Class 20 slides

11. Meta/Within and Nascent Competition

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Topics

- Meta/Within
  - Elimination of actual potential competition
  - Elimination of perceived potential competition
- Edwards/JenaValve
  - Existing competition in research, development, and commercialization
- Eliminating “nascent” competition
  - *Microsoft* and the 2023 Merger Guidelines
  - Some cases:
    - Mallinckrodt/Synacthen
    - Visa/Plaid
    - Facebook/Instagram/WhatsApp
  - Policy proposals and questions of application

Meta/Within



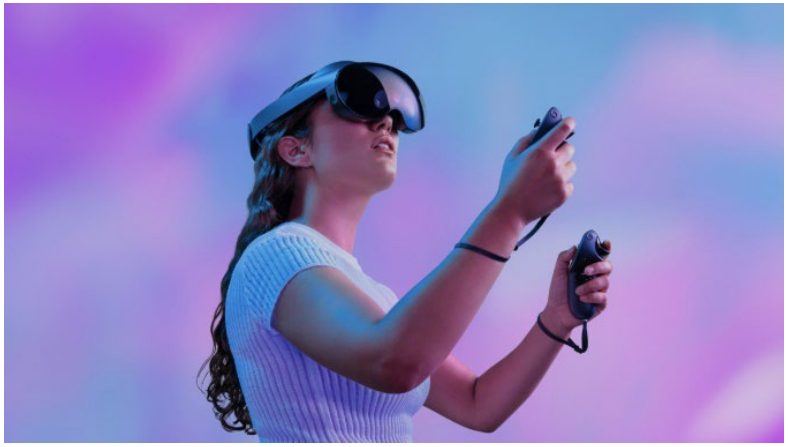


Meta/Within

- The deal
  - Meta to acquire Within Unlimited
    - Announced November 1, 2021
    - Reportedly for around $400 million—Not publicly announced

Meta/Within

- *The buyer*: Meta (2022-23)
  - Formerly known as Facebook
  - The leading developer of virtual reality ("VR") devices and apps through its Reality Labs division
    - Operates the Quest Store, through which users obtain VR apps for Quest headsets
    - From 2019 through September 2022, Reality Labs incurred $36.1 billion in costs
    - Leading hardware product: Meta Quest VR headset (about 80% of headset sales)
      - Flagship product: Meta Quest Pro ($1499)
    - Leading software product: Beat Saber
      - “A VR rhythm game where the user slashes the beats of adrenaline-pumping music as they fly towards you, surrounded by a futuristic world”





Meta/Within

- *The target*: Within Unlimited (2022-23)
  - A privately held virtual and augmented reality company started in 2014
  - Flagship product: *Supernatural*, a VR subscription fitness service
    - The leading VR fitness app (monthly subscription: $18.99)
    - Offers over 800 fully immersive VR workouts, each set to music and located in a virtual setting such as the Galapagos Islands and the Great Wall of China



The Section 13(b) action

- The FTC's original complaint
  - July 27, 2022: The FTC filed a Section 13(b) action in the Northern District of California after a 3-2 vote
  - Claims
    - Elimination of Meta as an actual potential entrant
    - Elimination of Meta as a perceived potential entrant
    - Elimination of horizontal competition between Supernatural and Beat Saber
- The amended complaint
  - October 7, 2022: Dropped the horizontal competition claim
- The preliminary injunction proceeding
  - Judge Edward J. Davila held a seven-day evidentiary hearing
  - January 31, 2023: Preliminary injunction denied (public opinion: February 3)

The decision

- Product market definition
  - Rejected defendants' argument for a larger market including
    - Non-dedicated fitness VR apps
    - Non-VR connected fitness products and services
  - Accepted the FTC's alleged market for VR dedicated fitness apps
    - Used *Brown Shoe* factors
    - Did not rely on the FTC expert's HMT analysis
- Geographic market definition
  - The United States
    - Not contested by the parties
    - Quest users' geolocation determines content availability and prices[1]

Key result: HMT support is probative, but not necessary, in determining the dimensions of the market

[1] FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 920-21 (N.D. Cal. 2023).

The decision

- Product market definition: *Brown Shoe*[1]

Practical indicium	Evidence credited by the court
Industry recognition	Meta and Within distinguished VR dedicated fitness. Odders Lab described its fitness app as competing more directly with dedicated fitness apps than gaming apps.
Characteristics and uses	Trainer-led workouts and trackable progress; an immersive 360-degree VR experience using portable equipment
Production inputs	VR engineering, fitness expertise, workout content, and studio capabilities
Customers	Older and more female than VR users overall
Prices	Subscription pricing and lower cost than connected fitness equipment; the court gave pricing less weight

[1] Meta Platforms, 654 F. Supp. 3d at 913-20.

The decision

- Product market definition: HMT
  - The FTC's HMT analysis (Dr. Hal J. Singer)
    - Supernatural's price had never changed, so Singer used a Qualtrics willingness-to-switch survey
  - Merging parties' objection: Disputed reliability and admissibility.
    - Singer relied on Qualtrics without verifying panels, sampling, or response quality
    - Over two dozen respondents claimed regularly to use all 27 listed fitness products
  - FTC's response
    - The motion was untimely; survey flaws went to weight in a bench proceeding
    - The FTC also relied on independent Brown Shoe evidence

Court: Did not resolve the dispute: relied on Brown Shoe, and denied the motion to strike as moot[1]

[1] Meta Platforms, 654 F. Supp. 3d at 920-21.

