Statement of Commissioner Joshua D. Wright,
Dissenting in Part and Concurring in Part
In the Matter of Holcim Ltd. and Lafarge S.A.
FTC File No. 141-0129

May 8, 2015

The Commission has voted to issue a Complaint and a Decision & Order against Holcim Ltd. ("Holcim") and Lafarge S.A. ("Lafarge") to remedy the allegedly anticompetitive effects of the proposed merger of the two companies. I dissent in part from and concur in part with the Commission's decision because the evidence is insufficient to provide a reason to be of harm arising from the proposed transaction, a structural theory alone cannot provide a sufficient basis to establish reason to believe a transaction violates the Clayton Act. It follows, in my view, that the Commission should refrain from imposing a remedy in the markets for which the evidence is insufficient to support either a coordinated effects theory or a unilateral effects theory.

I. The Commission's Structural Theory and Presumption Are Unsupported by Economic Evidence

The Commission argues mergers that reduce the number of competitors in a relevant market to three or two are unique in the sense that they warrant a presumption of competitive harm and illegality,[3] but it cannot defend its structural presumption upon the basis of economic evidence or accumulated empirical knowledge.

The Commission cites in support of its structural theory and presumption three academic articles written by economists.[4] Only two offer economic evidence, and the proffered substantiation fails to support the claim. The first is an important early entrant into the static entry literature examining the relationship between market size and the number of entrants in a market, focusing upon isolated rural markets.[5] It strains credulity to argue that Bresnahan and Reiss's important analysis of the impact of entry in markets involving doctors, dentists, druggists, plumbers, and tire dealers in local and isolated areas, where they find the competitive benefits of a second competitor are especially important, apply with generality sufficient to support a widely applicable presumption of harm based upon the number of firms. Indeed, the authors warn against precisely this interpretation of their work.[6]

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[3] *Id.* at 3.

[4] *Id.* at 3 n.9.

[5] Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977 (1991). While Bresnahan and Reiss is an important early contribution to the static entry literature, it cannot possibly bear the burden the Commission wishes to place upon it. Abstracti.349 20e upohi11.5(A349.3ater 4

The second article is a laboratory experiment and does not involve the behavior of actual firms and certainly cannot provide sufficient economic evidence to support a presumption that four-to-three and three-to-two mergers in real-world markets will result in anticompetitive coordination.[7] Once again, the authors warn against such an interpretation.[8]

Finally, the Commission cites a draft article, authored by Steve Salop, in support of its view that economic evidence supports a presumption that four-to-three and three-to-two mergers are competitively suspect.[9] The article does not purport to study or provide new economic evidence on the relationship between market structure and competition. Thus, it cannot support the Commission's proposition.[10]

There is simply no empirical economic evidence sufficient to warrant a *presumption* that anticompetitive coordination is likely to result from four-to-three or three-to-two mergers. Indeed, such a presumption would be inconsistent with modern economic theory and the analysis endorsed by the *Merger Guidelines*, which deemphasize inferences of competitive harm arising from market structure in favor of

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& Peter C. Reiss, *Do Entry Conditions Vary Across Markets*, 3 BROOKINGS PAPERS ECON. A *w ( )3TJ0 T Tw 9.98us2u1m1p0.00*

Rather than relying upon economic evidence to defend the Commission's structural presumption, the Commission highlights case law supporting a presumption of illegality for mergers to duopoly or that substantially increase concentration.[15] As a preliminary matter, case law that endorses a wholly structural approach to merger analysis – an approach clearly rejected by the *Merger Guidelines* – does not constitute relevant economic evidence. Judicial opinions adopting this approach are orthogonal to the proposition in need of *economic substantiation*: that mergers resulting in three- or two-firm markets are likely to result in coordination. Indeed, one can find a variety of economically dubious propositions adopt5(i)15(n84)15(n)6(t)4(n)6(t)-10(i)15(ar)-1(u)7(c)8(tic)8(a)4(s) merger incentives to coordinated

conduct. Such evidence must evince a change in the post-merger competitive market dynamics and, in particular, post-merger incentives to engage in coordinated pricing. The *Merger Guidelines* provide the elimination of a maverick firm as an illustrative example of the type of evidence that would satisfy the third condition and warrant a presumption of adverse coordinated effects.[18] Importantly, the *Merger Guidelines* explain evidence that a merger will eliminate a maverick is given weight precisely because it cha10(s)-1t6(e)-2(s)]T2p168

