Dissenting Statement of Commissioner Joshua D. Wright

In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain

FTC File No. 131-0087

April 11, 2014

The Commission has voted to issue a Complaint and Decision & Order ("Order") against Ardagh Group ("Ardagh") to remedy the allegedly anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers Inc. and Compagnie de Saint-Gobain (jointly, "St. Gobain"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Ardagh's acquisition will substantially lessen competition in glass containers manufactured and sold to beer brewers and spirits distillers in the United States, in violation of Section 7 of the Clayton Act. FTC staff and their economic expert should be commended for conducting a thorough investigation of this matter, working diligently to develop and analyze a substantial quantity of documentary and empirical evidence, and providing thoughtful analyses of the transaction's potential competitive effects. Indeed, I agree with the Commission that there is evidence sufficient to give reason to believe the proposed transaction would likely result in unilateral price increases. After reviewing the record evidence, however, I concluded there is no reason to believe the transaction violates Section 7 of the Clayton Act because any potential anticompetitive effect arising from the proposed merger is outweighed significantly by the benefits to consumers flowing from the transaction's expected cognizable efficiencies. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I write separately today to explain my reasoning for my vote in the matter and to highlight some important issues presented by this transaction relating to the burden of proof facing merging parties seeking to establish cognizable efficiencies.

I. Potential Anticompetitive Effects Are Small At Best Relative to Cognizable Efficiencies

The Commission alleges both unilateral and coordinated price effects will arise from the proposed transaction. The economic logic of the unilateral effects theory is straightforward: If the merger combines the two glass manufacturers who are the most preferred for a set of customers, there is the potential for a price increase arising from the loss of competition between those two firms. This is because sales previously diverted to the next closest competitor in response to a price increase will now be internalized by the post-merger firm. When analyzing the potential for unilateral price effects, the 2010 Merger Guidelines indicate the Agencies will consider "any reasonably available and reliable information," including "documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys."[1] The Merger Guidelines also contemplate a number of quantitative analyses to facilitate the analysis of potential unilateral effects including calculating diversion ratios and the value of diverted sales. Where sufficient data are available, the Merger Guidelines indicate "the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger."[2] In my view, the totality of record evidence supports an inference – though a fragile one – that the merger is likely to result in very modest unilateral price effects at best.

With respect to the potential coordinated price effects, I find successful coordination in this market highly unlikely.[3] However, even if coordination was a more plausible concern, I am not persuaded record evidence is probative of the effects that would arise as a result of *this* merger. My view and analysis of the record evidence relied upon to assess the magnitude of any potential coordinated effects is that it is suspect and cannot identify price differences attributable to changes in post-merger incentives to coordinate that would result from the proposed transaction rather than other factors. In addition, even if coordinated effects were likely, any estimated expected effect would need to be discounted by a probability of successful coordination that is less than one.

In summary, given the totality of the available evidence, I am persuaded that the proposed transaction is likely to generate, at best, small unilateral price effects.

The key question in determining whether the proposed transaction is likely to violate Section 7 of the Clayton Act is thus whether any cognizable efficiencies "likely

---

[1] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html [hereinafter MERGER GUIDELINES].

[2] *Id*.

[3] Although coordinated effects may be more likely with two rather than three key competitors, I do not find evidence sufficient to conclude coordination is likely. For example, I find that prices are individually negotiated and not particularly transparent, and the incentive to cheat without detection would likely undermine a collusive outcome. In the ordinary course of business, competitive firms collect information and monitor one another's behavior. There is no evidence that the information collected by firms in the glass container market is accurate or that coordination based upon that information has taken place to date.

would be sufficient to reverse the merger's potential to harm customers in the relevant market."[4] The 2010 Merger Guidelines and standard cost-benefit principles teach that efficiencies should matter most when competitive effects are small.[5] The Commission's view of the record evidence is apparent in the Complaint, which alleges that "nearly all" of the efficiencies proffered by the parties are non-cognizable.[6] However, my own review of the record evidence leads me to disagree with that conclusion. In fact, I find that given reasonable assumptions, cognizable efficiencies are likely to be substantial and more than sufficient to offset any anticompetitive price increase. While reasonable minds can differ with respect to the magnitude of cognizable efficiencies in this case, I do not find the allegation of zero or nearly zero efficiencies plausible. Indeed, my own analysis of the record evidence suggests expected cognizable efficiencies are up to six times greater than any likely unilateral price effects. The relative magnitude of the expected cognizable efficiencies set forth is dispositive of the matter under my own analysis.

---

[4] MERGER GUIDELINES § 10.

