
  3. The agencies believe that ***no customer group is too small*** to deserve antitrust protection
  4. *Corollary*: No deal is too small not to be challenged

The predictive model for horizontal mergers

Reduction in Bidders/Competitors*

5 → 4	Usually clears if no bad documents and no material customer complaints
4 → 3	Usually challenged unless there are no bad documents and there is a strong procompetitive business rationale, some customer support, *and* minimal customer complaints
3 → 2	Almost always challenged unless there are no bad documents, and there is a compelling business rational that is strongly supported by customers and no material customer complaints
2 → 1	Always challenged

* Critically, these must be ***meaningful*** and ***effective alternatives*** from the perspective of the customer; "fringe" firms that customers do not regard as feasible alternatives do not count

Historical note: Up until 2015, 5 → 4 deals almost always cleared without any review and the chart would be compressed to begin at 4 → 3

Prediction: In the Biden administration, it is likely we will see an attempt to further tighten the standards to begin at 6 → 5 (with 3 → 2 always being challenged)

The predictive model for horizontal mergers

- Special cases inviting challenge
  1. Unilateral effects
     - Two firms that compete very closely with one another but much less with other firms in the market
     - Often occurs with premium brands (think BMW and Mercedes Benz in an automobile market)
  2. Acquisition of a "maverick"
     - Elimination by an established firm of a typically smaller competitor that has been especially disruptive in the marketplace to the benefit of consumers
  3. Acquisition of an actual potential entrant
     - In a highly concentrated market, the acquisition by or of a firm that otherwise likely would have entered the market in the near future and thereby increased competition
  4. Acquisition of a "nascent competitor"
     - The acquisition by an entrenched "superfirm" (think Facebook) of a firm that has technology that objectively might be used by the seller or a third party in the future to compete against the buyer, whether or not anyone has a present intention of competing with the acquiring firm with the technology (think Instagram and WhatsApp)—Challenges, but no judicial decisions

New theory

Basic structural tests for horizontal mergers

- The chances of successfully defending a deal *improve* if—
  - There are demonstrable powerful forces that constrain price increases or other anticompetitive behavior beyond the mere number of incumbent competitors
  - Three major forces:
    1. *Entry, repositioning, or output expansion* by third-party competitors in response to anticompetitive behavior by the combined company
       - Requires low barriers to entry or repositioning
    2. *Powerful customers*, who can use their bargaining leverage to stop the combined firm from acting anticompetitively
       - Requires a detailed explanation of how the bargaining will work to constrain the combined firm
       - Defense only works firm-by-firm—the merger can still harm small firms that do not have the requisite bargaining power to protect themselves
    3. *Efficiencies*, where the procompetitive pressure of the efficiencies outweighs the anticompetitive pressure of the increased market power
       - More on this below
       - Agencies are very skeptical about efficiencies

Basic structural tests for horizontal mergers

- Defenses
  - These forces are *legal defenses* if they are sufficient in likelihood and magnitude to completely offset the likely customer-harming aspects of the transaction
  - Basic distinction #2
    - *Negative defense*: The merger is not anticompetitive in the first instance
    - *Affirmative defense*: Even if the merger is anticompetitive, it is nonetheless not unlawful
  - Technically—
    - A *negative defense* denies an element of the plaintiff's prima facie case
    - An *affirmative defense*
      - accepts the elements of the prima facie case as true, *but*
      - raises matters outside of the prima facie case that provide a justification or an excuse to absolve the defendant from liability

There are no affirmative defenses in modern antitrust law

Another basic distinction

- Basic distinction #3: Truth v. evidence
  - The agencies (and the courts) deal in ***evidence***
  - Having the ***truth*** but being unable to prove it will not win the day
  - The investigating staff also needs evidence to be able to make its case to the agency decision makers and, if necessary, in litigation

So what are the sources of evidence?