The decision

- Elements of the actual potential competition theory of harm
  1. The relevant market must be operating noncompetitively with room for competitive improvement
  2. The potential entrant must be relatively unique in its ability and incentive to enter the relevant market
  3. The potential entrant must have "available, feasible means" of independent entry
  4. The actual potential entrant must have a reasonable likelihood of entry into the relevant market in the near future
  5. Entry, if it were to occur, must have a reasonable probability of a substantial procompetitive effect[1]
- Court acceptance
  - The court accepted the theory under Section 7 despite the Supreme Court's reservation of the question
- Qualification
  - Not all of these elements are specifically identified as such in the case law but are inherent in the precedent and the underlying economic theory

[1] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 625-26, 633, 638-39 (1974); FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 925-28 (N.D. Cal. 2023).

The decision

1. Market conditions
   - Concentration was "well above" the 2010 Guidelines' thresholds
     - The FTC did not also have to plead oligopolistic, interdependent, or parallel behavior
   - Meta relied on market nascency, volatile shares, recent entry, and low entry barriers
     - The court was inclined to find the rebuttal insufficient but did not decide the issue because other elements failed
2. Relative uniqueness
   - The court did not separately examine Meta's relative uniqueness among potential entrants
     - Its analysis focused on Meta's own capabilities, incentives, and likelihood of entry[1]

[1] Meta Platforms, 654 F. Supp. 3d at 921-38.

The decision

3. Capacity to enter
   - *"Available feasible means":* De novo entry or entry through a "toehold" acquisition
     - FTC did not argue a toehold route here
   - The court examined Meta's capabilities and incentives to enter
4. Likelihood and timing of entry
   - *Standard of proof*: Reasonable probability
     - This court required a likelihood "noticeably greater than fifty percent" and rejected defendants' proposed "clear proof" standard
   - *Timing*: "In the near future"
     - The court required a reasonable temporal estimate and rejected an "eventual entry" theory
5. Competitive significance of entry
   - Independent entry must offer a "substantial likelihood of ultimately producing deconcentration in that market or other significant procompetitive effects"[1]

[1] Meta Platforms, 654 F. Supp. 3d at 925-28 & n.9, 934-35.

The decision

- Objective vs. subjective evidence
  - Definitions
    - *Objective evidence*: Market facts and the firm's capabilities and economic incentives
    - *Subjective evidence:* The firm's actual intentions and plans, including contemporaneous documents and executive testimony
  - Court's approach
    - Begin with objective evidence
    - Consult subjective evidence if the objective evidence is weak, inconclusive, or conflicting
    - Subjective evidence cannot overcome directly conflicting objective evidence[1]
    - The court favored contemporaneous documents over litigation testimony
- Qualification
  - Evidence of likely entry may be objective or subjective; subjective evidence is not required if objective evidence is sufficient
  - The court imposed no categorical requirement that an entry plan reach a particular decision-making stage[2]

[1] Meta Platforms, 654 F. Supp. 3d at 927-29 & n.11 (quoting United States v. Falstaff Brewing Corp., 410 U.S. 526, 570 (1973) (Marshall, J., concurring)).
[2] Meta Platforms, 654 F. Supp. 3d at 932, 934-35.

The decision

- Developing a standalone app
  - FTC's proposed route
    - Meta's financial resources, VR engineers, and incentives could support independent development
  - Meta's response
    - Meta lacked fitness expertise and never had a concrete entry plan
  - Court's findings
    - Meta had the financial and VR engineering resources to enter de novo but lacked fitness-content creation and studio-production capabilities
    - The incentive evidence was inconclusive: Meta could benefit from VR fitness through headset sales and support for third-party apps
    - Strategy documents did not identify a standalone app as an entry option
    - Hardware integration and defensive concerns favored owning an app but did not establish probable de novo entry
- Conclusion
  - Resources and interest in VR fitness did not establish reasonably probable independent entry on this record[1]

[1] Meta Platforms, 654 F. Supp. 3d at 928-35.

The decision

- Repositioning Beat Saber
  - FTC's proposed route
    - A dedicated fitness app through a Beat Saber-Peloton partnership
  - Meta's response
    - The proposal had lost momentum before Meta pursued Within
  - Court's findings on the contemporaneous record
    - The proposal's content and structure remained unclear; internal support was neither uniform nor widespread
    - *Chronology*:
      - Meta did not pursue the consultant's March 25 research proposal
      - Active discussion lapsed before Meta began pursuing Within in June 2021
- Court's conclusion
  - Repositioning Beat Saber was not reasonably probable, even assuming a willing fitness-content partner
  - The court therefore did not reach the likely procompetitive effect of independent entry[1]

[1] Meta Platforms, 654 F. Supp. 3d at 935-38.

