

Statement of the Federal Trade Commission¹
In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and
Compagnie de Saint-Gobain
File No. 131-0087
April 11, 2014

In June 2013, the Commission issued a complaint alleging that Ardagh Group, S.A.'s proposed \$1.7 billion acquisition of Saint-Gobain Containers, Inc. would reduce competition in the U.S. markets for glass containers for beer and spirits. Specifically, the Commission alleges that the acquisition would have eliminated head-to-head competition between the parties and resulted in a near duopoly in markets already vulnerable to coordination. If the Commission had not challenged the deal, the merged firm and its only remaining significant competitor, Owens-Illinois would have controlled more than 75 percent of the relevant markets. The Commission staff developed evidence to prove at trial that the acquisition would likely have substantially lessened competition in violation of Section 7 of the Clayton Act. After the start of litigation, the parties chose to settle the matter by divesting six of the nine U.S. plants currently owned by Ardagh. The Commission has now accepted the proposed consent order for public comment and believes it addresses the competitive issues here, as well as the widespread customer concerns expressed by brewers and distillers who depend on a steady and competitively-priced supply of glass containers. We outline below our concerns with this deal and the benefits of the proposed consent.

The 2010 Merger Guidelines explain that the Commission will likely challenge a transaction where “(1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct. . . ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.”² We have reason to believe each of these factors is present here. The transaction would have dramatically increased concentration in already highly-concentrated markets. The glass container markets for beer and spirits are vulnerable to post-acquisition coordination, exhibiting features such as low demand growth, tight capacity, high and stable market shares, and high barriers to entry that typify markets that have experienced coordination. The existing three major glass manufacturers already have access to a wealth of information about the markets and each other, including plant-by-plant production capabilities, profitability, the identities of each other's customers, and details regarding each other's contracts and negotiations with customers. Customers, industry analysts, public statements, and distributors all serve as conduits for market information. The Commission found evidence that companies in this industry understand their shared incentives to keep capacity tight, avoid price wars, and follow a “price over volume” strategy. We believe this transaction would have made it easier for the remaining two dominant manufacturers to coordinate with one another on

¹ Chairwoman Ramirez and Commissioners Brill and Ohlhausen join in this statement.

² U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 7.1 (2010) [hereinafter 2010 Horizontal Merger Guidelines], *available at* <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

price and non-price terms to achieve supracompetitive prices or other anticompetitive outcomes.

As noted in the 2010 Merger Guidelines, the Commission will also likely challenge a transaction producing harmful unilateral effects. For instance, this could occur where the merged firm would no longer have to negotiate against other competitors for customer supply contracts, or where the transaction would eliminate a competitor that otherwise could have expanded output in response to a price increase.³ The Commission charges that Ardagh's acquisition of Saint-Gobain would have eliminated head-to-head competition between the two merging firms, which are the second- and third-largest U.S. glass container manufacturers in the relevant product markets. Brewers and distillers have reaped substantial benefits from the rivalry between the two, often playing one against the other in supply negotiations.

Once a prima facie showing of competitive harm is made, the Commission will consider evidence from the parties of verifiable, merger-specific efficiencies that could offset this harm.⁴ In highly concentrated markets with high barriers to entry, as here, the parties can rebut the evidence of harm only with evidence of "extraordinary efficiencies."⁵ Efficiencies represent an important aspect of the Commission's merger analysis, with a recent study showing that over a ten-year period 37 of 48 closed investigations involved internal staff memoranda examining efficiencies.⁶ Similarly, a recent survey analyzing evidence considered by Commission staff prior to issuing second requests concluded that staff credited parties' detailed efficiency claims "[i]n most cases," even if they proved insufficient to offset competitive concerns about the transaction.⁷

In this matter, many of Ardagh's proffered synergies were not merger-specific and could have been achieved absent the acquisition. For instance, the parties claimed the merger would allow them to reduce overhead within the Saint-Gobain organization. However, this claim related to the staffing of the current Saint-Gobain organization alone and is separate from any additional savings to be reaped from eliminating staff positions made redundant by the combination of Ardagh and Saint-Gobain. Thus, the claim is not merger specific. In addition, Ardagh made broad claims of additional operational efficiencies, and likely would have achieved some. However, the parties put forward insufficient evidence showing that the level of synergies that could be substantiated and verified would outweigh the clear evidence of consumer harm.

³ See 2010 Horizontal Merger Guidelines §§ 6, 6.2-6.3.

⁴ See *id.* § 10.

⁵ *Fed. Trade Comm'n v. Heinz*, 246 F.3d 708, 720 (D.C. Cir. 2001); *In re Polypore Int'l, Inc.*, Initial Decision, No. 9327, 2010 WL 866178, at *184-85 (FTC Mar. 1, 2010).

⁶ Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission: 1997-2007* 14 n.31 (2009), available at <http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf>.

⁷ Darren S. Tucker, *A Survey of Evidence Leading to Second Requests at the FTC*, 78 Antitrust L.J. 591, 602 (2013).

For these reasons, we respectfully disagree with Commissioner Wright's conclusion that there is no reason to believe the transaction violates Section 7 of the Clayton Act. We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims here and believe he overlooks several important points in his analysis. We are mindful of our responsibility to weigh appropriately all evidence relevant to a transaction and, moreover, understand our burden of proof before a trier of fact.

Commissioner Wright expresses concern that competitive effects are estimated whereas efficiencies must be "proven," potentially creating a "dangerous asymmetry" from a consumer welfare perspective.⁸ We disagree. Both competitive effects and efficiencies analyses involve some degree of estimation. This is a necessary consequence of the Clayton Act's role as an incipency statute. In addition, while competitive effects data and information tends to be available from a variety of sources, the data and information feeding efficiencies calculations come almost entirely from the merging parties. Indeed, the 2010 Merger Guidelines observe that "[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms."⁹ The need for independent verification of this party data animates the requirement that, to be cognizable, efficiencies must be substantiated and verifiable.

Courts have repeatedly emphasized that, "while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable."¹⁰ This is for good reason. Indeed, "if this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act."¹¹ The merger analysis the Commission undertook in this case is thus entirely consistent with the 2010 Horizontal Merger Guidelines and established case law.

Finally, we also believe the proposed consent order addresses the competitive concerns we have identified. The proposed order requires Ardagh to sell six manufacturing plants and related assets to a single buyer within six months, thereby creating an independent third competitor that fully replaces the competition that would have been lost in both the beer and spirits glass container markets had the merger proceeded unchallenged. In sum, we have ample reason to believe that the proposed merger was anticompetitive and without appropriate efficiency justification, and that the proposed remedy will maintain competition in the market for glass containers for beer and spirits. We commend and thank Commission staff for their hard work on this matter.

⁸ Dissenting Statement of Commissioner Wright at 5.

⁹ 2010 Horizontal Merger Guidelines § 10.

¹⁰ *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 46 (D.D.C. 2011); *see also* 2010 Horizontal Merger Guidelines § 10 (noting that it is "incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify [them] by reasonable means.").

¹¹ *H&R Block*, 833 F. Supp. 2d at 46.