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What the FTC's loss in the Meta/Within transaction means for the future of potential competition cases

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Perspectives of the Weil trial team[1]

On February 24, 2023, the Federal Trade Commission officially dismissed its administrative challenge to Meta Platforms, Inc.'s acquisition of Within Unlimited, Inc. (Within), the company behind the virtual reality (VR) fitness application, Supernatural.

The sole question before the court was whether the transaction eliminated "potential competition," as Meta, which owns the Quest VR platform, did not have a "dedicated fitness VR app."

The move by the FTC came less than a month after Northern District of California Judge Edward J. Davila denied the FTC's request for a preliminary injunction pending the outcome of the FTC's administrative trial based on evidence provided by the parties during a seven-day bench trial in December 2022.

When it filed its cases, the FTC touted them as an effort to preserve competition in the "dynamic, rapidly growing U.S. markets for dedicated-fitness VR apps."[2] The sole question before the court was whether the transaction eliminated "*potential* competition," as Meta, which owns the Quest VR platform, did not have a "dedicated fitness VR app" prior to the acquisition.[3]

Though the court found that the FTC had not met its burden, the FTC has suggested that the decision paves the way for future challenges of deals between firms that are not current competitors. As Bureau of Competition Director Holly Vedova stated about the decision, "Even in situations where a court doesn't reach the conclusion we were hoping for, a court's opinion can have beneficial interpretations of the law that can help us in future cases down the road, and really chart a new course."[4]

Did *FTC v. Meta* really move the ball?

What is potential competition?

For going on six decades, federal antitrust enforcers have been arguing that transactions can violate Section 7 of the Clayton Act if they impact competition between firms that are poised to become competitors in the future. That theory is a cornerstone of the FTC's approach to pharmaceutical mergers,[5] has been litigated recently by the agency,[6] and is reflected in its 2010 Horizontal Merger Guidelines.[7]

The Supreme Court has long recognized that the elimination of "perceived" potential competition — the possibility that the threat of entry by one of the merging parties affects competition in a market where the other is already present — could violate Section 7.[8] And while it left open whether the effect on future competition from an entrant, which it distinguished as "actual potential competition," is cognizable,[9] many appellate and lower courts have been willing to accept it as a theory of competitive harm.

The problem for the government historically has been less a question of the viability of the theory, but more a question of proving liability: victories in potential competition cases have been few and far between, particularly when it comes to actual potential competition.

How did judge Davila approach potential competition in *FTC v. Meta?*

The FTC complaint alleged that eliminating Meta as a potential independent competitor in its "dedicated fitness VR apps" market would have two potential anticompetitive effects.[10]

Victories in potential competition cases have been few and far between, particularly when it comes to actual potential competition.

First, it alleged that the merger would eliminate the alleged "edge effect" it believed Meta exerts on existing competitors. The second part of the FTC's potential competition claim was that, but for the proposed acquisition, Meta would have entered the market *de novo*.

Both types of potential competition theories start with the same prerequisites of all merger cases — high concentration in a properly

defined market that is otherwise insulated from entry — and add additional requirements for the two theories.

In perceived potential competition cases, it must be shown that the acquirer "in fact tempered oligopolistic behavior" of the incumbents, and for actual potential competition the FTC must prove a likelihood that independent entry in the near future would produce "deconcentration or other significant procompetitive effects."[11]

Judge Davila followed the traditional approach to assessing whether the required market conditions were present, and concluded that the FTC had established a presumption that they were. But the opinion leaves open whether that presumption was overcome by Meta's extensive rebuttal evidence about nascency, volatility of shares, new entry, entry barriers and the absence of price competition because the elements of the potential competition theories were not satisfied.[12]

Though the decision was a resounding win for Meta, did the FTC significantly advance potential competition law?

Much of the opinion is dedicated to evaluating the specific criteria of the potential competition theories, the standard of proof, and the sufficiency of the FTC's evidence. Regarding the perceived potential competition claim, the FTC advocated that it had met its burden by showing that Meta *objectively* should be perceived by market incumbents as a threat that constrained their behavior.

The court summarily rejected that position, holding instead that the FTC must prove (but had not) that the threat of entry by Meta actually affected competition.[13]

The opinion devotes considerably more time to the actual potential competition claim, which was the focus of most of the trial. It agreed that potential competition is a viable doctrine, and accepted the FTC's proposed standard that the entry must be "reasonably probable."

It also agreed with the FTC that "objective" evidence is more valuable in assessing that probability than actual intent (i.e. "subjective") to enter. But the court still found the FTC's proof lacking.

The failure of proof was important (and ultimately fatal) because the FTC had urged that Meta's financial capabilities, expertise in VR, and interest in fitness as a use case alone qualified it as an actual potential entrant.[14] The court said that was not enough, and went on to examine Meta's assessment of its specific capabilities, incentives and intentions.

That subjective evidence — primarily Meta internal documents assessing the company's capabilities and likelihood of entry — showed that Meta did not have the "available feasible means" to enter the relevant market other than by acquisition, though the opinion does downplay the relevance of post- acquisition statements of intent.[15]

As a result, the court found that the FTC had not met its burden, and did not need to reach the question of whether Meta's theoretical entry would significantly increase competition in the relevant market.[16]

Did *FTC v. Meta* move the ball for the FTC, or was it pulled (again) before the FTC could kick it?