The decision

- Elimination of perceived potential competition
  - Perception as a likely potential entrant
    - Incumbents must perceive the firm as a likely entrant; objective capabilities and incentives are probative[1]
  - Court's application
    - Meta's undisclosed intentions were irrelevant—incumbents' perceptions were relevant
    - The objective evidence did not establish Meta as a likely entrant
    - Within's documented concerns were stale; evidence of other incumbents' perceptions was absent
    - A Meta employee's report of Within's concerns was uncorroborated hearsay2
    - The court did not separately address Meta's uniqueness as a perceived entrant2
- WDC: Distinct inquiries
  - Whether Meta probably would enter differs from whether incumbents reasonably perceived an entry threat capable of affecting their conduct

[1] United States v. Falstaff Brewing Corp., 410 U.S. 526, 533-36 & 534 n.13 (1973).
[2] Meta Platforms, 654 F. Supp. 3d at 938-40 & n.14.

The decision

- Elimination of perceived potential competition
  - Incumbent reaction to the threat of entry
    - Incumbent firms must be shown to be responding to the perceived threat of entry by maintaining lower prices, higher product quality, or other more favorable competitive terms than they otherwise would
    - This competitive influence may be established by direct or circumstantial evidence; an observed price cut or an admission of entry-deterring intent is not required[1]
  - Anticompetitive effect
    - The acquisition must remove or weaken that competitive constraint, creating a reasonable probability of a substantial lessening of competition in the market[1]
  - Court's application
    - The FTC did not establish that Meta's perceived entry tempered incumbents' anticompetitive conduct
    - The headcount document predated Supernatural's entry; later concerns about potential entrants were not linked to Meta
  - Pleading versus proof
    - The complaint adequately alleged a competitive constraint, but the preliminary-injunction evidence was insufficient[2]

[1] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 624-25, 639-40 (1974); Falstaff, 410 U.S. at 534 n.13.
[2] Meta Platforms, 654 F. Supp. 3d at 940-41.

The lessons of Meta/Within

- The outcome
  - The FTC failed to establish likely success on either potential competition theory; the court denied the preliminary injunction[1]
- The lessons
  - The court accepted the FTC's market definition and considered both potential competition theories
  - *Actual potential competition*: The FTC failed to establish a feasible and reasonably probable path to independent entry
    - Capabilities, incentives, documents, and chronology mattered; a documented entry plan was not invariably required
  - *Perceived potential competition*: The FTC failed to establish a perceived entry threat and an actual tempering effect on competition
- Disposition in 2023
  - February 6: No FTC appeal
  - February 8: Meta closed
  - February 24: FTC dismissed its administrative complaint[2]

[1] Meta Platforms, 654 F. Supp. 3d at 920-21, 925-38, 940-41.
[2] Respondents' Motion, Ex. B (F.T.C. Feb. 8, 2023); Meta, Within Joins Meta (Feb. 8, 2023); FTC Order Dismissing Complaint (Feb. 24, 2023).

Edwards/JenaValve (2026)

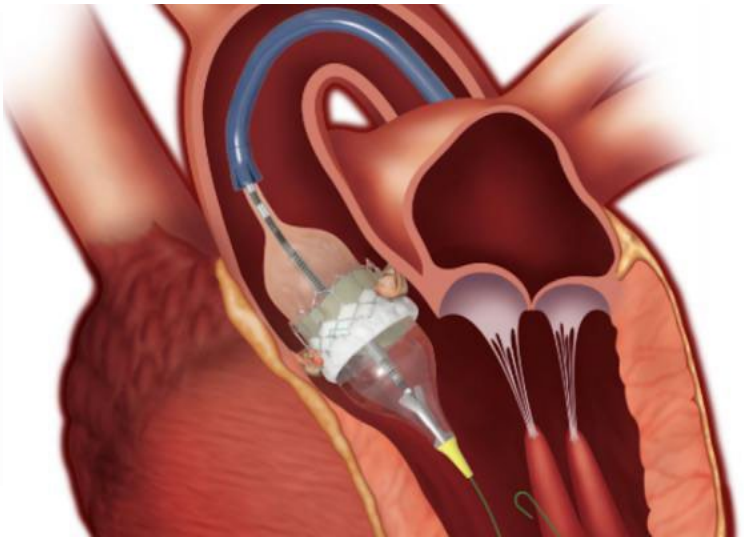




Edwards/JenaValve

- Transcatheter aortic valve replacement (TAVR)
  - A minimally invasive medical procedure used to treat severe aortic stenosis (a narrowing or stiffening of the heart's aortic valve)
  - TAVR replacement valves
    - Delivered through a catheter, usually from the groin through the femoral artery, without open-heart surgery
    - At the time, already approved in the United States for aortic stenosis





Edwards/JenaValve

- Transcatheter aortic valve replacement (TAVR)
  - TAVR-AR replacement valves
    - TAVR devices designed specifically for aortic regurgitation, a leaky aortic valve that lets blood flow back into the heart
    - Regular TAVR valves anchor on calcium buildup that AR patients often lack
    - Over 100,000 Americans have severe symptomatic AR; with open-heart surgery the only FDA-approved treatment, nearly 75% go untreated
  - TAVR-AR development
    - No FDA-approved TAVR-AR valve
    - Edwards:
      - Maker of the SAPIEN TAVR valve for aortic stenosis
      - Aabandoned developing its own TAVR-AR valve
    - Only two U.S. TAVR-AR programs in clinical trials
      - *JenaValve's Trilogy*:
        - Approved in Europe in 2021
        - U.S. pivotal trial enrolled in 2022
      - *JC Medical's J-Valve*:
        - FDA authorized a U.S. pivotal trial in May 2024

