

## Potential Entrants and the Case Against Steris

Leah Cable & Chris Silveri  
Student Fellows  
Institute for Consumer Antitrust Studies  
Loyola University Chicago School of Law

### Introduction

This article addresses the Federal Trade Commission's power to block mergers that may substantially lessen competition, and whether the FTC may regulate mergers of potential competitors in a given market.

The FTC's mission is to “protect[] the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education.”<sup>1</sup> The FTC acquires its enforcement directive from Section 7 of the Clayton Act, which instructs that “no person engaged in . . . any activity affecting commerce shall acquire . . . the whole or any part of the stock or other share capital” where the “effect of such acquisition may be substantially to lessen competition.”<sup>2</sup> Through this statute, Congress concerns itself with probabilities, not certainties, when vesting enforcement power to the FTC.<sup>3</sup> As such, the FTC is permitted to pursue an injunction in order to enforce Section 7, which provides the FTC adequate time to perform its greater enforcement function and prove any violation of Section 7 by preponderance of the evidence.<sup>4</sup> Section 13(b) also requires a proper showing that the FTC is likely to have success and that the action is in the public interest.<sup>5</sup> To that end, the FTC “must ‘raise questions going to the merits so serious, substantial, difficult and doubtful as to make them

---

<sup>1</sup> *Mission*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission> (last visited Feb. 13, 2023).

<sup>2</sup> 15 U.S.C. § 18; *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 858 (6th Cir. 2005).

<sup>3</sup> *Fed. Trade Comm'n v. Steris Corp.*, 133 F. Supp. 3d 962, 965 (N.D. Ohio 2015).

<sup>4</sup> *Steris*, 133 F. Supp. 3d at 966.

<sup>5</sup> 15 U.S.C. § 53(b) (providing that “[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, . . . a preliminary injunction may be granted. . .”).

fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance, and ultimately by the Court of Appeals.”<sup>6</sup>

The FTC generally proffers the “actual potential entrant” doctrine which addresses the scenario in which a potential entrant merges with a firm already competing in the market and the effect of that merger lessens competition.<sup>7</sup> The FTC contends that the acquisition of an actual potential competitor violates Section 7 if the following four conditions are met: (1) The relevant market is highly concentrated, (2) the competitor “probably” would have entered the market, (3) its entry would have had pro-competitive effects, and (4) there are few other firms that can enter effectively.<sup>8</sup>

In the analysis to follow, we will discuss the potential entrant doctrine as it relates to the FTC’s case against Steris Corporation.

### **Background**

Steris Corporation announced in October 2014 its agreement to merge with foreign competitor Synergy Health in a \$1.9 billion transaction that would combine two providers of healthcare industry sterilization.<sup>9</sup> Steris’s services in the United States utilize gamma radiation, e-beam radiation and ethylene oxide gas to sterilize medical and other equipment.<sup>10</sup> Steris and Sterigenics, its primary competitor, are the only United States entities that offer gamma radiation sterilization, which is the preferred option required for some healthcare products and by some

---

<sup>6</sup> *Steris*, 133 F. Supp. 3d at 966 (citing *F.T.C. v. ProMedica Health Sys., Inc.*, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011)).

<sup>7</sup> *Id.* at 966.

<sup>8</sup> *Id.*

<sup>9</sup> Ian G. John, Christine Wilson, James H. Mutchnik, and Mark L. Kovner, *Kirkland & Ellis explains the Recent Denial of the FTC’s Motion to Enjoin the Steris-Synergy Merger*, THE CLS BLUE SKY BLOG (Oct. 6, 2015), <https://clsbluesky.law.columbia.edu/2015/10/06/kirkland-ellis-explains-the-recent-denial-of-the-ftcs-motion-to-enjoin-the-steris-synergy-merger/>.

