In the Matter of
POLYPORE INTERNATIONAL, INC.,
a corporation
Docket No. 9327

Concurring Opinion of Commissioner J. Thomas Rosch

I concur with the Commission's thorough and well-reasoned decision finding that Daramic's acquisition of Microporous violated Section 7 of the Clayton Act. I also concur with the Commission's conclusion that only complete divestiture will remedy this violation. I write separately to describe an alternate analytical framework that would focus on the competitive effects of this transaction instead of focusing initially on defining the precise contours of the relevant market and only then considering the transaction's competitive effects.

I also write separately to address Daramic's assertion that the Commission should consider first and foremost the testimony of the economic expert it retained and the economic tools described in the Horizontal Merger Guidelines in defining the relevant market. I would focus instead on the direct evidence of competitive effects, including the parties' motives for the merger and their post-merger behavior, and let that direct evidence define the market that is relevant in this case.

I. THE LAW

The Commission's decision acknowledges that both the courts and the Commission have recognized that the traditional burden-shifting framework that begins with defining the relevant market "does not exhaust the possible ways to prove a § 7 violation on the merits." Opinion at 11 (quoting *FTC v. Whole Foods Market*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.)). Nevertheless, the Commission's opinion embraces a traditional analytical framework in this case, including precise upfront market definition. Opinion at 10-11.

The ultimate inquiry in this case, as in any Section 7 case, is whether the transaction is likely to result in anticompetitive effects, not what the precise metes and bounds of the relevant market are. In rule of reason cases brought under Section 1 of the Sherman Act, the courts have long analyzed the analogous issue of whether it is appropriate to determine the lawfulness of completed or ongoing conduct by evidence of anticompetitive effects, rather than by requiring precise upfront market definition. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000); *Ball Mem'l Hosp. v. Mut. Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *see also Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004) ("*Toys 'R' Us* [and] *Indiana Federation of Dentists* . . . stand for the proposition that if a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power—in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.").

In that context, the courts have recognized that the purposes of market definition, on the one hand, and direct evidence of anticompetitive effects, on the other hand, are consistent—

both techniques seek to determine whether an agreement by competitors is likely to facilitate the exercise of market power, or whether a completed agreement has enabled the exercise of market power. *See Toys "R" Us*, 221 F.3d at 937. Thus, for more than a decade, scholars have declared that in Section 1 rule of reason cases, market definition is not an end in itself but rather an indirect means to assist in determining the existence or likelihood of the exercise of market power. *See* IIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 532a, at 242-43 (3d ed. 2007); Herbert Hovenkamp, *Federal Antitrust Policy* § 12.8, at 550 (3d ed. 2005). Put differently, both the courts and scholars have recognized that in Section 1 rule of reason cases, market definition is a tool for analyzing market power, but it is not the only tool, either as a matter of law or economics.

There is no principled reason why the same analysis should not be used in Section 7 cases. Indeed, two decades ago, Judge Posner observed that judicial interpretation of Section 1 of the Sherman Act and Section 7 of the Clayton Act had converged. *United States v. Rockford Mem'l Corp*., 898 F.2d 1278, 1281-83 (7th Cir. 1990); *see also* IV Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 913b (3d ed. 2009) ("In cases where a merger facilitates a significant 'unilateral' price increase for a grouping of sales that was not an obvious relevant market prior to the merger, the appropriate conclusion is that the merger has identified a new grouping of sales capable of being classified as a relevant market. This formulation meets the statutory requirement [in Section 7] that the 'effect' of a merger is anticompetitive in some 'line of commerce' and in some 'section of the country.'"). At the same time, Judge Thomas (now Justice Thomas) emphasized in *United States v. Baker Hughes, Inc*., 908 F.2d 981, 992 (D.C. Cir. 1990), that the ultimate inquiry in a Section 7 case is whether the transaction is likely to result in anticompetitive effects, not simply to define the relevant market.

