likelihood of competitive harm from coordination. The *Merger Guidelines* specify that the agencies are likely to challenge a merger if: (1) “the merger would significantly increase concentration and lead to a moderately or highly concentrated market;”

There are other considerations, however, that indicate the market for heavy vehicle tie rods is not particularly vulnerable to coordination. First, while the product might be fairly homogeneous, there are significant switching costs including the time and cost involved with validation testing of the new supplier's tie rods. All else equal, significant switching costs make markets less vulnerable to coordination because they diminish firms' ability to punish effectively deviations from the coordinated price. Second, cost and demand fluctuations appear to be relatively frequent and large, which increase the information costs needed to detect accurately deviations.[8] Third, Urresko is a relatively recent entrant and has become the largest supplier in the market. These types of disruptive market events are generally not conducive to successful coordinated interactions. Finally, there are a number of large buyers, which can result in dramatic market share swings if a supplier loses the majority of a buyer's business. While the record evidence with respect to vulnerability of the relevant market is certainly mixed at best, it would not be unreasonable to find the second prong in the *Merger Guidelines* satisfied.

Ultimately, however, I do not have reason to believe the proposed transaction is likely to result in coordinated effects because the record evidence does not satisfy the third condition – that is, there is no "credible basis on which to conclude that the merger may

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observation that a market with N firms will, after the merger, have N-1 firms, is simply insufficient without more to establish the required credible basis under the *Merger Guidelines*. This is true even when a merger reduces the number of firms from three to two. The Commission offers no explanation as to why the *Merger Guidelines* would go through the trouble of requiring a credible basis to believe a merger will change the market's competitive dynamics that *enhances* the market's vulnerability to coordinated conduct, *in addition to* an increase in market concentration, in order to substantiate a coordinated effects merger challenge

II. Unilateral Effects Are Unlikely in the Relevant Market

The sole evidence offered in favor of the Commission's allegation that the merger will render unilateral price effects likely is that some customers have used the competition between ZF and TRW to obtain better pricing and some customers have switched between the two suppliers.[12] While this is certainly material to our inquiry, this is a thin reed, without more, upon which to base a unilateral price effects case. There is no information on price effects. Moreover, there is no substantial evidence on the record with respect to the role the market leader, Urresko, plays in disciplining prices. The fact that Urresko is a recent entrant and has become the market leader in a relatively short period of time also re 3.38o5004 T -1.34 Td(r)-hot61(t a)4(n((s)8(ko,n((s)87(a)4(ti)15(o and the number of entrants in a market, focusing upon isolated rural markets.[17] 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.[18]

The second 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-

This is not to say that evidence of changes in market structure cannot ever warrant such a presumption. It does when the evidence warrants as much. The Commission has in certain contexts found reason to believe competition would be substantially lessened based simply upon a reduction of firms in the relevant market. See *Actavis plc-Forest Laboratories*[25] and also *Akorn-Hi-Tech Pharmacal*,[26] which both involve generic pharmaceutical markets. The Commission was able to draw conclusions about the relationship between price and the number of firms in generic pharmaceutical markets because substantial research has been done to establish that such a relationship exists.[27] Indeed, the cases in the pharmaceutical industry are the exceptions that prove the rule that the Commission needs to do more than count the number of firms in a market to have reason to believe a substantial lessening of competition is likely. No such research has been done in this market. Accordingly, unlike in generic pharmaceutical markets, we have no evidence to conclude that a simple reduction in the number of firms in this market is likely to lead to higher prices and lower output. Simply assuming such a relationship exists in this market without any evidence to suggest that it does harkens back to the bad old days of the first half of the 20th century, when the structure-conduct-performance paradigm was in vogue.

To summarize, there are three-to-two mergers that give rise to unilateral effects, and three-to-two mergers that give rise to coordinated effects. It is our burden to show that *this* three-to-two merger is likely anticompetitive. The Commission must find sufficient evidence to support an inference of likely economic harm to consumers. The heavy degree of reliance upon a structural presumption in this case is not sufficient to do so.

Finally, the Commission and Commissioner Ohlhausen each claim that the quantity, and presumably the quality, of the evidence is not the same for investigations truncated by remedy proposals compared to cases where a full phase investigation is

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[25] Analysis of Agreement Containing Consent Orders to Aid Public Comment 2, Actavis plc, FTC File No. 141-0098 (June 30, 2014) ("In generic pharmaceutical product markets, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers within each relevant market would likely have a direct and substantial anticompetitive effect on pricing.").

[26] Analysis of Agreement Containing Consent Orders to Aid Public Comment 3, Akorn Enterprises, Inc., FTC File No. 131-0221 (Apr. 14, 2014) ("In generic pharmaceuticals markets, price is heavily influenced by the number of participants with sufficient supply.").

[27] *See* David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 REV. ECON. & STAT. 37

completed or compared to a completed trial, respectively.[28] While this observation is an accurate description of the pragmatic reality of conducting law enforcement investigations, I do not agree with the implication that the quantum and quality of evidence needed to satisfy the "reason to believe" standard should turn on whether and when a remedy proposal is offered during an investigation. The idea is that we should "take into account the need for predictability and fairness for merging parties in these circumstances"[29] and considerations whether it is "appropriate to subject the parties to the added expense and delay of a full phase investigation."[30] I fully support the agency identifying opportunities to lower the administrative costs of antitrust investigations and believe there to be ample opportunity to do so. But attempts to operate a more efficient law enforcement system must satisfy the constraint, required by law, that there is reason to believe a transaction violates Section 7 of the Clayton Act. That standard sets a relatively low bar for the minimum level of evidence required to substantiate a merger challenge. I reject the view that it should be a standard that should be relaxed because the merging parties offer a remedy.[31] The Commission is primarily a law enforcement agency, albeit one that largely conducts it business by entering into consents with merging parties. Making the consent process more efficient and predictable is a laudable goal; but we must not allow pursuit of a more efficient consent process to distort our evaluation of the substantive merits. To do so, as in my view we have here, risks in the long run reducing the institutional capital of the agency in magnitudes far greater than any potential cost savings from truncating an investigation.

For these reasons, I cannot join my colleagues in supporting the 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.

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[28] *See* Statement of the Federal Trade Commission, *supra* note 9, at 3 n.7; *see also* Separate Statement of Commissioner Maureen K. Ohlhausen 1, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015).

[29] Separate Statement of Commissioner Maureen K. Ohlhausen, *supra* note 28, at 2.

[30] Statement of the Federal Trade Commission, *supra* note 9, at 3 n.7.

[31] That said, as I stated in *Holcim Ltd.*, I am not suggesting the "reason to believe" standard "requires access to every piece of relevant information and a full and complete economic analysis of a proposed transaction, regardless of whether the parties wish to propose divestitures before complying with a Second Request." *See* Statement of Commissioner Joshua D. Wright, *supra* note 24, at 11.