Edwards/JenaValve

- Two acquisitions on successive days[1]
  - July 22, 2024:
    - Edwards acquired JC Medical for $115 million, just below the $119.5 million HSR threshold, and invested $25 million in its parent, Genesis
    - No HSR filing was made
  - July 23, 2024
    - Edwards agreed to acquire JenaValve for about $945 million ($500 million in cash and up to $445 million in milestones)
    - Required an HSR filing

- Edwards kept the JC Medical deal from JenaValve
  - JC Medical's CEO was "totally blindsided"
  - An employee said Edwards had "just bought the AR market"

[1] FTC v. Edwards Lifesciences Corp., No. 25-cv-02569 (RC), 2026 WL 228723, at *1, *9-10 (D.D.C. Jan. 9, 2026) (public version filed Jan. 28, 2026).

Edwards/JenaValve

- The FTC's complaint[1]
  - August 6, 2025: The Commission voted 3-0 to begin an administrative proceeding and filed a Section 13(b) action in D.D.C. for a preliminary injunction
  - The FTC challenged only the JenaValve merger, which was paused for regulatory review—the JC Medical acquisition had already closed
    - July 2026: In a separate civil-penalty action, Edwards and Genesis agreed to pay $12 million for allegedly structuring the JC Medical deal to avoid an HSR filing[2]
- Three Section 7 theories[3]
  1. Acquiring its only competitor would "tend to create a monopoly"
  2. Combining the only two firms in the market was presumptively unlawful under Philadelphia National Bank
  3. The merger would eliminate substantial head-to-head competition
     - The court declined to rely on the first theory, left the presumption undecided, and decided the case on the third

[1] *Edwards Lifesciences*, 2026 WL 228723, at *1.
[2] Complaint ¶¶ 1-2, United States v. Edwards Lifesciences Corp., No. 1:26-cv-02450 (D.D.C. July 13, 2026); Press Release, Fed. Trade Comm'n, FTC Secures $12 Million in Penalties for Pre-Merger Reporting Act Violations (July 13, 2026).
[3] *Edwards Lifesciences*, 2026 WL 228723, at *22-23.

Edwards/JenaValve

- *Court*: Edwards and JenaValve were competing before commercial approval[1]

Evidence of rivalry	Competitive significance
J-Valve's larger sizes prompted JenaValve to accelerate a larger Trilogy valve	Rivalry encouraged product development that could allow more patients to be treated
The firms competed for clinical sites and investigators; JenaValve accelerated trial arrangements and streamlined enrollment	Rivalry affected development schedules even though clinical sites were not scarce
The court found modest price competition during clinical trials and expected price competition after commercialization	Independent programs constrained clinical pricing and prospective commercial prices

  - *Court*: The absence of commercial sales did not make this existing competition merely prospective

[1] Memorandum Opinion at 57-62, 64-68, FTC v. Edwards Lifesciences Corp., No. 25-cv-02569 (D.D.C. Jan. 9, 2026), ECF No. 178.

Edwards/JenaValve

- The parties' response and the court's analysis[1]
  - Edwards argued that owning both programs would help treat more patients and preserve incentives to innovate
  - *Court:* Continued incentives to innovate did not answer the concern that common ownership would reduce development incentives and support higher prices
- Disposition
  - January 9, 2026: Preliminary injunction; structural presumption unresolved[2]
    - Likely Section 7 harms: Loss of existing rivalry in development and trials, and a commercial monopoly once either device is approved[2]
  - Edwards abandoned the deal; the FTC dismissed its complaint January 28[3]
  - March 17, 2026: Trilogy became the first FDA-approved TAVR-AR device[3]
- Connection to nascent competition
  - The court protected existing rivalry—it did not adopt actual potential competition or a separate nascent-competition doctrine
  - Nascent threat cases add uncertainty about whether an emerging threat will develop into significant competition

[1] *Edwards Lifesciences*, Memorandum Opinion at 66-70.
[2] I*d.* at 51-53, 107; *Edwards Lifesciences*, 2026 WL 228723, at *31-33 & n.5.
[3] Edwards Lifesciences, Edwards Comments on JenaValve Acquisition (Jan. 9, 2026); FTC Order Dismissing Complaint, No. 9442 (Jan. 28, 2026); U.S. Food & Drug Admin., Premarket Approval P250024 (Mar. 17, 2026).