<sup>10</sup> *Steris*, 133 F. Supp. 3d at 964; John, *supra* note 9.

healthcare companies due to its dense penetration capabilities.<sup>11</sup> As such, Steris and Sterigenics account for 85% of the U.S. market for contract sterilization services.<sup>12</sup>

Synergy, a British company, is the largest provider of e-beam radiation services in the U.S., but it is a much smaller competitor than Steris or Sterigenics.<sup>13</sup> While Synergy does not have a U.S. gamma radiation sterilization facility, it operates more than thirty-six contract sterilization facilities outside the U.S.<sup>14</sup> Importantly, Synergy has been developing a new x-ray sterilization technology, operating the only facility in the world providing these services on a commercial scale, in the hopes of increasing its U.S. market presence and competing with the gamma radiation services of Steris and Sterigenics.<sup>15</sup> X-ray sterilization has shown the potential to be more cost-effective when compared to gamma radiation, and also had the potential to be more effective than traditional radiation on every other operating level.<sup>16</sup>

On May 29, 2015, the FTC filed a complaint and asked the court to grant immediate injunctive relief under Section 13(b) in order to prevent Steris from acquiring its alleged potential competitor, Synergy, on June 1 of that year.<sup>17</sup> The FTC's sued on "the theory that even though Synergy is currently only a small player offering contract sterilization services to medical device makers and others, it was set to become a real threat to the radiation-based service that Steris and market leader Sterigenics . . . offer in the U.S. by importing X-ray sterilization currently offered only in Europe."<sup>18</sup> The FTC postulated that the competition that would be

---

<sup>11</sup> *Steris*, 133 F. Supp. 3d at 964; John, *supra* note 9.

<sup>12</sup> *Steris*, 133 F. Supp. 3d at 964.

<sup>13</sup> *Id.*; John, *supra* note 9.

<sup>14</sup> *Steris*, 133 F. Supp. 3d at 964; John, *supra* note 9.

<sup>15</sup> *Steris*, 133 F. Supp. 3d at 964, 967; John, *supra* note 9.

<sup>16</sup> *Steris*, 133 F. Supp. 3d at 968.

<sup>17</sup> *Id.* at 963.

<sup>18</sup> Melissa Lipman, *FTC's \$2B Steris Merger Fight To Turn On Future Competition*, LAW360 (Aug. 12, 2015, 3:29 PM), <https://www.law360.com/articles/689828/ftc-s-2b-steris-merger-fight-to-turn-on-future-competition>.

eliminated as a result of the merger would not be replicated in the market and that future competition in the X-ray sterilization space would thus be nonexistent.<sup>19</sup>

On September 24, 2015, the U.S. District Court for the Northern District of Ohio denied the Federal Trade Commission's motion for a preliminary injunction pursuant to Section 13(b) of the Clayton Act to prevent the merger between Steris and Synergy.<sup>20</sup> Prior to the hearing that saw the FTC's motion denied, the court directed the parties to focus their attention on the second requirement of the actual potential entrant doctrine and "whether, absent the acquisition, the evidence shows that Synergy probably would have entered the U.S. contract sterilization market by building one or more x-ray facilities within a reasonable period of time."<sup>21</sup>

### **Facts**

The District Court based its analyses on the following findings of fact: When X-ray sterilization presented Synergy an avenue through which to compete on a global scale, Andrew McLean was brought on to lead the design and project teams for Synergy's development of their x-ray capabilities sixteen months prior to the proposed merger's announcement.<sup>22</sup> The strategy for this project was due to be presented to Synergy's two controlling boards around the same time that the world's leading supplier of Cobalt-60 (the energy source for gamma radiation sterilization) was purchased by Sterigenics in an obvious move to make Synergy more

---

<sup>19</sup> *Steris/Synergy Health, In the Matter of*, FED. TRADE COMM'N (Oct. 7, 2015), <https://www.ftc.gov/legal-library/browse/cases-proceedings/151-0032-steris-synergy-health-matter> ("According to the FTC, it is unlikely that new competitors in the market for contract radiation sterilization services would replicate the competition that would be eliminated by the merger. The Commission alleged that the challenged acquisition would eliminate likely future competition between Steris's gamma sterilization facilities and Synergy's planned x-ray sterilization facilities in the United States, thus depriving customers of an alternative sterilization service and additional competition.").

<sup>20</sup> John, *supra* note 9.

<sup>21</sup> *Steris*, 133 F. Supp. 3d at 966.