This is not to say that one can avoid defining the relevant market altogether. As the passage from Areeda & Hovenkamp makes clear, the text of Section 7 requires identification of the "line of commerce" and the "section of the country" that are likely to suffer anticompetitive effects as a result of a transaction. *See also Republic Tobacco,* 381 F.3d at 737 (in Section 1 cases, an antitrust plaintiff cannot "dispense entirely with market definition" but it is sufficient that the "rough contours" of the market be identified). In the case of a consummated merger, which this is, there is generally no need to predict whether the transaction is likely to result in anticompetitive effects because that will be apparent from what has actually occurred. When that is so, the competitive effects themselves may define the relevant market. Thus, at least in a case like this, market definition cannot properly be considered a gating item in the sense that competitive effects cannot be considered before the market is defined. Indeed, in the case of a consummated merger, the relevant market may generally be defined after the effects of the transaction are identified.

The authorities on which Daramic relies are not to the contrary. Daramic asserts, for example, that market definition is a "critical" requirement in antitrust cases generally, and it cites seven cases supporting that assertion. RAB at 9. That is correct, but it does not mean that the relevant market must necessarily be defined with precision upfront. Daramic also contends that Complaint Counsel bears the burden of proving the relevant market. *Id*. That is true too, but it does not mean that Complaint Counsel cannot bear this burden, at least in a consummated merger case, by proving that the challenged merger resulted in anticompetitive effects. In fact,

that is just what former Chairman Muris contemplated when he said that in a consummated merger case, "it's not enough to assert that the transaction was anticompetitive – you have to prove it." *Id*. at 9 n.7 (quoting *Interview with Timothy Muris*, Global Competition Review, Dec. 21, 2004).

Daramic repeatedly assails the ALJ's reliance on statements of the parties and other participants in the market, including customers, instead of on "economic" or "econometric" evidence. *Id*. at 1, 6-7, 9-24. Specifically, Daramic urges that the testimony of Complaint Counsel's expert be disregarded because he relied on "soft" qualitative evidence instead of "rigorous" economic tests like the "hypothetical monopolist test," the SSNIP test, and the Elzinga-Hogarty test. *Id*. at 1, 6-7, 10-15, 19-21, 23-24. Similarly, Daramic urges that the testimony of its own expert must be credited because it was "grounded" in such economic theories. *Id*. at 15-16, 21, 23-24.[1] In the same vein, at pages 10 and 16 of its appeal brief, Daramic describes as a "46-year old" historical relic the Supreme Court's decision in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), in which the Court specifically blessed the use of "practical indicia" of the market, like the views of market participants, to define the relevant market.[2] Presumably, Daramic would also dismiss the district court's decision in *FTC v. Staples, Inc*., 970 F. Supp. 1066, 1075, 1078 (D.D.C. 1997) and the D.C. Circuit's majority decision in *Whole Foods*, 548 F.3d at 1033 (Brown, J.); *id.* at 1044-45 (Tatel, J.), both of which relied on such "practical indicia" in the same fashion.[3]

To be sure, economic analyses like the "hypothetical monopolist" test, the SSNIP test, and the Elzinga-Hogarty test may be valuable predictive tools in unconsummated merger cases where there is a need to predict whether the transaction will result in anticompetitive effects. But, where, as here, the merger has been consummated, the need for predicting the effects of the transaction may be reduced or eliminated. That, in turn, may reduce or eliminate the need for economic tools to help make the prediction. There may be empirical evidence whether and to what extent customers regarded the parties' rivals as alternatives before and after the transaction; whether a price increase or a significant impairment in non-price terms or innovation occurred in the wake of the transaction; and whether and to what extent rivals were attracted by the changes resulting from the transaction and capitalized on them by entry or

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[1] I emphasize that I would not choose the testimony of Complaint Counsel's expert over the testimony of Daramic's expert, as such, or the use of the hypothetical monopolist and SSNIP tests, which these experts purported to use. Opinion at 17-18. I only credit the testimony of Complaint Counsel's expert insofar as that testimony accurately described the "practical indicia" endorsed in *Brown Shoe*.

[2] Daramic invokes "soft" evidence of the relevant market—*i.e.*, practical indicia of the relevant market of the sort blessed in *Brown Shoe*—when it considers it in its self-interest to do so. RAB at 8, 18, 20-23.