[5] MERGER GUIDELINES § 10 ("In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great."). It is sometimes argued, pointing to language in the Merger Guidelines that "efficiencies almost never justify a merger to monopoly or near-monopoly," that the Merger Guidelines rule out or render the burden facing merger parties practically insurmountable in the case of mergers to monopoly or "three-to-two" situations. In my view, this is a misreading of the Merger Guidelines in letter and spirit. The sentence prior notes that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great." The Merger Guidelines' reference to mergers to monopoly or near-monopoly are illustrations of cases in which likely adverse effects might be large. The Merger Guidelines themselves do not rule out an efficiencies defense when a merger with small anticompetitive effects, with any market structure, generates cognizable efficiencies that are sufficient to prevent the merger from being anticompetitive. Nor do the Merger Guidelines suggest that a merger in a market with many firms that exhibits significant unilateral price effects should face a less serious burden in order to establish an efficiencies defense. The Merger Guidelines' more general shift toward effects over market structure is also consistent with this analysis and undermines the logic of a position that the comparison of anticompetitive harms to cognizable efficiencies should be conducted differently depending upon the number of firms in the relevant market. To the extent the Commission believes the judicial decisions cited in note 5 of their statement endorse the notion that extraordinary efficiencies are required to justify a merger to monopoly or duopoly even when the anticompetitive effects from that merger are small, this is the analytical equivalent of allowing the counting of the number of firms within a market to trump analysis of competitive effects. The Commission should reject that view as inconsistent with the goal of promoting consumer welfare.

[6] *See*, *e.g.* Complaint, In the Matter of Ardagh Group S.A., F.T.C. Docket No. 9356 (June 28, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf.

II. When Is There an Efficiencies Defense at the FTC?

I would like to highlight some important issues presented by this transaction as they relate to how the Commission analyzes parties' efficiencies claims, and in particular, whether the burden of proof facing parties seeking to establish cognizable efficiencies is or should be meaningfully different than the burden facing the agency in establishing that a proposed merger is likely to substantially lessen competition.

My view is that the burden facing the agency with respect to the likelihood of anticompetitive effects should be in parity to that faced by the parties with respect to efficiencies. I recognize that this view is at least superficially in tension with the 2010 Merger Guidelines, which appear to embrace an asymmetrical approach to analyzing harms and benefits. Indeed, the 2010 Merger Guidelines declare that "the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies."[7] This tension is easily resolved in the instant case because the efficiencies substantially outweigh the potential harms, but it merits greater discussion.

To begin with, it is important to define which issues are up for discussion and which are not with some precision. The issue is not whether the burden-shifting framework embedded within Section 7 of the Clayton Act is a useful way to structure economic and legal analysis of complex antitrust issues.[8] It is. Nor is the pertinent question whether the parties properly bear the burden of proof on efficiencies. They do.[9]

The issues here are twofold. The first issue is whether the magnitude of the burden facing merging parties attempting to demonstrate cognizable efficiencies *should* differ from the burden the Commission must overcome in establishing the likelihood of anticompetitive effects arising from the transaction *in theory*. The second is whether the magnitudes of those burdens differ *in practice*. The Commission appears to answer the first question in the negative.[10] With respect to the second question, the Commission points to some evidence that the Agency does in fact consider efficiencies claims when

[7] MERGER GUIDELINES § 10.

[8] See, e.g., United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990).

[9] *See* MERGER GUIDELINES § 10.

[10] Statement of the Commission, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (April 11, 2014) ("We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims").

presented in many investigations. There is little dispute, however, that the Commission gives some form of consideration to efficiency claims; the relevant issue is over precisely *how* the Commission considers them. More specifically, must merging parties overcome a greater burden of proof on efficiencies in practice than does the FTC to satisfy its prima facie burden of establishing anticompetitive effects? This question, in my view, merits greater discussion.

Even when the same burden of proof is applied to anticompetitive effects and efficiencies, of course, reasonable minds can and often do differ when identifying and quantifying cognizable efficiencies as appears to have occurred in this case. My own analysis of cognizable efficiencies in this matter indicates they are significant. In my view, a critical issue highlighted by this case is whether, when, and to what extent the Commission will credit efficiencies generally, as well as whether the burden faced by the parties in establishing that proffered efficiencies are cognizable under the Merger Guidelines is higher than the burden of proof facing the agencies in establishing anticompetitive effects. After reviewing the record evidence on both anticompetitive effects and efficiencies in this case, my own view is that it would be impossible to come to the conclusions about each set forth in the Complaint and by the Commission – and particularly the conclusion that cognizable efficiencies are nearly zero – without applying asymmetric burdens.

Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

There is ample discretion in the 2010 Merger Guidelines to allow for this outcome in practice. For example, the merger-specificity requirement could be interpreted narrowly to exclude any efficiency that can be recreated with any form of creative contracting. While the Merger Guidelines assert that Agencies "do not insist upon a less restrictive alternative that is merely theoretical," there is little systematic evidence as to how this requirement is applied in practice. Verifiability, on the other hand, could be interpreted to impose stricter burden of proof than the agency is willing to accept when it comes to predictions, estimates, presumptions, or simulations of anticompetitive effects. There is little guidance as to how these provisions of the

Merger Guidelines ought to be interpreted.[11] Neither is further guidance likely forthcoming from the courts given how infrequently mergers are litigated. None of this, of course, is to say that parties should not bear these burdens in practice. Efficiencies, like anticompetitive effects, cannot and should not be presumed into existence. However, symmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.