<sup>22</sup> *Id.* at 968, 973, 976.

competitive in the global market that consisted of competitors Steris and Sterigenics.<sup>23</sup> In order to determine which projects to fund within Synergy and after some internal analysis, the project team would present their business case to both of Synergy's controlling boards, during which stage the case undergoes a "black hat" (or two-part) review by the corporate finance team before it receives funding.<sup>24</sup> This "black hat" review required that the project's projections and business model meet a series of metrics, such as return on capital employed, internal rate of return, cash payback, and revenue commitments from customers.<sup>25</sup> This system of internal review made it clear that a project of this magnitude would not move forward unless future viability was assured.<sup>26</sup>

Nearly a year prior to the proposed merger's announcement, and as later expressed by Mr. McClean, there was concern about several issues relating to the project as well as trepidation surrounding supplier contracts to support the financial model for building the facilities needed to offer these x-ray services.<sup>27</sup> Internal discussions pointed clearly to the fact that the x-ray business on U.S. soil faced an uncertain future well before the proposed merger with Steris was announced. To follow up on these concerns, Mr. McClean approached a number of major medical manufacturers in hopes of securing some form of commitment from them.<sup>28</sup> He returned

---

<sup>23</sup> *Id.* at 968 ("Now concerned about Cobalt-60 supply in the hands of Sterigenics and motivated by his belief in x-ray technology, Dr. Steeves decided to explore fully the concept of commercial x-ray sterilization in the U.S. and other parts of the world.").

<sup>24</sup> *Id.* at 969.

<sup>25</sup> *Id.* at 969-70.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 968, 970 (In a letter to Synergy's COO, Mr. McClean relayed the following: "I know I sound like a broken record on this but the message does not seem to be cutting through. . . . The fact of the matter is that building an x-ray facility today would not guarantee conversions tomorrow. As an example Daniken x-ray is only ~25% capacity utilized after more than 3 years. If we did not force customers to move from Daniken and our other gamma sites, then capacity utilization would be only 10%. These are the facts and if we push ahead and build without a proper baseload customer(s) in the U.S. it is to our peril. And of course we do not have the same footprint in the U.S. that would allow us to "force" customers to convert and cross validate and indeed our competitors would be doing everything possible to stop that occurring, creating further delays and barriers. No one is more enthusiastic about getting an x-ray foot- print in the U.S. than myself, however it could be a complete disaster.").

<sup>28</sup> *Id.* at 971.

to the board with signed letters of interest but still had difficulty getting anyone to “bear the risk” of the new service in the United States.<sup>29</sup> As internal analysis of the x-ray sterilization service’s viability continued, it was clear that the project would miss the required metrics by the “black hat” review, and it was later discovered that some of the only concrete numbers feeding into the analysis were counted twice.<sup>30</sup> Mr. McClean continued conversations with clients on a continuous basis regarding the potential opportunity for use of Synergy’s x-ray services on any project, but there was continually radio silence on that front.<sup>31</sup>

Despite these ongoing issues with the internal project that were evident from the outset, the proposed merger between Steris and Synergy was announced in October 2014, sixteen months after Mr. McClean was brought on to assess the viability of Synergy’s x-ray technology.<sup>32</sup> While not factually developed by the District Court, this merger was a clear bid to better compete with mutual competitor Sterigenics, who had just previously acquired the energy source for gamma radiation sterilization.<sup>33</sup> Synergy’s x-ray project undoubtedly offered the potential to better compete, but the internal struggles to justify its costs, lasting at least sixteen months prior to the announcement of the proposed merger, were certainly known during negotiations as well.<sup>34</sup> Despite this, plans to continue exploring these options were set to continue under the combined entity moving forward.<sup>35</sup>

---

<sup>29</sup> *Steris*, 133 F. Supp. 3d at 971.

<sup>30</sup> *Id.* at 972.

<sup>31</sup> *Id.* at 973; *but see Steris*, 133 F. Supp. 3d at 973 (“Still, he had cause for optimism because J & J continued to express enthusiasm about x-ray, they complained about the sharp increase in prices for Cobalt-60, and there was concern in the industry over Cobalt-60 supply and tightening regulations over disposal of Cobalt-60 and EO residuals.”).

<sup>32</sup> *Steris*, 133 F. Supp. 3d at 973.

<sup>33</sup> *Id.* at 968.

<sup>34</sup> *Id.* at 973.