[3] Daramic's contention at page 12 of its appeal brief that reliance on such "soft" evidence did not permit Complaint Counsel's expert to "estimate cross-elasticities of demand" is wrong. As Daramic admits in footnote 11 of its brief, Complaint Counsel's expert specifically relied on "statements by the buyers that they had very little options to substitute" to find that "the demand curve was very inelastic."

repositioning. Evidence about what actually happened following the transaction may, in other words, reduce the need to employ economic theories in order to predict the relevant market or what is likely to happen—in particular, the SSNIP test described in the Horizontal Merger Guidelines. Put differently, economic theory is not a substitute for, or superior to, the empirical evidence about whether the transaction has actually resulted in anticompetitive effects. *See, e.g.*, *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 68-72 (D.D.C. 2009); *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 428 (D. Del. 2006); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997).

Again, however, it cannot be said that the fact that a merger is consummated will always eliminate the need for these predictive tools. For one thing, in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Supreme Court held that if and to the extent a relevant market was dynamic (or to put it simply, that the past or current circumstances in the market were not prologue), adjustments should be made in our assumptions about those circumstances. That may require predictions that can be aided by the use of economic tools. For another thing, drivers are more careful when they see a police car nearby (or think that one may be nearby). *See Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 434-35 (5th Cir. 2008) (observing that post-acquisition evidence can be manipulated by respondents). Thus, what has actually occurred may be illusory. It may be that as soon as the police are gone (or in this context, as soon as an investigation or challenge is over), market conduct may change radically. For that reason too, predictive economic tools may be useful in some, but not all, consummated merger cases. But the record does not reflect the need for such tools in this case.

II. THE FACTS

The Commission opinion describes in detail evidence demonstrating that Daramic's acquisition was likely to and in fact did cause anticompetitive effects. I write separately to emphasize two types of evidence that are particularly helpful in illuminating the transaction's effects: Daramic's documents describing the transaction's purpose, and post-merger price increases.

Both the ALJ and the Commission found that Daramic's documents established that Daramic acquired Microporous (1) to eliminate a key competitive threat in the motive, deep cycle, and SLI markets; (2) to eliminate a threat to its revenues and profits; and (3) to enable price increases. Opinion at 28-30. The Supreme Court has held that the intent of a party can be considered to illuminate the effects of its conduct. *See Aspen Skiing Co v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 602 (1985) ("evidence of intent is . . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive'"); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"); *see also United States v. Microsoft Corp*., 253 F.3d 34, 59 (D.C. Cir. 2001) ("Evidence of the intent behind the conduct of a monopolist is relevant . . . to the extent it helps us understand the likely effect of the monopolist's conduct."); *U.S. Football League v. NFL*, 842 F.2d 1335, 1359 (2d Cir. 1988) ("Evidence of intent *and* effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices."). Thus, I consider this evidence to be relevant in order to assess the transaction's competitive effects.

Both the ALJ and the Commission opinion also found that Daramic announced significant and wide-ranging post-acquisition price increases that were consistent with its pre-acquisition intent documents. Opinion at 30-31; IDF 897-918. Daramic argues that these price increases were justified by higher input costs, but both the Commission opinion and the ALJ found otherwise. Opinion at 31; IDF 917-22. Daramic also argues that the price increases were never implemented, but merely announced. RAB at 36. This ignores the surcharge that Daramic announced and instituted for most customers on July 1, 2008. IDF 906. In addition, Daramic announced increased prices in late 2008 and early 2009, which were effective for many customers. Opinion at 30-31; IDF 897-918. For other customers, the record was closed before a final price was reached. Yet even for these customers, the evidence shows that Daramic was seeking significant price increases and that customers had very limited success resisting those increases. And, perhaps most significantly, those price increases did not result in a single lost sale for Daramic. IDF 916.

III. CONCLUSION

In sum, especially where, as here, the merger at issue is consummated, it is generally preferable to determine whether a merger has had anticompetitive effects by reference to the parties' motives for the transaction and the actual effects resulting from the merger instead of trying first to define with precision the dimensions of relevant market based on the testimony of paid expert economists and the predictive economic tools described in the Merger Guidelines.