Major sources of evidence

1. Company documents submitted with the original HSR filing
2. Company responses to second requests in an HSR Act review
   - Ordinary course of business documents
   - Responses to data and narrative interrogatories
3. Interviews/testimony/public statements of merging firm representatives
4. Interviews with knowledgeable customers
5. Interviews with competitors
6. Customer responses in staff interviews and to DOJ Civil Investigative Demands (CIDs) or FTC precomplaint subpoenas
7. Analysis of bidding or "win-loss" data
   - Including the ability of customers to play the merging firms off one another
8. "Natural" experiments
9. Expert economic analysis

Synergies/Efficiencies

Synergies/efficiencies

- Some definitions
  - *Synergies* (a business term)
    - Benefits to the company from the transaction that lower the combined firms' costs or increase its revenues
  - *Efficiencies* (an antitrust term)
    - The term used in antitrust analysis for synergies that benefit consumers

Synergies are relevant to the antitrust analysis only to the extent they are passed on or otherwise benefit to customers

Synergies

- Types of synergies enabled by the deal
  1. Customer value-enhancing efficiencies
     - Making existing products better or cheaper
     - Creating new products or product improvements better, cheaper, or faster
  2. Cost-saving efficiencies
     - Reductions in duplicative costs
     - Increases in the productive efficiency of the combined operation (e.g., through best practices, transfer of more efficient production technology)
  3. Anticompetitive synergies
     - Eliminating competition on price, quality, service, or innovation and so increases profits (horizontal theory of anticompetitive harm)
     - Creating an incentive and ability to withhold important/ essential products or services used by competitors and so eliminate competition and increase price (vertical theory of anticompetitive harm)

Efficiencies

- Efficiencies play two roles in an antitrust merger analysis
  1. They provide an explanation why the acquiring firm is pursuing the deal (and probably paying a significant premium) that does not depend on price increases to customers or other anticompetitive effects
  2. In close cases, efficiencies may tip the agencies into not challenging the deal
     a. Where the efficiencies exist *inside* a problematic relevant market, efficiencies are a legal defense if efficiencies negate the anticompetitive effects that otherwise would likely occur
     b. Where the efficiencies exist *outside* of the problematic relevant market, efficiencies are not a legal defense but can appeal to prosecutorial discretion

Efficiencies

- To be credited by the investigating agency, synergies must be:
  1. Merger-specific
     - That is, they could not be obtained in the absence of the merger
  2. Verifiable by sufficient evidence
  3. Would completely and immediately be sufficient to offset any anticompetitive tendencies of the merger
  4. Not the result of an anticompetitive effect of the transaction
- Agency view
  - *Obama*: Efficiencies have been given very little weight as a legal defense since the middle of the Obama administration
  - *Trump*: Surprisingly, the same perspective continued during the Trump administration
  - *Biden*: Skepticism almost surely will continue—perhaps with even more hostility—in the Biden administration

Homework Assignment for Class 3

The problem

The general counsel of TransDigm has asked you to begin a merger antitrust analysis of an acquisition by TransDigm of SCHROTH from Takata. The GC wants to start with a “quick and dirty” view of the problems that might arise in the United States. To this end, the GC will try to find the answers within the company to up to six questions. What six questions would you like to ask?

Instructor's answer

1. Business rationale
   - What is TransDigm's business rationale for making the acquisition (i.e., how will TransDigm make money by acquiring SCHROTH)?
2. Customer benefits
   - How, if at all, will customers benefit from the transaction?
3. Complaints
   - Who, if anyone, is likely to complain about the transaction and, if so, what will they say? (Especially interested in customer reactions)
4. Power to harm customers
   - If someone (say a sophisticated customer) was hostile to the deal, how would it argue that the merger will give TransDigm the ability and incentive to raise prices, reduce product or service quality, reduce investment in innovation or product improvement, or cut off supplies to competitors?

Instructor's answer

5. Competitive overlaps
   - In what product lines do TransDigm and SCHROTH compete against each other in the United States?
6. Other competitors
   - In each overlapping product line, are there significant other competitors to whom customers can turn to protect themselves in the event that TransDigm increases its price, reduces its product or service quality, or reduces investment in innovation or product improvement following the acquisition?

Questions from homework submissions

1. What are the relevant markets that will be affected by this acquisition?
2. How would you define the market (products/services and geography) for your products?
3. Will this acquisition substantially decrease competition in the relevant markets?
4. How big a player is TransDigm within the market?
5. For each product TransDigm produces, please provide the names of all competitors and their respective market shares.

Questions from homework submissions

6. Will consumers be harmed by this acquisition by an increase in prices?
7. Do customers “play off” TransDigm and SCHROTH against each other to get better prices?
8. What would TransDigm’s new market share in an already highly concentrated market be after the acquisition?
9. Would the acquisition decrease innovation of future technologies, or would TransDigm remain motivated to innovate?