FTC v. Meta confirms that the FTC is willing to go all out to "rein in Big Tech," and crack down on mergers more broadly. Though the decision was a resounding win for Meta, did the FTC significantly advance potential competition law?

It's not clear that the decision does that. For example, it:

- Confirmed that district courts are generally unwilling to conclude that the actual potential competition doctrine does not exist at all — but then again, almost every court before it has been willing to assume its theoretical validity, at least *arguendo*.[17]
- Accepts the FTC's proposed "reasonably probable" standard for measuring the likelihood of entry, but added the interpretation that it means "*noticeably greater* than 50 percent," consistent with the Fifth Circuit interpretation.[18] While that is a lower standard than "clear proof" that several circuits[19] (and the FTC itself)[20] require, it is arguably higher than the "probable" standard recently accepted by Judge Polster in *FTC v. Steris*.[21]
- Clarifies that objective evidence is important in assessing the likelihood of entry, but did not accept that subjective evidence — the internal assessment of the feasibility of entry — was irrelevant as the FTC had argued.

These modest holdings do not seem to do much to improve the FTC's chances of success in future potential competition cases. One thing about the case, however, is clear: with only one win in an actual potential competition case since 1973, the goalposts in these cases always seem to be further away than the government's evidence takes it.

Notes

[1] Weil's trial team included Weil Partners Michael Moiseyev, Chantale Fiebig, Eric Hochstadt, Liz Ryan and Bambo Obaro.

[2] FTC Case Summary, *FTC v. Meta Platforms Inc./Mark Zuckerberg/Within Unlimited*, FTC Docket No. 221-0040, *available at* http://bit.ly/3KmZmbU.

[3] Midway through discovery, the FTC abandoned the claim that Meta was a current competitor in the broader "VR fitness app" market via its popular Beat Saber game. *See, e.g.,* Wall Street Journal, "FTC Loses Antitrust Challenge to Facebook Parent Meta" (Feb. 1, 2023), *available at* http://bit.ly/3zEyaR1 ("In October, the FTC refiled its lawsuit and dropped all references to Meta and Within being direct competitors.").

[4] Holly Vedova, Director, Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), *available at* https://bit.ly/3UkjQGR.

[5] *See, e.g., In the Matter of Bristol Myers Squibb Company and Celgene Corp.*, FTC Docket No. C-4690 (Nov. 12, 2019).

[6] *Fed. Trade Comm'n v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015).

[7] *E.g.*, U.S. Dep't of Justice and Fed. Trade Comm'n 2010 Horizontal Merger Guidelines §5.3 ("A merger between an incumbent and a potential entrant can raise significant competitive concerns.")

[8] *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625 (1974) ("[T]he Court has interpreted § 7 as encompassing what is commonly known as the 'wings effect' — the probability that the acquiring firm prompted premerger procompetitive effects

within the target market by being perceived by the existing firms in that market as likely to enter de novo.") (internal citations omitted).

[9] *Id*. at 639.

[10] Amended Complaint for a Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, *Fed. Trade Comm'n v. Meta Platforms, Inc., et al.*, No. 5:22-cv-04325-EJD, Dkt. No. 102 (N.D. Cal. Oct. 7, 2022) at ¶56.

[11] Order Denying Plaintiff's Motion for Preliminary Injunction, *Fed. Trade Comm'n v. Meta Platforms, Inc., et al.*, No. 5:22-cv-04325- EJD, Dkt. No. 549 at 39, 60-61.

[12] *Id*. at 40 ("[B]ecause the Court finds *infra* that the FTC has not satisfied the other elements of the potential competition theories they have brought, the Court need — and does not — decide whether the Defendants' showing here is sufficient to rebut the FTC's prima facie case on substantial concentration.") (internal citations omitted).

[13] *Id*. at 63 ("[T]he FTC must produce some evidence — direct or circumstantial — that Meta's presence had a direct effect on the firms in the relevant market. Under this standard, the FTC's evidence on this element is insufficient.").

[14] *Id*. at 53 ("To the extent the FTC implies that — based solely on the objective evidence of Meta's resources and its excitement for VR fitness — it would have inevitably found and implemented some unspecified means to enter the market, the Court finds such a theory to be impermissibly speculative.")

[15] *Id*. at 49-53.

[16] *Id*. at 60.

[17] *See, e.g., Steris Corp.*, 133 F. Supp. 3d at 966 ("Accordingly, in deciding the likelihood of success on the merits, the Court will assume the validity of this doctrine.").

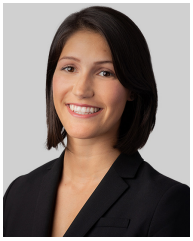
[18] Order Denying Plaintiff's Motion for Preliminary Injunction, *Fed. Trade Comm'n v. Meta Platforms, Inc., et al.*, No. 5:22-cv-04325- EJD, Dkt. No. 549 at 41 (emphasis added).

[19] *Fed. Trade Comm'n v. Atl. Richfield Co.*, 549 F.2d 289, 294-95 (4th Cir. 1977); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360, 1490 (D. Kan. 1987) *aff'd in part and remanded in part*, 899 F.2d 951 (10th Cir. 1990); *accord United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980).

[20] *In the Matter of B.A.T. Indus., Ltd., et al.*, 104 F.T.C. 852, 926 (1984).

[21] *Steris Corp.*, 133 F. Supp. 3d at 978 ("In order to obtain injunctive relief, the FTC has to show a likelihood of proving at trial that, absent the merger, Synergy probably would have entered...").

About the authors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