Eliminating “Nascent” Competition

"Nascent competitors"

- Nature of the threat
  - A "nascent competitor" is a firm that has the potential to present a serious threat in the future to a dominant firm
  - The threat usually resides in the nascent competitor's development of a new technology or a new product that could possibly shift share away from the dominant firm
- The enforcement concern
  - An emerging concern beginning in 2019 was the failure of the enforcement agencies to block acquisitions of "nascent competitors" by large tech companies
  - Amazon, Apple, Facebook, Google, and *Microsoft* were the principal acquirers of concern

"Nascent competitors"

- Nature of the competitive threat to the dominant firm

Independent development

The nascent firm develops its technology	→ The firm supplies a competing product

Development by another firm

Another firm acquires the business or licenses its technology	→ That firm supplies a competing product

Support for other competitors

The nascent firm's technology or services facilitate other firms' competition	→ Other firms compete more effectively, without the nascent firm itself entering

"Nascent competitors"

- Nascent competitors and the potential competition doctrine

Actual potential competition requires, among other things	Uncertainty concerning a nascent threat
"Available, feasible means" of independent entry	It may be uncertain whether the firm, another acquirer, or a licensee could develop a competitive product
A reasonable likelihood of entry into the relevant market in the near future	The firm may not be considering entry, or entry may be more distant than the near future
A reasonable probability that entry would have a substantial procompetitive effect	Even if entry occurs, technological and commercial success and the competitive impact may remain speculative

  - These uncertainties can make a traditional actual potential competition claim difficult to prove. They do not categorically exclude acquisitions of nascent competitors from Section 7.

The Section 2 solution

- Monopoly maintenance under Sherman Act § 2
  - Enforcers have used Sherman Act § 2 to challenge acquisitions of nascent threats to an existing monopoly
    - Section 2 supplies a separate theory of liability from Section 7
  - Monopolization: Two elements (*Grinnell*)[1]
    1. Possession of monopoly power in the relevant market
    2. The willful acquisition or maintenance of that power, as distinguished from growth or development resulting from a superior product, business acumen, or historic accident
       - Conduct satisfying the second element is called an *anticompetitive exclusionary act*
  - Two types of monopolization
    1. Acquisition of a monopoly
    2. Monopoly maintenance
- Attempted monopolization is a distinct offense[2]
  - Elements:
    1. An anticompetitive exclusionary act
    2. A specific intent to monopolize
    3. A "dangerous probability" of achieving monopoly power

[1] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[2] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

The Section 2 solution

- *Microsoft:* The seminal case[1]
  - Microsoft held monopoly power in Intel-compatible PC operating systems
    - Consumers wanted many applications; developers wanted many users
    - This applications barrier to entry protected Windows
  - Netscape Navigator and Sun's Java were middleware technologies that could support applications across operating systems
    - Their success could reduce dependence on Windows, although neither was then a substitute for Windows
- The challenged conduct
  - The case involved exclusionary conduct to maintain an existing monoply, not acquisition of the threats
  - Microsoft restricted rivals' distribution and use through particular exclusive agreements, developer deception, and threats to Intel
  - The court evaluated individual acts, sustaining some exclusion claims and rejecting others
  - Its causation analysis became foundational for challenges to acquisitions of nascent threats

[1] United States v. Microsoft Corp., 253 F.3d 34, 53-59, 60-80 (D.C. Cir. 2001) (en banc) (per curiam).

The Section 2 solution

- *Microsoft*: Causation[1]
  - In a Section 2 monopoly maintenance action for injunctive relief, causation may be inferred from anticompetitive conduct reasonably capable of contributing significantly to monopoly maintenance
  - Two inquiries:
    1. Is exclusion of nascent threats generally capable of contributing significantly to continued monopoly power?
    2. Did Java and Navigator reasonably constitute nascent threats when the challenged conduct occurred?
  - Proof that these technologies actually would become viable platform substitutes was unnecessary
- Limits
  - Monopoly power and anticompetitive exclusionary conduct remain separate requirements
  - Intent helps establish likely competitive effects. It does not replace that inquiry[2]
  - Structural relief requires a clearer causal connection between the conduct and creation or maintenance of monopoly power than liability alone

[1] United States v. Microsoft Corp., 253 F.3d 34, 78-80 (D.C. Cir. 2001) (en banc) (per curiam).
[2] Id. at 59.

Nascent competitive threats

- 2023 Merger Guidelines § 2.6.A[1]
  - Agencies examine acquisitions of threats that could become significant rivals, help other rivals grow, or otherwise reduce dominant firms' power
  - Threats may initially serve niche customers, overlap only partly, or supply complementary services
    - They may expand or help customers combine other firms' products into an alternative
  - Technological transitions may weaken entry barriers and create competitive opportunities
- Statutory routes and limits
  - *Section 7*: Preventing competitive disruption or weakening constraints may entrench dominance
  - *Section 2*: Separately, examine whether the acquisition is reasonably capable of contributing significantly to monopoly maintenance
    - A nascent threat may be uncertain and take years to materialize

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 2.6.A, at 19-21 (2023).