Questions from homework submissions

10. Will consumers benefit from or be harmed by differences in product quality after the acquisition?
11. Has TransDigm received any customer complaints about the transaction?
12. What documents do the merging parties have that might reveal the intent of the transaction?
13. Does TransDigm have any documents, or has it made any public statements, suggesting that postmerger it will raise prices, reduce production, or decrease R&D investment?

Practice pointer #1

- Attorney-client privilege applies to these communications
  - Core elements—
    1. a communication (including a written communication)
    2. between a client and its attorney or their respective agents
    3. made in confidence
    4. for the purpose of obtaining *or* providing legal advice for the client

    Know these elements! The party asserting the privilege bears the burden of proof and will be required to establish each element on a privilege log *when withholding a document on privilege grounds*

  - Protects communications, *not* the underlying facts
  - The attorney-client privilege can be waived—
    1. Explicit or intentional waiver
    2. Implied waiver (usually through disclosure to a third party)
    3. “At-issue" waiver
    4. The crime-fraud exception

Practice pointer #2

- The work product doctrine may also apply
  1. *Hickman v. Taylor* (ordinary) work product
     - The ordinary work product doctrine provides a qualified privilege from discovery of—
       - Documents or other tangible things
       - Prepared in anticipation of litigation
       - By or for a party or a party's representative[1]
     - Commonly extended to information sought through depositions and interrogatories (i.e., protects communications)
     - Can be pierced when the party seeking discovery shows that it—
       - Has substantial need for the materials to prepare its case, and
       - Cannot, without undue hardship, obtain their substantial equivalent by other means[2]
  2. Attorney opinion work product
     - Applies to the "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation"[3]
     - Absolutely protected—cannot be pierced by a showing of need

[1] See Fed. R. Civ. P. 26(b)(3)(A). [2] *Id*. [3] *Id*. 26(b)(3)(B).

Bonus Class Exercise

(time permitting)

It is September 2016. Nicholas Howley, the CEO of TransDigm, is considering making an acquisition of the SCHROTH commercial airlines safety restraint business. He is asking you for a preliminary antitrust risk analysis of this deal. You know no facts, but Mr. Howley is happy to answer your questions at the meeting. He is also skeptical that the deal presents any material antitrust risk.

Before the meeting: Learn what you can

1. Look at the websites of both companies
   - Learn about their businesses
   - Try to determine whether there are any product overlaps
2. Search the Internet and newspaper archives using "TransDigm and SCHROTH" as the search request

Assume that you find from this research that—

- *The deal involves a horizontal overlap in safety restraints for commercial airlines*
- *TransDigm is the dominant firm in the business*
- *SCHROTH is a new entrant with a small share*
- *There are few if any other firms in the business*

But no other meaningful information

Goals of the meeting

1. *Teach* the client the operational test for Section 7 illegality
2. *Ask* the client the most important factual questions
3. *Communicate* your view of the antitrust risk in a way that the client understands
4. *Provide* any strategic advice as to how the client might minimize antitrust risk

We will go through each goal in detail

Teach the client the operational test

- Important to start with the operational test
  1. Unless the client understands the test, they will not be persuaded by your advice
     - The client will not be persuaded unless they can replicate your analysis and reproduce your conclusion
  2. If the client understands the test, they are more likely to give complete and meaningful answers your factual questions
  3. If the client knows the test, they can continue to think after they leave the meeting about what other facts may be relevant and follow up with you to sharpen the risk analysis
  4. The client *needs* to know the operational test as they move forward with the transaction

Teach the client the operational test

- Important to start with the operational test

Start prepping the client with the first meeting so that they can understand the antitrust implications of—

- *What they write in their documents*
- *What they say to the press and to customers*
- *What they say in meetings with the investigating agency*

Teach the client the operational test

- Start with Clayton Act § 7
  - Governing merger antitrust statute
  - Other statutes may apply, but they will not be more restrictive than Section 7
  - Section 7 prohibits transactions that "may substantially lessen competition"
- But what does this mean *operationally*?
  - A transaction "may substantially lessen competition" when it is likely to harm an identifiable group of customers by—
    1. Increasing prices
    2. Reducing market output
    3. Reducing product or service quality
    4. Reducing the rate of technological innovation or product improvement
    5. [Maybe] reducing product variety

