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Uncommitted Entry in the Merger Guidelines: It's not whether – it's when

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Uncommitted entry: where does it belong?

- **Merger Guidelines provide a logical approach to merger review**
  - **Define the market based on consumer behavior**
  - **Identify participants active in the antitrust market**
  - **Compute shares/concentration/delta as an initial screen**
  - **If share/concentration statistics exceed threshold levels:**
    - **Assess competitive effects**
    - **Assess entry**
    - **Assess efficiencies**
    - **Failing firm arguments?**
- **"Uncommitted entry" is one of several supply responses that must be considered when reviewing a merger – but where?**

Uncommitted entry must have a place at the table

- Ultimately, where the analysis of uncommitted entry occurs matters little to the analysis
- But where it is done can affect the clarity of the analysis, and the efficiency of the merger review process
- Its current treatment in the Merger Guidelines – uncommitted entry is assessed when market participants are identified and their shares are determined -- seems both confusing and inefficient

Uncommitted entry analysis can clog the market share/concentration screen

- **In many investigations, market share and concentration figures and deltas serve as an initial screen**
- **NOT the place to be performing potentially time-consuming calculations called for by “uncommitted entry” analysis:**
  - **extent of an uncommitted entrant’s sunk costs**
  - **likelihood that consumers will purchase the uncommitted entrant’s product**
  - **profitability of alternative uses of the uncommitted entrant’s assets in different markets**

Uncommitted entry analysis thus belongs later in the merger review process

- Entry analysis involves a detailed inquiry of timeliness and profitability
- Such an inquiry is not always needed for purposes of merger review
- When entry is considered, one must remain mindful of the distinction between “uncommitted” entrants and “committed” entrants, i.e., those that would need to incur significant fixed costs to begin selling in the relevant market
- But the basic analysis would be the same (would the entry be profitable if sales opportunities became available) so they could all be called “entrants”

The identification of an "uncommitted entrant" can be complex

- "If a firm has the technological capability to achieve such an uncommitted supply response, but likely would not (e.g., because difficulties in achieving product acceptance, distribution, or production would render such a response unprofitable), that firm will not be considered to be a market participant." (Section 1.32)
- "In assessing whether a firm is such a market participant, the Agency will take into account the costs of substitution or extension relative to the profitability of sales at the elevated price, and whether the firm's capacity is elsewhere committed or elsewhere so profitably employed that such capacity likely would not be available to respond to an increase in price in the market." (Section 1.321)

A modest recommendation

- Limit the application of "uncommitted entry" as currently described in the Merger Guidelines to mergers for which:
  - capacity is the proper measure for calculating shares

    and

  - capacity is controlled by firms that would already be identified as participants in the market
- In this way, "uncommitted entry" affects market share and concentration calculations due to the re-deployment of capacity by firms that already have the other assets – customer relationships, distribution networks, brand name – related to the product at issue
- CAVEAT: the suggestions above pertain only to the FTC/DoJ merger review process – for purposes of litigation, incorporating additional supply responses into the market definition/market share/concentration analysis and calculations may well provide the clearest summary statistics to a court

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