Mallinckrodt/Novartis AG (2017)



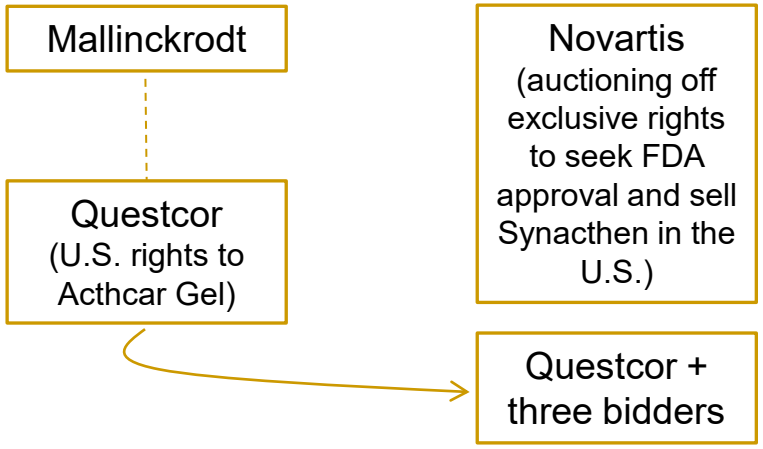


Mallinckrodt/Novartis AG (2017)

- The deal
  - In June 2013, Questcor Pharmaceuticals acquired the rights to sell Synacthen Depot in the United States from Novartis
    - On August 14, 2014, Mallinckrodt plc acquired Questor for $5.8 billion
- Background
  - Questcor's H.P. Acthar Gel was the only therapeutic adrenocorticotropic hormone ("ACTH") product sold in the United States
    - ACTH is the standard of care for infantile spasms ("IS"), a rare but extremely serious disorder involving seizures within the first two years of life
    - Questor acquired the rights to Acthar in 2001
    - Since 2001, Questcor has repeatedly raised Acthar's price from $40 per vial in 2001 to more than $34,000 per vial in 2017
    - A course of Acthar treatment for IS requires multiple vials and can cost well over $100,000

Mallinckrodt/Novartis AG (2017)

- The FTC's concern
  - Synacthen is a synthetic ACTH drug sold in other parts of the world to treat IS
  - In 2011, Novartis decided to sell the exclusive rights to seek FDA approval for Synacthen and commercialize it in the United States
  - Three firms submitted formal offers to Novartis
  - Subsequently, Questcor entered the bidding and outbid the other companies to acquire the U.S. rights to Synacthen



  - *Allegation*: Questcor acquired the Synacthen rights to prevent another company from entering into competition with Acthar in the United States

Mallinckrodt/Novartis AG (2017)

- The FTC's challenge
  - Complaint filed January 18, 2017 (post-acquisition)
  - Action brought in federal district court by FTC and five states
  - Questcor's acquisition of the Synacthen rights violated—
    - Section 2 of the Sherman Act (monopolization)
    - Section 5 of the FTC Act
    - Various state statutes
  - Invoking *Microsoft*, the complaint alleged that eliminating independent development of Synacthen was reasonably capable of contributing significantly to Questcor's monopoly maintenance

There was no Section 7 count

- Outcome
  - Mallinckrodt settled and stipulated to the entry of a permanent injunction:
    - No actual litigation—Stipulation filed simultaneously with the complaint
    - Pay $100 million (disgorgement)
    - Grant a license to develop Synacthen to treat infantile spasms and nephrotic syndrome to an FTC-approved licensee within 120 days of the entry of the order
    - Pay $2 million to states for attorney's fees and costs
    - Monitor to oversee compliance

Visa/Plaid (2020)





Visa/Plaid

- The proposed acquisition and alleged threat
  - The DOJ challenged the $5.3 billion acquisition under Sections 7 and 2[1]
    - The complaint alleged Visa monopolized online debit transactions with a 70% share
  - Plaid's capabilities and plans[2]
    - Connections to 11,000 U.S. financial institutions and over 200 million consumer bank accounts could help Plaid overcome entry barriers
    - Plaid planned a competing money movement business by the end of 2021. These were allegations, not a guarantee of commercial success.
    - The planned service would enable payments directly from bank accounts, disintermediating Visa's debit network and potentially lowering merchant costs
- The statutory theories[3]
  - Sherman Act § 2 monopoly maintenance
    - Eliminating a nascent but significant threat would maintain Visa's monopoly
  - Clayton Act § 7
    - The acquisition would entrench that monopoly, deprive consumers and merchants of a lower-cost alternative, and reduce competition and innovation

[1] Complaint ¶¶ 1, 12, United States v. Visa Inc., No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020).
[2] *Id*. ¶¶ 7-10, 33.
[3] *Id*. ¶¶ 13-14, 76-78.

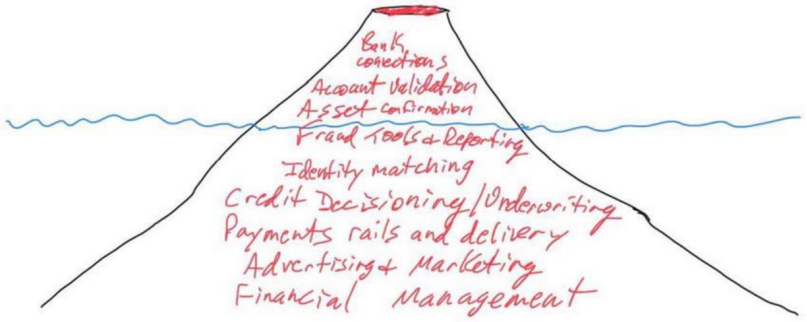
Visa/Plaid

- Why Plaid threatened Visa[1]
  - Plaid's data network linked consumers' bank accounts to fintech apps; it did not yet compete with Visa
  - Network effects created a chicken-and-egg barrier for new debit networks, like *Microsoft*'s applications barrier
  - Plaid's existing connections with banks and consumers could help it surmount that barrier
- The DOJ's answers to Visa's defenses[2]
  - Visa would have an incentive to "raise the price of, degrade, delay, or shelve" Plaid's pay-by-bank debit service
  - Efficiencies would not outweigh the harm; any benefits could be achieved through less restrictive means
- The Section 7 theory[3]
  - Entrenchment of an existing monopoly, not traditional actual potential competition; Section 7 did not require proof of monopoly power

[1] Complaint ¶¶ 4, 7-8, 21, 38, 58, United States v. Visa Inc., No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020).
[2] *Id*. ¶¶ 67, 74-75.
[3] *Id*. ¶¶ 76-78.