Clients can grasp the operational test immediately

Teach the client the operational test

- Tell the client how the investigating agency is going to find the facts about the likely competitive effect
  - HSR reportability and merger review process
    - Time to ask questions to find out if the deal is likely to be reportable
  - The investigating agency will—
    1. Entertain a presentation from the parties on the deal
    2. Interview—and perhaps later depose under oath—you and other relevant employees in both companies
    3. Obtain massive amounts of the documents and data from both companies
    4. Interview customers and competitors (and maybe obtain documents and data from them)
    5. Analyze win-loss records of the companies in bidding for projects
    6. Use economists to assist in analyzing the likely competitive effects of the transaction

Teach the client the operational test

- Bottom line
  - The agency's conclusion on the likely effect on customers will determine the outcome of the investigation
    - NB: It is the *agency's conclusion*, not necessarily the truth, that counts
  - The best defense is a good offense
    - Can we argue that the deal is a "win-win" for the merging parties *and* the customers?
    - Companies do not do deals out of the goodness of their heart—*they do deals to make money*
    - Do we have a story consistent with the business model for the transaction, the documents and other company evidence, and the likely customer responses in staff interviews that the deal will be good for customers?

Best story*: The transaction will enable the combined company to make money by reducing costs and by making better products faster to the benefit of our shareholders and our customers*

Ask the client questions

1. What is the deal rationale?
   - How will TransDigm make money from the transaction?
   - Are there any documents on the business rationale?
     - If so, what do they say? Do they support the business rationale? Or refute it?
   - What are the implications of the business model for customers?
2. What will the company documents say about competition between the two companies?
   - If the government conducts a full investigation, it will see all of your documents eventually. Are their any documents that might suggest—or the government might read to suggest—that customers will be harmed in any way by the transaction?
   - We need to know about any bad documents *now* so that we can deal with them *now*. Waiting to deal with them later can be disastrous.
3. Who are the customers and what will they say to the agency when interviewed?

Communicate the antitrust risk

- *Answer the client's question*: Based on what you learned in the meeting, what is the antitrust risk presented by the deal?
  - It is not sufficient for you to form a view as to the antitrust risk
  - You must meaningfully communicate the nature of this risk to the client so that the client can make informed business decisions
    - If the client does not understand your advice, they cannot act on it
    - If the client is not persuaded that your advice is correct, they will not act on it
- Best explained in terms of—
  - Substantive risk
  - Inquiry risk
  - Remedies risk

So what would you tell Mr. Howley about each of these risks in a TransDigm/SCHROTH deal?

Provide any strategic advice

1. Emphasize the need for a compelling sales pitch for the deal to customers of *both* companies
   - Offer to help the relevant business people develop this pitch and advise on when and how to roll it out
   - Note that it is the customers of the target company that are typically the most difficult to persuade
     - Will eventually need to work with the target company as to how best to persuade its customers
2. Emphasize the need for care in drafting documents
   - "Bad" documents alone can kill a deal
     - Avoid creating documents that suggest—implicitly as well as explicitly—that the deal could harm customers
     - Some documents are "bad" because they were carelessly phrased or factually incorrect, not because they speak the truth—These can also kill a deal
   - If there is one, include the procompetitive business rationale for the deal in as many documents as possible

Provide any strategic advice

3. Consider whether the deal can be structured to make it non-HSR reportable to minimize inquiry risk

Final thoughts

1. Caution the client that this advice is only preliminary and depends on what the client has told you in the meeting
2. Note that more work should be done
   - Would like to send the client a *preliminary information request* for easily obtainable documents and data
   - When confidentiality considerations permit, would like to set up a *meeting with knowledgeable employees* to develop the facts and the arguments further
3. Tell the client that all documents created at the request of counsel should have the following prominent legend:

   PRIVILEGED AND CONFIDENTIAL
   Prepared at the request of counsel

   - Whenever possible, make this legend *machine readable*

Do NOT forget this!!!

