Dissenting Statement of Commissioner Joshua D. Wright
In the Matter of Reynolds American Inc. and Lorillard Inc.
FTC File Number 141-0168

May 26, 2015

The Commission has voted to issue a Complaint and Decision & Order against Reynolds American Inc. ("Reynolds") to remedy the allegedly anticompetitive effects of Reynolds' proposed acquisition of Lorillard Inc. ("Lorillard"). I respectfully dissent because the evidence is insufficient to provide reason to believe the three-way transaction between Reynolds, Lorillard, and Imperial Tobacco Group, plc ("Imperial") will substantially lessen competition for combustible cigarettes sold in the United States. In particular, I believe the Commission has not met its burden to show that an order is required to remedy any competitive harm arising from the original three-way transaction. This is because the Imperial transaction is both highly likely to occur and is sufficient to extinguish any competitive concerns arising from Reynolds' proposed acquisition of Lorillard. This combination of facts necessarily implies the Commission should close the investigation of the three-way transaction before it and allow the parties to complete the proposed three-way transaction without imposing an order.

In July 2014, Reynolds, Lorillard, and Imperial struck a deal where, as the Commission states, "Reynolds will own Lorillard's Newport brand and Imperial will own three former Reynolds' brands, Winston, Kool and Salem, as well as Lorillard's Maverick and e-cigarette Blu brands, and Lorillard's corporate infrastructure and manufacturing facility."[1] Thus, this deal came to us as a three-way transaction. As a matter of principle, when the Commission is presented with a three (or more) way transaction, an order is unnecessary if the transaction—taken as a whole—does not give reason to believe competition will be substantially lessened. The fact that a component of a multi-part transaction is likely anticompetitive when analyzed in isolation does not imply that the transaction when examined as a whole is also likely to substantially lessen competition.

When presented with a three-way transaction, the Commission should begin with the following question: If the three-way deal is completed, is there reason to believe competition will be substantially lessened? If there is reason to believe the three-way deal will substantially lessen competition, then the Commission should pursue the appropriate remedy, either through litigation or a consent decree. If the deal

[1] *See* Statement of the Federal Trade Commission 1, Reynolds American Inc., FTC File No. 141-0168 (May 26, 2015).

examined as a whole *does not* substantially lessen competition, the default approach should be to close the investigation. An exception to the default approach, and a corresponding remedy, may be appropriate if there is substantial evidence that the three-way deal will not be completed as proposed. In such a case, the Commission must ask: what is the likelihood of only a portion of the deal being completed while the other portion, which is responsible for ameliorating the competitive concerns, is not completed? In this case, this second inquiry amounts to an assessment of the likelihood that Reynolds' proposed acquisition of Lorillard would be completed but the Imperial transaction would not be.

I agree with the Commission majority that the first question should be answered in the negative because the proposed transfer of brands to Imperial makes it unlikely that there will be a substantial lessening of competition from either unilateral or coordinated effects.[2] I also agree with the Commission majority that if Reynolds and Lorillard were attempting a transaction without the involvement of Imperial, the acquisition would likely substantially lessen competition.[3] Thus, taken as a whole, I do not find the three-way transaction to be in violation of Section 7 of the Clayton Act.

The next question to consider is whether there is any evidence that the Imperial portion of the transaction will not be completed absent an order. In theory, if the probability of the Imperial portion of the transaction coming to completion in a manner that ameliorates the competitive concerns arising from just the Reynolds-Lorillard portion of the transaction were sufficiently low, then one could argue the overall transaction is likely to substantially lessen competition. I have seen no evidence that, absent an order, Reynolds and Lorillard would not complete its transfer of assets and brands to Imperial. While there are no guarantees and the probability that the Imperial portion of the transaction will be completed is something less than 100 percent, I have no reason to believe it is close to or less than 50 percent.[4]

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[2] Statement of the Federal Trade Commission, *supra* note 1, at 3.

[3] Statement of the Federal Trade Commission, *supra* note 1, at 1. While I agree with the Commission's ultimate conclusion that Reynolds' proposed acquisition of Lorillard would substantially lessen competition, I do not agree with the Commission's reasoning. In particular, I do not believe the assertion that higher concentration resulting from the transaction renders coordinated effects likely. Specifically, I have no reason to believe that the market is vulnerable to coordination or that there is a credible basis to conclude the combination of Reynolds and Lorillard would enhance that vulnerability. For further discussion of why, as a general matter, the Commission should not in my view rely upon increases in concentration to create a presumption of competitive harm or the likelihood of coordinated effects, see Statement of Commissioner Joshua D. Wright, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015).

[4] I would find a likelihood that the Imperial portion of the transaction would be completed less than 50 percent to be a sufficient basis to challenge the three-way transaction or enter into a consent decree.

I fully accept that a consent and order will increase the likelihood that the Imperial portion of the transaction will be completed. Putting firms under order with threat of contempt tends to have that effect. I also accept the view that a consent and order may mitigate some, but perhaps not all, potential moral hazard issues regarding the transfer of assets and brands from Reynolds-Lorillard to Imperial. Specifically, the concern is that, post-merger, Reynolds-Lorillard would complete the Imperial portion of the transaction but more in form but not in function and artificially raise the cost for Imperial. Higher costs for Imperial, such as undue delays in obtaining critical assets, would certainly materially impact Imperial's ability to compete effectively. Given this possibility, a consent and order, including the use a monitor, would make such behavior easier to detect, and consequently would provide some deterrence from these potential moral hazard issues.

It is also true, however, that a monitor in numerous other circumstances would make anticompetitive behavior easier to detect and consequently deter that behavior from occurring in the first place. Based upon this reasoning, the Commission could try as a prophylactic effort to impose a monitor in all oligopoly markets in the United States. This would no doubt detect (and deter) much price fixing. Such a broad effort would be unprecedented, and of course, plainly unlawful. The Commission's authority to impose a *remedy* in any context depends upon its finding a law *violation*. Here, because the parties originally presented the three-way transaction to ameliorate competitive concerns about a Reynolds-Lorillard-only deal, and they did so successfully, there is no reason to believe the three-way transaction will substantially lessen competition; therefore, there is no legal wrongdoing to remedy.

The Commission understandably would like to hold the parties to a consent order that requires them to make the deal along with a handful of other changes. But that is not our role. There is no legal authority for the proposition that the Commission can prophylactically impose remedies without an underlying violation of the antitrust laws. And there is no legal authority to support the view that the Commission can isolate selected components of a three-way transaction to find such a violation. In the absence of such authority, the appropriate course is to evaluate the three-way transaction presented to the agency as a whole. Because I conclude, as apparently does the Commission, that the three-way transaction does not substantially lessen competition, there is no competitive harm to correct and any remedy is unnecessary and unwarranted.[5] Entering into consents is appropriate only when the transaction at

[5] The Commission points to the HSR Act as providing the legal basis for the FTC to enter into consent orders "to ensure that any competitive issues with a proposed transaction are addressed effectively." Statement of the Federal Trade Commission, *supra* note 1, at 4 n.7. When a proposed transaction or set of

issue—in this case the three-way transaction—is likely to substantially lessen competition. This one does not.

transactions would not substantially lessen competition, as is the case with the three way transaction originally proposed here, there are no competitive issues with the proposed transaction to be addressed, and the belief that a consent order may even further mitigate concerns regarding the transfer of assets is not material to our analysis under the Clayton Act. The HSR Act is not in conflict with the Clayton Act and does not change this result.