treatment of the economics of coordinated effects, similarly explains that “[i]t is now well understood that it is not sufficient when gauging the likelihood of coordinated effects from a merger to simply of competitors in the Relevant Market to three or two, and the remaining competitors will be unable or unwilling to compete for market share – for example, because of capacity constraints, leaving the merged entity with the ability to unilaterally raise prices. Each of these theories requires particularized evidence sufficient to establish reason to believe the proposed transaction violates Section 7 of the Clayton Act. I conclude the available evidence is sufficient to do so in some Relevant Markets and insufficient in others.

Unilateral price effects are “most apparent in a merger to monopoly in a relevant market.”[30] Basic economic theory provides a robust and reliable inference that a merger to monopoly or near monopoly is likely to result in anticompetitive effects. A rational firm with little or no competitive constraints will set prices or choose output to maximize its profits; it can be expected that a rational firm acquiring such monopoly power will adjust prices and output accordingly. No further economic evidence is required to substantiate an enforcement action based upon likely unilateral price effects and to establish reason to believe a merger to monopoly or near monopoly is likely to violate Section 7 of the Clayton Act. This analysis applies to at least one of the Relevant Markets.

The analysis is necessarily more nuanced for theories falling within the second category of theories of unilateral price effects. These theories involve Relevant Markets where the proposed transaction would reduce the number of competitors from four to three or three to two, and the market share for the merged entity would not be large enough to infer it would have the power to raise market prices unilaterally. In these markets, particularized evidence is required to establish reason to believe the merged firm will gain unilateral pricing power. In many Relevant Markets, staff was successful in uncovering the required evidence. For example, in some Relevant Markets, there was evidence of a significant subset of customers for whom a sole market participant would be the only remaining acceptable supplier, due either to physical proximity or to some other preference rendering alternatives an unacceptable source of portland or slag cement. The Commission’s example of ready-mix concrete producers,[31] a relevant subset of customers, is an illustrative example here. In some Relevant Markets, the evidence supports a finding that0(f)7(or)-1R57(e)3(01 1(e)3(e)3(603(e)(a)4(n)618cC /SpanJ0.001 Tc 0.1

find it sufficient to create reason to believe the merger is likely to result in competitive harm. Several other Relevant Markets fall into this category.

In other Relevant Markets, the allegation that there will remain only one acceptable supplier for a significant subset of customers after the proposed transaction lacks evidentiary support. Specifically, in these markets, the record evidence does not indicate that a material number of customers view Holcim and Lafarge as closest anticipated likelihood of competitive effects from "possible" to "likely" under any of these theories. Without this necessary evidence, the only remaining factual basis upon which the Commission rests its decision is the fact that the merger will reduce the number of competitors from four to three or three to two. This is simply not enough evidence to support a reason to believe the proposed transaction will violate the Clayton Act in these Relevant Markets.

IV. Conclusion

Prior to entering into a consent agreement with the merging parties, the Commission must first find reason to believe that a merger likely will substantially lessen competition under Section 7 of the Clayton Act. A presumption that such reason to believe exists when a merger decreases in the number of competitors in a market to three or two is misguided. Additionally, when the Commission alleges coordinated or unilateral effects arising from a proposed transaction, this standard requires more than a mere counting of pre- and post-merger firms. In particular, reason to believe a proposed transaction is likely to result in coordinated effects requires evidence – absent from the record here – that the merger will *enhance* a market's vulnerability to coordinated pricing, and not just that it takes place in a market that is already concentrated. In the absence of such a particularized showing, the Commission's trump the Commission's primary obligation to collect evidence sufficient to establish reason to believe the merger will harm competition before issuing a complaint and accepting a consent.

For the reasons I explain above, I find reason to believe the proposed transaction is likely to result in unilateral price effects, and thus violate the Clayton Act, in the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/Providence, the Mid-Atlantic region, and the western Great Lakes region. I conclude there is no reason to believe the proposed transaction will violate Section 7 in eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids; it follows that I believe the Commission should refrain from imposing a remedy in these markets.