<sup>35</sup> *Id.*

Subsequently, in early November 2014, Synergy announced that they successfully signed their exclusive agreement with IBA to provide the adequate equipment for Synergy’s x-ray services on an exclusive basis and Mr. McClean, through his subordinates, continued to solicit letters of interest in Synergy’s x-ray services following this announcement, but news on the economic front worsened.<sup>36</sup> The machine underlying the IBA deal increased in cost and decreased in the functions necessary to support the business that Synergy was hoping to conduct.<sup>37</sup> This development punctuated the uphill battle that this project faced throughout its internal review period, which spanned nearly two years, that consisted of customer reluctance, lack of revenue commitments, and, now, increasing overhead costs for the service itself.<sup>38</sup>

This uncertainty, which predated the Steris and Synergy merger negotiation and announcement and persisted throughout, coupled with the uncertainty around the timeline that IBA would be able to test and provide the necessary machinery, frustrated Mr. McClean and, “[o]n February 24, 2015, McLean sent a declaration to the FTC stating that he was terminating Synergy’s U.S. x-ray project, and listing the reasons for doing so.”<sup>39</sup> Mr. McClean cited his “full-court” efforts and failure to solicit customer commitments, as well as the fact that there was “no reasonable prospect of customer acceptance for Synergy’s X-ray project.”<sup>40</sup> In support of this,

---

<sup>36</sup> *Id.* at 974–75.

<sup>37</sup> *Id.* at 975 (“The machine that formed the cornerstone of the September 2014 business plan was IBA’s Rhodotron TT300. IBA had represented that its Rhodotron TT300 was a combination x-ray/e-beam machine that could meet Synergy’s needs. But in late 2014, IBA began expressing a lack of confidence in the TT300, proposing a reconfiguration of the TT1000 with a 250,000 increase in price. . . . “While the TT300 provided both e-beam and x-ray services, the greater capacity was on the e- beam side. A machine that provided both services was critical to the September 2014 business model because it guaranteed considerable e-beam revenue for years (which would be satisfied by the movement of products from the Lima, Ohio e-beam plant to the new facility) while Synergy’s U.S. x-ray business developed.”).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 975–76.

<sup>40</sup> *Id.* at 976.

Mr. McClean referenced emails from five of Synergy's top customers stating that they had no intention of using x-ray sterilization.<sup>41</sup>

In the months following, the FTC filed their complaint.

### **Reasoning**

While the complaint sought a preliminary injunction against Steris and Synergy, the district court ruled against the FTC's proposition that the potential merger would cause Synergy to abandon its effort to construct new facilities for sterilizing products through x-rays.<sup>42</sup> The standard that the FTC failed to meet, according to the court, was a showing that it was likely that "absent the merger, Synergy probably would have entered the U.S. contract sterilization market by building one or more x-ray facilities in the U.S. within a reasonable period of time."<sup>43</sup> In determining that the FTC has failed to carry its necessary burden, the court relied upon a multitude of reasons.

Despite an exceptional amount of effort by Synergy, the most significant reason that it discontinued the x-ray project in the U.S. was due to clear lack of customer commitment.<sup>44</sup> Evidence presented to the court showed that Synergy was unable to secure the financial commitment of even one customer, despite multiple healthcare product manufacturers expressing interest in the x-ray technology.<sup>45</sup> Witness testimony presented by the FTC itself underscored how J & J and Zimmer's interest in the x-ray facilities were, at best, "lukewarm."<sup>46</sup> Given that

---

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 984.

<sup>43</sup> *Id.* at 978.

<sup>44</sup> *Id.*,

Despite considerable effort on Synergy's part, as shown by the evidence and described in concise detail in McLean's declaration, not a single medical device customer would sign a take-or-pay contract, and only about 6 of the 185 customers Synergy initially targeted in its sales and marketing campaign would sign even a nonbinding letter of interest.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* at 979.



the project proposed by McLean was “not based on anything more than assumptions,” both healthcare product manufacturers strongly expressed their desire to remain noncommittal until multiple factors surrounding the project were resolved, which they never were.<sup>47</sup> McLean was keenly aware that the SEB and PLC board would reject their business model if it was lacking the necessary financial backing, and he expressed his frustrations over this on numerous occasions.<sup>48</sup>

The evidence indicated that the lack of customer commitments actually “had nothing to do with the merits or benefits of x-ray sterilization.”<sup>49</sup> On the contrary, existing gamma customers were extremely unwilling to convert to x-ray sterilization as there would not be a significant reduction in cost and the conversion process could take several years.<sup>50</sup> In support of this observation, the court relied on uncontested emails between McLean and some of the healthcare product manufacturers which “clearly showed” how backing x-ray sterilization of their products was not in their interest—there simply was nothing McLean or Tyranski (Synergy’s president) could do about this fact.<sup>51</sup>

Another notable factor undermining the FTC’s allegation that the proposed merger was the leading variable causing Synergy to abandon its efforts to construct a new facility was simply the fact that there were extensive hoops needing to be jumped through prior to construction, on top of the considerable capital costs. Not only was the initial estimated cost of building two x-ray facilities in the U.S. well over Synergy’s budget, leaving little to no room for any risk to be tolerated, these estimates continued increasing throughout the period prior to Synergy

---

<sup>47</sup> See *id.* at 979–80 (outlining the relevant testimony and describing J & J and Zimmer’s concerns regarding, among other things, there being no approval by regulatory agencies in the countries where the x-ray sterilized products were intending to be sold, no location selected in the United States for the facility, and functionality studies having yet to be completed).