Final thoughts

4. Note that at some point in the process we will need to bring the target company onboard
   - The target's evidence and customer outreach program will be equally if not more critical to the outcome of any merger review
   - Note that we should be able to work with the target company under the "common interest" privilege
5. The target, unless incompetently advised, is likely to recognize the antitrust risk in the transaction
   - Should expect that the target will attempt to negotiate some provisions in the purchase agreement to—
     - Decrease the risk of a deal failure, *and*
     - Compensate the target for risk that cannot be eliminated

Appendix

Overview: Theories of anticompetitive harm

- "Conventional" theories of anticompetitive harm
  1. Elimination of horizontal competition in output/downstream/seller markets
     - Where competing sellers merge to the harm of customers
     - The vast bulk of merger antitrust challenges invoke this theory
  2. Elimination of potential competition
     a. Actual potential competition:
        - Where the merger involves one of the few firms (the actual potential entrant) that likely would have entered the market in the near future but for the merger and whose entry would have substantially increased competition in the market
        - The idea is that, on a going-forward basis, the market would be more competitive without the merger than with it
     b. Perceived potential competition (essentially a dormant theory)
        - Where the merger involves one of a few firms (the perceived potential entrant) that incumbent firms in the market perceive is on the verge of entering the market and whose presence causes the incumbent firms in the market to act more competitively than they would in the absence of the perceived potential entrant

Overview: Theories of anticompetitive harm

- "Conventional" theories of anticompetitive harm
  3. Vertical harm
     a. Input foreclosure
        - Where the merger involves a firm and a supplier, and postmerger the combined firm can competitively disadvantage its downstream rivals by refusing to sell (foreclose) them supplies or raising their supply prices[1]
     b. Output foreclosure
        - Where the merger involves a firm and a customer/distributor, and postmerger the combined firm can competitively disadvantage its upstream rivals by refusing to buy or distribute their products or paying less than competitive prices
     c. Anticompetitive information conduits
        - Where the merger involves a firm (usually a downstream firm) that deals with the other merging firm's rivals and obtains sensitive information from them that postmerger the combined firm can use to competitively disadvantage those rivals and reduce competition in the market

Overview: Theories of anticompetitive harm

- "New" theories of anticompetitive harm being tested
  1. Elimination of horizontal competition in input/upstream/buyer markets
     - Where competing buyers merge to the harm of suppliers (including labor)
     - Invoked on occasion in the past (usually in agricultural markets)
     - A major focus for the Biden administration (especially for anticompetitive effects in labor markets)
     - *Test case*: United States v. Bertelsmann SE & Co. KGaA, No. 1:21-cv-02886 (D.D.C. filed Nov. 2, 2021)
       - Alleges a merger between two major book publishers violates Section 7 because it is likely to reduce the advances paid to authors
       - Tried in August 2022—decision expected in the fall

Overview: Theories of anticompetitive harm

- "New" theories of anticompetitive harm being tested
  2. Dominant firm entrenchment
     a. Elimination of nascent competition
        - Entrenched dominant firms should not e allowed to acquire firms or assets that, absent the acquisition, could potentially be used by the seller or a third party to undermine the entrenched firm's dominant position
          - Usually involves the acquisition of a new product or a new technology
          - The idea: An entrenched dominant firm should be prohibited from acquiring any firms or assets with the potential—even if the probability is low—of undermining the firm's dominant position
        - Introduced in the Trump administration
        - *Test cases*:
          - FTC v. Facebook, Inc., No. CV 20-3590 (JEB) (D.D.C. filed Dec. 9, 2020) (challenging Facebook's acquisitions of WhatsApp and Instagram) (trial to be held in 2024)
          - United States v. Visa, No. 3:20-cv-07810 (N.D. Cal. filed Nov. 5, 2020) (challenging Visa's proposed acquisition of Plaid Inc.) (transaction abandoned)

Overview: Theories of anticompetitive harm

- "New" theories of anticompetitive harm being tested
  2. Dominant firm entrenchment
     b. Modern entrenchment
        - Entrenched dominant firms should not be allowed to acquire firms or assets that could further entrench them
        - *Test case*: FTC v. Meta Platforms, Inc., No. 3:22-cv-04325 (N.D. Cal. filed July 27, 2022)
          - Alleges Meta's proposed acquisition of privately-owned Within Limited, Inc. violates Section 7 in the relevant market for VR dedicated fitness apps and the broader market for VR fitness apps.
          - Theory of harm: If Meta is allowed to acquire Within's popular VR fitness app, the acquisition would further entrench Meta in the VR space; if the acquisition is blocked, Meta will develop its own VR fitness app even though it has no current plans to do so.
          - Trial is scheduled to begin on December 8, 2022