There are legitimate and widespread concerns that this has not been the case. Academics, agency officials, and practitioners have noted that although efficiencies are frequently a significant part of the business rationale for a transaction, receiving credit for efficiencies in a merger review is often difficult.[12] Professor Daniel Crane has analyzed the perceived asymmetries between competitive effects analysis and efficiencies discussed above and their implications for competition systems and consumer welfare.[13] Others have pointed out that recent court cases reveal that "the efficiency defense faces an impossibly high burden."[14] Moreover, testimony from senior agency officials recognize the potential costs of imposing an unnecessarily high burden of proof to demonstrate cognizable efficiencies and states that symmetrical treatment of the evidence as they related to efficiencies versus competitive effects is warranted.

> *Placing too high a burden on the parties to quantify efficiencies and to show that they are merger-specific risks prohibiting transactions that would be efficiency-enhancing. On the other hand, we are not able simply to take the parties' word that the efficiencies they have identified will actually materialize. Ultimately, we evaluate evidence related to*

---

[11] The 2006 Merger Guidelines Commentary provides some guidance on efficiencies, but offer little guidance on the interpretation of these provisions and the type of substantiation required. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (Mar. 2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm#44.

[12] *See, e.g.*, Michael B. Bernstein & Justin P. Hedge, *Maximizing Efficiencies: Getting Credit Where Credit Is Due*, ANTITRUST SOURCE, Dec. 2012, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec12_hedge_12_20f.authcheckdam.pdf.

[13] Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 386-87 (2011). Professor Crane argues that "as a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies," *id.* at 348, and rejects a variety of justifications for asymmetrical treatment of merger costs and benefits.

[14] Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 SUP. CT. ECON. REV. 230 (2005).

efficiencies under the same standard we apply to any other evidence of competitive effects.[15]

The lack of guidance in analyzing and crediting efficiencies has led to significant uncertainty as to what standard the Agency applies in practice to efficiency claims and led to inconsistent applications of Section 10 of the Merger Guidelines, even among agency staff.[16] In my view, standard microeconomic analysis should guide how we interpret Section 10 of the 2010 Merger Guidelines, as it does the rest of the antitrust law. To the extent the Merger Guidelines are interpreted or applied to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, such interpretations do not make economic sense and are inconsistent with a merger policy designed to promote consumer welfare.[17] Application of a more symmetric standard is unlikely to allow, as the Commission alludes to, the efficiencies defense to "swallow the whole of Section 7 of the Clayton Act." A cursory read of the cases is sufficient to put to rest any concerns that the efficiencies defense is a mortal threat to agency activity under the Clayton Act. The much more pressing concern at present is whether application of asymmetric burdens of proof in merger review will swallow the efficiencies defense.

---

[15] Statement of Kenneth Heyer on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearings on the Treatment of Efficiencies in Merger Enforcement (Nov. 17, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Heyer.pdf.

[16] In a recent study examining agency analysis of efficiencies claims, an FTC economist and attorney found significant disparities. Malcolm B. Coate & Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission: 1997-2007 (2009), *available at* http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf. Coate and Heimert find that "BE staff endorsed 27 percent of the claims considered, while BC accepted significantly fewer (8.48 percent) of the claims considered during the studied period." The disparity also applies to rejection of efficiencies claims. The Bureau of Economics rejected 11.9 percent of the claims, while the Bureau of Competition rejected a significantly higher 31.9 percent of claims. *Id*. at 26.

[17] For example, Professor Crane explains that "[i]f the government and merging parties were held to the same standard of proof—preponderance of the evidence, for example—then, conceptually, harms and efficiencies would be given equal weight despite the different allocations of burdens of proof." In addition, "[i]f probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle." Crane, *supra* note 11, at 387-88.

III. Conclusion

There are many open and important questions with respect to the treatment of efficiencies at the Agencies. While the Agencies' analytical framework applied to diagnosing potential anticompetitive effects got an important update with the 2010 Merger Guidelines, there remains significant room for improvement with respect to the aligning agency analysis of efficiencies with standard principles of economic analysis. Primary among these important questions is whether the burden of proof required to establish cognizable efficiencies should be symmetrical to the burden the Agencies must overcome to establish anticompetitive effects. In my view, issues such as out-of-market efficiencies and the treatment of fixed costs also warrant further consideration.[18]

For the reasons set forth in this statement, I conclude that the harms from the transaction are small at best and, applying a symmetric standard to assessing the expected benefits and harms of a merger, the expected cognizable efficiencies are substantially greater than the expected harms. Accordingly, I believe the merger as proposed would have benefitted consumers. As such, I cannot join my colleagues in supporting today's consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

[18] See, e.g., Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM (2014) (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411270; Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145 (2011).