<sup>48</sup> *Id.* at 978.

<sup>49</sup> *Id.* at 980.

<sup>50</sup> *Id.* at 980–81.

<sup>51</sup> *Id.*

abandoning the project.<sup>52</sup> The court disagreed with the FTC's contention that Synergy was in a good position to build the U.S. facilities in the foreseeable future, and instead agreed with a witness who noted that that "evaluating an alternative sterilization modality is a long-term project."<sup>53</sup> In addition to Synergy still needing to complete installation and operational qualifications, the healthcare product manufacturers themselves would also need to jump through certain necessary hoops prior to the facilities being constructed.<sup>54</sup> For instance, the cost of switching from gamma to x-ray sterilization had yet to be formally analyzed, there were no discussions regarding pricing for x-ray sterilization of specific products, regulatory approval was needed for the chosen site, and material shelf-life studies and packaging studies remained to be completed.<sup>55</sup> All of these remaining steps for the parties involved evidently persuaded the court that this project would not be completed in the foreseeable future, notwithstanding Synergy's best efforts.

Lastly, the court noted that the best evidence supporting Synergy's decision to abandon the project for legitimate business reasons was the timing of it all.<sup>56</sup> Synergy vigorously continued to work on the x-ray project after the merger was announced, trying to gain support from the SEB and ultimately achieve PLC approval.<sup>57</sup> The court accepted that Synergy's efforts

---

<sup>52</sup> See *id.* at 981–82 (explaining how evidence showed that by the time contractors were involved and Synergy received actual proposals, the estimates had already increased by \$2.5 million). "The only certainty about the proposed machine was that it would cost considerably more than the initial business model estimates." *Id.* at 982.

<sup>53</sup> *Id.* at 982–83.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 983.

<sup>57</sup> *Id.* at 984,

Synergy, led by McLean and Tyranski, continued to go all out to try to win SEB support for the business plan, and ultimately PLC approval. The x-ray team continued to court customers, signing them up to get their products tested at Daniken. The team continued their detailed discussions with IBA on the appropriate machine. They made road trips to scout out sites, soliciting incentives from the various cities.

to enter the market were not a sham but legitimate efforts to achieve success on the project.<sup>58</sup> These efforts being continued while the FTC conducted its investigation persuaded the court that the decision to terminate the project was reached only after serious consideration of all pertinent business factors.<sup>59</sup> Instead of terminating the project shortly after meeting with the FTC and hearing their objections to the merger, the court noted that Synergy would have continued its x-ray efforts to better convince the FTC that the merger was not the driving decision, which they did not do.<sup>60</sup>

Ultimately the court reasoned that Synergy’s failure to obtain customer commitments, their inability to lower capital costs, and the timing of the continued efforts “unequivocally show[ed] that the problems that plagued the development of x-ray sterilization as a viable alternative to gamma sterilization ... justified the termination of the project.”<sup>61</sup> Moreover, it was clear to the court that the negotiations for the proposed merger had zero impact on Synergy’s efforts to continue the U.S. x-ray project.<sup>62</sup>

### **Potential & Realized Impacts**

One aspect of the *FTC v. Steris* decision that is typically viewed as a “win” for the FTC is how the district court did not challenge the actual potential entrant doctrine.<sup>63</sup> This is positive for