Visa/Plaid

- Evidence of the competitive threat[1]
  - Visa's CEO called the acquisition an "insurance policy" against a threat to its U.S. debit business
  - Visa projected a potential $300-500 million downside by 2024 if Plaid went to a rival



Visa's internal assessment, reproduced in the DOJ complaint

- Response and disposition
  - Visa described Plaid as a complementary data network and claimed the combination would improve services and consumer choice[2]
  - January 12, 2021: Deal abandoned; no merits decision[3]
  - No judicial probability or timing standard was established

[1] Complaint ¶¶ 9-11, United States v. Visa Inc., No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020).
[2] Visa Inc., Visa Statement on Planned Acquisition of Plaid (Nov. 5, 2020).
[3] U.S. Dep't of Just., Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block (Jan. 12, 2021).

Facebook/Instagram/WhatsApp









Facebook/Instagram/WhatsApp

- Transactions and theory[1]
  - Facebook acquired Instagram in 2012 and WhatsApp in 2014
  - The FTC sued in 2020 for unlawful monopoly maintenance in personal social networking services, applying Sherman Act § 2 through FTC Act § 5
    - No Section 7 claim was pleaded
    - FT sought injunctive relief, including divestiture, under FTC Act § 13(b)
- Different competitive threats
  - Instagram was a mobile photo-sharing service that, the FTC alleged, already competed with Facebook
  - WhatsApp was a messaging service that might expand into personal social networking, independently or under another owner
  - The FTC claimed continued independence from Facebook would preserve those threats
  - Meta disputed the threats and claimed its investments produced substantial consumer benefits
  - Earlier decisions not to challenge the transactions created no presumption of legality

[1] Memorandum Opinion at 6-10, 12-13, 61-76, FTC v. Meta Platforms, Inc., No. 1:20-cv-03590-JEB (D.D.C. Nov. 13, 2024), ECF No. 384.

Facebook/Instagram/WhatsApp

- 2024 summary judgment framework[1]
  - Applying *Microsoft*, the court held that a monopolist's acquisition of an actual competitor or nascent threat could establish prima facie anticompetitive conduct
    - Separate proof of higher prices or reduced output was unnecessary
  - Targets had to reasonably constitute competitive threats when acquired
  - The court declined to import the traditional Section 7 actual potential competition standard
- Evidence and disposition
  - An informed, reasonable assessment by the acquiring monopolist can be highly probative
    - Ordinary course acquirer and target communications reveal assessments and plans
  - Objective capabilities and willingness to compete can support a threat despite little subjective evidence, or undermine exaggerated fears
  - The acquisitions claim survived summary judgment. Liability remained for trial

[1] Memorandum Opinion at 61-65, 75-76, FTC v. Meta Platforms, Inc., No. 1:20-cv-03590-JEB (D.D.C. Nov. 13, 2024), ECF No. 384.

Facebook/Instagram/WhatsApp

- 2024 decision: Procompetitive justifications[1]
  - After a prima facie showing of anticompetitive conduct, Meta could show benefits in output, prices, quality, service, or innovation
  - Requirements identified by the court:
    - Competition on the merits
    - Nonpretextual justifications
    - Acquisition-specific benefits unattainable through less restrictive means
  - Benefits achievable without the acquisition could not justify its anticompetitive effects
  - Out-of-market benefits required a strong showing of relevance
    - The court permitted evidence but reserved whether to credit those benefits
- Disposition
  - Summary judgment denied on the motion and cross-motion

Keep in mind that the dismissal was on summary judgment. The court did not resolve disputed issues, but decided only that disputed issues existed for trial.

[1] Memorandum Opinion at 77-83, 91-92, FTC v. Meta Platforms, Inc., No. 1:20-cv-03590-JEB (D.D.C. Nov. 13, 2024).

Facebook/Instagram/WhatsApp

- 2025 trial judgment[1]
  - On November 18, 2025, Meta won because the FTC failed to prove *current* monopoly power
  - Section 13(b):
    - Applies only when "*is violating, or is about to violate*" any provision of law enforced by the Federal Trade Commission
    - Would require the FTC to show:
      - Meta currently has monopoly power in the relevant market, and
      - Meta's current anticompetitive exclusionary acts is maintaining that power
    - Past power and continuing harm from past conduct is not sufficient to give the FTC a cause of action under Section 13(b)
  - *Court:* Section 13(b) does not provide the FTC with a cause of action
    - TikTok and YouTube in the relevant market
    - Even TikTok alone defeated the monopoly power showing

[1] Memorandum Opinion at 22-24, 88-89, FTC v. Meta Platforms, Inc., No. 1:20-cv-03590-JEB (D.D.C. Dec. 2, 2025), ECF No. 705 (lesser-redacted version of the November 18, 2025, opinion).

