UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of O-I Glass, Inc. and
In the Matter of Ardagh Group S.A.
File No. 211-0182

January 4, 2023

Today, the Commission announced that it has accepted, subject to final approval, consent agreements with two companies in the glass container industry. The consents resolve allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. These cases, which allege stand-alone violations of Section 5, are among the first to employ the approach that the recently issued Section 5 Policy Statement[1] describes. For the reasons explained below, I dissent.

Context is important. Under current leadership, the Commission has demanded significant volumes of information from parties under investigation, but not all requested information is related to traditional competition analysis.[2] In addition, this Commission has declared its willingness to take losing cases to court.[3] When faced with the expense of complying with expansive demands for documents and other material, and the possibility of an enforcement

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[1] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[2] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *There's Nothing New Under the Sun: Reviewing Our History to Foresee the Future*, Keynote Address at GCR Live Merger Control 8-9, Virtually and Brussels, Belgium (October 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597798/gcr_merger_control_keynote_final.pdf.

[3] *See* Lina M. Kahn, Chair, Fed. Trade Comm'n, *How FTC Chair Lina Khan wants to modernize the watchdog agency*, Marketplace interview with Kimberly Adams, https://www.marketplace.org/shows/marketplace-tech/how-ftc-chair-lina-khan-wants-to-modernize-the-watchdog-agency/, (June 17, 2022) ("We always want to win the cases that we're bringing. That said, it's no secret that in certain areas, you know, there's still work to be done to fully explain to courts how our existing laws and existing authorities, which go back over 100 years, apply in new context. . . . And I think there can be a serious cost of inaction. So we really have a bias in favor of action."); David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, New York Times, https://www.nytimes.com/2022/12/07/technology/meta-vr-antitrust-ftc.html (Dec. 7, 2022) ("In April, Ms. Khan said at a conference that if 'there's a law violation" and agencies "think that current law might make it difficult to reach, there's huge benefit to still trying.' She added that any courtroom losses would signal to Congress that lawmakers needed to update antitrust laws to better suit the modern economy. 'I'm certainly not somebody who thinks that success is marked by a 100 percent court record,' she said.").

action regardless of the merits, parties under investigation rationally may express a willingness to settle. Under these circumstances, staff's investigation typically is quite limited.

Noteworthy Aspects of the Complaints

There are several noteworthy aspects of the Complaints issued against O-I Glass and Ardagh. The first is the brevity of these documents; each Complaint runs three pages, with a large percentage of the text devoted to boilerplate language. Given how brief they are, it is not surprising that the complaints are woefully devoid of details that would support the Commission's allegations. In short, I have seen no evidence of anticompetitive effects that would give me reason to believe that respondents have violated Section 5 of the FTC Act.

The second noteworthy aspect of these complaints is their omission of any allegations that the non-compete provisions at issue are unreasonable, a significant departure from hundreds of years of legal precedent. The first complaint alleges that O-I Glass entered into non-compete agreements with employees that prohibited them from working for competitors of O-I in the United States for one year following the conclusion of their employment with O-I.[4] And the second complaint alleges that Ardagh's contracts typically prohibited employees from performing the same or substantially similar services to those the employee performed for Ardagh for any glass container competitor of Ardagh in the United States, Canada, or Mexico for two years following the conclusion of their employment with Ardagh.[5]

Courts have long analyzed the temporal length, subject matter, and geographic scope of non-compete agreements to determine whether those agreements are unreasonable; when non-compete agreements are not found to be unreasonable, courts repeatedly have held that they do not violate the antitrust laws.[6] In the cases before us, the Commission makes no reasonableness assessment regarding the duration or scope of the non-compete clauses. Instead, it seems to treat the non-compete clauses as per se unlawful under Section 5 of the FTC Act. But the Seventh Circuit held that under Section 5, "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]"[7] Notably, the Seventh Circuit further found that "even if [the non-compete] restriction is unreasonable as to geographic scope," it was "not prepared to say that it is a per se violation of the antitrust laws."[8]

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[4] O-I Glass, Inc. Complaint ¶ 7.

[5] Ardagh Group S.A. Complaint ¶ 7.

[6] *See* United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974).

[7] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).

[8] *Id.*

A third noteworthy aspect of the complaints concerns the absence of allegations that the non-compete clauses in the O-I Glass and Ardagh contracts were enforced.[9] Absent efforts to enforce a non-compete provision, courts have been unwilling to find a violation of the antitrust laws.[10]

Fourth, the complaints assert that the non-compete clauses impede entry or expansion of rivals in the glass container industry, based on a claim that barriers to entry in the glass container industry include "the ability to identify and employ personnel with skills and experience in glass container manufacturing."[11] But the Commission makes no factual allegations regarding the inability of any rival to enter or expand. Moreover, this asserted barrier to entry and expansion in the industry is newly alleged by the Commission; in 2013, the Commission challenged the proposed merger of Ardagh Group S.A. and Saint-Gobain Containers, Inc. following a lengthy and thorough investigation. The complaint described in detail the barriers to entry in the glass container industry but did not reference the difficulty of obtaining experienced employees.[12]

Continuing in this vein, the complaints here also assert that the non-compete provisions reduce employee mobility and "caus[e] lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardships to employees."[13] But the complaints do not identify a relevant market for skilled labor as an input to glass container manufacturing, and fail to allege a market effect on wages or other terms of employment. Even the Analysis to Aid Public Comment relies only on academic literature that discusses the effects of non-competes, albeit not in the glass container industry.