---

<sup>58</sup> *Id.* (“The evidence demonstrates that this was not a sham to convince the FTC that Synergy wanted to enter the market; it was legitimate effort by Synergy employees who really wanted the project to succeed.”).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 966 (noting that while the defendants challenged the actual potential entrant doctrine, the FTC’s endorsement of the theory and the administrative law judge choosing to utilize it during the proceedings permitted the court to assume the validity of the doctrine); *see also* Bruce D. Sokler & Farrah Short, *FTC Merger Challenge Based on Harm to Potential Competition Rejected by District Court*, MINTZ (Sept. 28, 2015), <https://www.mintz.com/insights-center/viewpoints/2015-09-28-ftc-merger-challenge-based-harm-potential-competition> (“And perhaps the value to the FTC here, is its ability to walk away without the actual potential entrant doctrine having been challenged by the district court.”). This result may still be unsurprising, considering that Section 7 of the Clayton Act prohibits mergers and acquisitions that would have the effect of substantially lessening competition—making it an “inherently forward-looking” rule. Barbara T. Sicalides & Benjamin J. Eichel, *Some Useful Insights from Steris-Synergy Merger Case*, TROUTMAN PEPPER (Oct. 7, 2015),

the FTC in that it provides an alternative avenue to the perceived potential competition doctrine for seeking to protect competition, particularly in horizontal mergers where the acquired firm is only one that is *likely* to enter the market.<sup>64</sup> Further, the FTC itself has purported that this doctrine is uniquely important because the 1984 Merger Guidelines, which provide the general framework for the FTC to follow in determining whether to bring a claim, note that “present procompetitive effects via lower prices are not always present due to the misconstrued perceptions of incumbent firms.”<sup>65</sup> With these effects lacking in a potential merger, an agency would be unable to argue under the perceived potential competition doctrine despite a potential risk to competition still existing. An acceptance of this doctrine “may mark the beginning of a shift in the agencies’ willingness to challenge transactions involving potential competitors and a greater risk for companies considering acquisitions with potential competitors.”<sup>66</sup>

Although the FTC did lose its challenge of the Steris/Synergy merger, some scholars argue that the case underscores how agencies will continue to pursue potential competition cases if they are adequately persuaded that significant competitive harm is likely to occur.<sup>67</sup> It has also been suggested that the outcome of this case does not necessarily insinuate the existence of a

---

<https://www.troutman.com/insights/some-useful-insights-from-steris-synergy-merger-case.html>. *But see* Mark D. Alexander, *United States: Mergers*, GLOBAL COMPETITION REV. (Aug. 30, 2016), <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/the-antitrust-review-of-the-americas-2017/article/united-states-mergers> (noting that the Steris complaint involved a “somewhat unusual” theory based on potential competition).

<sup>64</sup> *See generally* Benjamin Eichel & Barbara Sicalides, *Federal Judge in Ohio Accepts Future Competition Theory: Parties Should Proceed with Caution in Deals to Acquire Potential Competitors*, JDSUPRA, <https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=2458a710-d65a-4eb3-a6aa-b7c94e14b5d9> (last visited Mar. 16, 2023) (discussing the implications of the court accepting the actual potential doctrine, including how it provides the FTC with the ability to begin challenging acquisitions of potential competitors); Henry S. Klimowicz, *Reinvigorating the Perceived Potential Competition Theory: An Analysis of the Potential Competition Doctrine and FTC v. Steris Corp.*, 49 SETON HALL L. REV. 173, 178–79 (analyzing the usefulness of the actual potential entrant doctrine).

<sup>65</sup> Klimowicz, *supra* note 64, at 198–99.

<sup>66</sup> Eichel & Sicalides, *supra* note 64.

<sup>67</sup> Alexander, *supra* note 63; *but see* Sicalides & Eichel, *supra* note 63 (claiming that the district court’s “ready acceptance” of the actual potential entrant doctrine “may or may not bolster the agencies’ willingness to challenge transactions involving potential competitors”).

weakening in the FTC's merger enforcement efforts, particularly because potential competition cases are more difficult to prove than traditional merger cases.<sup>68</sup> Alternatively, the district court omitting any discussion of the underlying principles or strengths and weaknesses of the theory indicates that the decision may be of extremely limited or no precedential value at all.<sup>69</sup> If that is the case, the decision could simply have no effect on the successfulness of the future competition theory being utilized.<sup>70</sup>

Another implication of *FTC v. Steris* is that its illustration of the appropriate conduct that parties should attempt to follow when conducting a merger may assist firms in avoiding antitrust liability when pursuing a genuine merger.<sup>71</sup> Prior to this decision there was almost no history or general guidelines for firms to look to regarding when potential competition may be deemed meaningful enough to trigger antitrust issues arising during due diligence and preclosing integration where a transaction involves competitors.<sup>72</sup> Now, because the district court's analysis involved a careful review of the facts and circumstances, specific factors that merging firms should look to pre-close have been more clearly articulated. During the period that a transaction is still pending, merging competitors must follow Synergy and Steris' lead by "continu[ing] to operate and vigorously compete with each other" and they should be aware of any other independent potential competitors that could eliminate the risk of their proposed merger.<sup>73</sup> Merging parties should additionally avoid either party to the transaction "over-stepping" its

---

<sup>68</sup> Sokler & Short, *supra* note 63.