Facebook/Instagram/WhatsApp

- Scope and appeal
  - The judgment
    - Case dismissed for lack of current monopoly power in the relevant market
    - The court did not decide whether the acquisitions constituted anticompetitive exclusionary conduct
  - On January 20, 2026, the FTC appealed to the D.C. Circuit
    - The appeal remains pending[1]

Query: If the FTC wins on appeal, what happens?

[1] Press Release, Fed. Trade Comm'n, FTC Appeals Ruling in Meta Monopolization Case (Jan. 20, 2026).

The outcomes of the cases

Case	Disposition	What the case establishes
Meta/Within	Preliminary injunction denied	Recognized potential competition theories can fail on the evidence
Edwards/JenaValve	Preliminary injunction granted; deal abandoned	Section 7 can protect existing competition before commercial sales
Mallinckrodt/Synacthen	Settled	An enforcement theory and remedy, without an adjudication of liability
Visa/Plaid	Deal abandoned	Allegations and evidence, without a judicial probability or timing standard
Facebook	Acquisition claims survived summary judgment (2024); judgment for Meta at trial (2025)	The conduct framework does not dispense with proof of monopoly power

Potential and nascent competition

Theory	Competition protected
Actual potential competition (Section 7)[1]	Reasonably likely independent entry offering a reasonable probability of substantial procompetitive effects
Perceived potential competition (Section 7)[1]	A present constraint: a perceived entry threat and its tempering effect on incumbents
Existing R&D rivalry (Section 7)[2]	Rivalry already occurring in development and clinical trials
Monopoly maintenance (Section 2)[3]	Exclusion of a nascent threat reasonably capable of contributing significantly to monopoly maintenance; monopoly power remains required
Entrenchment through acquisition (Section 7)[4]	Eliminating a nascent threat may substantially lessen competition or tend to create a monopoly by protecting a dominant position

[1] *Meta Platforms*, 654 F. Supp. 3d at 925-28, 938-41.
[2] *Edwards Lifesciences*, Memorandum Opinion at 48, 66-68.
[3] *Microsoft*, 253 F.3d at 50, 58-59, 78-79; Meta Platforms, Memorandum Opinion at 61-65 (Nov. 13, 2024).
[4] Merger Guidelines § 2.6.A, at 19-21 (2023); Complaint ¶¶ 76-78, United States v. Visa Inc. (Nov. 5, 2020).

Some questions

- Three types of nascent competitor acquisitions
  - *Investment in the technology.* The acquiring dominant firm plans to invest significantly in the new technology and bring it to market as a new product or a feature improvement
  - *Redeployment.* The acquiring dominant firm plans to redirect the acquired company's R&D and product development teams to different technologies or products
  - *"Killer acquisitions."* The acquiring dominant firm intends to suppress the acquired technology postmerger[1]
- Plans and competitive effects
  - Stated plans do not by themselves establish the competitive effect. Compare likely development under common ownership with likely development without the acquisition.

[1] See Colleen Cunningham, Florian Ederer & Song Ma, Killer Acquisitions, 129 J. Pol. Econ. 649 (2021) (estimating that 5.3-7.4 percent of acquisitions in their sample are "killer acquisitions").

Reinterpreting Section 7

- The incipiency standard
  - Section 7 prohibits mergers and acquisitions that may substantially lessen competition or tend to create a monopoly[1]
  - Existing law requires a reasonable probability of a substantial lessening of competition[2]
- *WDC:* A possible reinterpretation
  - Uncertain entry may prevent proof of a reasonable probability of substantial competitive harm
  - From a consumer welfare perspective, reasonableness should be interpreted in terms of the expected value of the harm, not just likelihood
    - A low probability of anticompetitive harm could justify intervention if the magnitude of the harm, should it occur, is sufficiently high
    - An expected value analysis also should consider any offsetting procompetitive benefits of the acquisition
  - This is a proposed interpretation of the incipiency standard, not a settled probability rule

[1] 15 U.S.C. § 18.
[2] United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957); accord United States v. ITT Cont'l Baking Co., 420 U.S. 223, 242 (1975); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

Some questions

- The legislative alternative[1]
  - Some proponents seek legislation to supplement judicial enforcement
  - The cited 2021 proposal would presume acquisitions of nascent potential competitors by dominant firms anticompetitive
- Questions for any approach
  - *Dominance.* How dominant must the acquiring company be?
  - *The threat.* How large, unique, likely, and imminent must the competitive threat be?
    - What evidence distinguishes a credible competitive threat from speculation?
  - *Benefits and proof.* What consumer benefits can justify the acquisition, and which party should bear the burden of production or persuasion?
  - *Remedies.* When should the agencies accept a decree requiring licensing on reasonable terms, as in *Mallinckrodt*, to restore an independent development path?

[1] See, e.g., Steven C. Salop, New U.S. Antitrust Legislation before Congress Must Mandate an Anticompetitive Presumption for Acquisitions of Nascent Potential Competitors by Dominant Firms (Washington Center for Equitable Growth June 22, 2021).