Similarly, the complaints allege that more than 1,000 employees at O-I and more than 700 employees at Ardagh were subject to non-compete agreements when the Commission opened the investigation, and that some of those employees were essential to a rival's entry or expansion.[14]

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[9] *Compare* O-I Glass, Inc. Complaint and Ardagh Group S.A. Complaint *with* Prudential Security, Inc. Complaint ¶¶ 18-21.

[10] O-Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065-66 (7th Cir. 1997) ("to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation."); Lektro-Vend Corp. v. Vendo Co., 660 F.2d at 267.

[11] O-I Glass, Inc. Complaint ¶ 6; Ardagh Group S.A. Complaint ¶ 6.

[12] The complaint in that merger challenge alleged that:

> "Effective entry or expansion into the relevant markets would neither be timely, likely, or sufficient to counteract the Acquisition's likely anticompetitive effects. The barriers facing potential entrants include the large capital investment necessary to build a glass plant, the need to obtain environmental permits, the high fixed costs of operating a glass plant, existing long-term contracts that foreclose much of the market, the need for specific manufacturing knowledge that is not easily transferred from other industries, and the molding technologies and extensive mold libraries already in place at existing manufacturers."

In the Matter of Ardagh Group S.A. and Saint-Gobain Containers, Inc., File No. 131-0087, https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf (2013) (Complaint ¶ 42.

[13] O-I Glass, Inc. Complaint ¶ 8; Ardagh Group S.A. Complaint ¶ 8.

[14] O-I Glass, Inc. Complaint ¶ 7; Ardagh Group S.A. Complaint ¶ 7.

The allegations imply that, conversely, many employees that were subject to non-compete agreements did *not* have industry-specific skills.[15] Consider, for example, employees in the glass container industry who worked in the fields of human resources or accounting, with skills sets that are easily transferable across industries. If they were subject to non-competes following their departure from O-I or Ardagh, these employees easily could seek employment in other industries, including retailing and the services sector. It is implausible that precluding employees with easily transferable skill sets from working for rivals in glass container manufacturing would have an impact on competition in any appropriately defined relevant market.

Absent any evidence, the Commission adopts the approach of the Section 5 Policy Statement and baldly alleges that the use of non-compete agreements "has a tendency or likely effect of harming competition, consumers, and workers," offering only a hypothesized outcome.

Business Justifications

The complaints improperly discount business justifications for the non-compete provisions. First, they allege in conclusory fashion that "[a]ny legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information."[16] This assertion is unsubstantiated.

Second, the complaints do not address the business justification and procompetitive benefit of employer-provided training. The complaints allege that identifying and employing personnel with skills and experience in glass container manufacturing is a barrier to entry, which implies that employee training and experience is essential and that the desired training is not available from sources other than industry incumbents. Firm-provided training is an accepted and documented business justification for non-compete clauses; firms are less willing to invest in employee training if employees leave the firm after receiving training.[17] The complaints do not allege that there is a less restrictive alternative for non-compete provisions regarding firm-provided training. Moreover, it is ironic that the orders issued in these matters may lead to reduced firm-sponsored training, which may (1) reduce the available trained labor that would allow entry or expansion of competing firms and (2) harm the same employees at O-I Glass and Ardagh that the cases claim to help.

Although the complaints are dismissive of business justifications, the relief obtained implicitly acknowledges the existence of legitimate business justifications for non-compete clauses. Specifically, the Agreements Containing Consent Orders prohibit the use of non-compete clauses for covered employees, which are described by a list of positions in Appendix A. Careful review

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[15] *See also* O-I Glass, Inc. Decision and Order Appendix A and Ardagh Group S.A. Decision and Order Appendix A (listing positions for which the use of non-compete agreements is prohibited, which includes positions that have general skills).

[16] O-I Glass, Inc. Complaint ¶ 9; Ardagh Group S.A. Complaint ¶ 9.

[17] *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R, Rev 783, 796-97 (2019); Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 711 (2022).

of those lists reveals that senior executives and employees involved in research and development are not included. Although not acknowledged in the Analysis to Aid Public Comment, the Commission here implicitly has credited at least some business justifications for non-compete clauses.

Concerns for Due Process

I am concerned whether the respondents had notice that their conduct would be viewed as unlawful. As noted above, the allegations here depart from a centuries-long line of precedent regarding the appropriate analysis of the legality of non-compete provisions, and conflict with a Seventh Circuit holding specific to Section 5 of the FTC Act. The allegations are premised on the Section 5 Policy Statement issued in November 2022, which also represents a radical departure from precedent. But the complaints in these matters challenge conduct of O-I Glass and Ardagh that predates the November 2022 Section 5 Policy Statement. The Second Circuit explained in *Ethyl* that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[18] Given the state of the law for hundreds of years prior to this enforcement challenge, I believe notice was lacking.

[18] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984). *See also id.* at 136 ("Review by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied.").