<sup>69</sup> Sicalides & Eichel, *supra* note 63.

<sup>70</sup> *See generally id.*

<sup>71</sup> *See, e.g.,* Sokler & Short, *supra* note 63; Sicalides & Eichel, *supra* note 63.

<sup>72</sup> *See* Sicalides & Eichel, *supra* note 63 ("There is little clarity or history regarding when potential competition is meaningful or sufficiently likely to play a factor in the ultimate analysis or trigger the special antitrust issues raised in connection with due diligence and preclosing integration in transactions with competitors.").

<sup>73</sup> *Id.*; Sokler & Short, *supra* note 63.

bounds by playing any role in the decision making going into an effort to terminate the other parties entrance into the market.<sup>74</sup>

One scholar implied that the district court providing what is essentially a roadmap for mergers involving potential competitor entrants is actually negative because “the decision exemplifies how some of the largest firms in extremely concentrated industries can avoid antitrust enforcement.”<sup>75</sup> While this may be true in some specific instances, the outcome in *Steris* can mainly be attributed to the specific facts of the case and the substantial evidence supporting Synergy’s defense.<sup>76</sup> In other words, Steris and Synergy were not attempting to enter into a transaction that was truly anticompetitive and taking steps to cover up unlawful conduct along the way—they were proceeding with a merger while continuing to act pursuant to their independent, rational business interests that were not premised on anticompetitive intentions.<sup>77</sup> If the transaction instead involved conduct by the parties that was clearly meant to avoid antitrust enforcement, one can reasonably presume that those facts would likely have led the district court to rule in favor of the FTC. Moreover, clearer standards existing may instead deter firms at the

---

<sup>74</sup> *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 983–84 (N.D. Ohio 2015); Sicalides & Eichel, *supra* note 63. The other factors indicated by the district court to be substantial considerations are:

[w]hether the potential competitor has entered into commitments with customers or vendors; whether the potential competitor has a corporate practice of policy for approval or commitment to a strategy or entry to a new market and how close the firm is to satisfying the elements of that policy; the existence of other potential competitors and how their progress compares with the potential competitor that is a party to the contemplated transaction; whether significant barriers remain to the entry of the potential competitor, including the nature, status, cost and complexities of any regulatory requirements; the likely timing of entry if matters progress as they were progressing before serious consideration of the transaction at issue; whether the potential competitor continued to work towards its entry goals even after entering into a potential merger agreement; ... the speed at which the market is evolving, including related technology, and where the potential competitor stands in the evolution process.

*id.* (internal citations omitted).

<sup>75</sup> Klimowicz, *supra* note 64, at 204.

<sup>76</sup> See John M. Majoras & Aaron Healey, *STERIS: The Limits of Imagined Competition*, GLOBAL COMPETITION REV. (Nov. 9, 2017), <https://globalcompetitionreview.com/guide/the-obama-trials/the-obama-trials/article/steris-the-limits-of-imagined-competition> (explaining how the factual record of the case was crucial to Steris’s success, given that the decision to terminate the x-ray project was truly based on legitimate business reasons).

<sup>77</sup> See generally *Steris*, 133 F. Supp. 3d at 977–84.

outset who are contemplating entering into a transaction that would violate antitrust laws rather than encourage them to continue with a transaction that would likely lead to costly litigation in hopes that they could “avoid” such antitrust enforcement.

### **Conclusion**

One of the FTC’s methods for protecting consumers from mergers or acquisitions that would substantially lessen competition is through the use of the actual potential entrant doctrine, as was utilized in *FTC v. Steris*, albeit unsuccessfully. As delineated in the district court’s analysis, the FTC failed to establish that Synergy would have entered the U.S. contract sterilization market but for the proposed merger between Synergy and Steris primarily because the factual record established that the decision to back out of the x-ray project rested on legitimate business reasons. Disagreement exists regarding the impact this decision will have on the successfulness of the actual potential entrant doctrine in the future, yet it has generally been accepted that the FTC will continue to pursue potential competition cases posing a risk of significant competitive harm. The decision also provides much needed clarity as to what type of pre-close conduct courts will focus on when evaluating mergers or acquisitions among potential competitors.