Separate Statement of Commissioner Maureen K. Ohlhausen
ZF Friedrichshafen AG/TRW Automotive Holdings Corp.
File No. 141-0235
May 8, 2015

I voted in favor of issuing for public comment the proposed consent agreement in this matter. As discussed below, there is sufficient evidence to provide me with a reason to believe that, absent a remedy, the transaction is likely to violate Section 7 of the Clayton Act. I also find that the proposed consent, which is intended to remedy any such violation, is in the public interest.

Based on the evidence presented to me – including the evidence discussed in the Analysis to Aid Public Comment and the majority statement in this matter – I am satisfied that the "reason to believe" prong that the Commission must assess in issuing a complaint, including in the consent context, is met here. It is important to note that the Commission makes the reason to believe determination before a full evidentiary and legal record is developed during a trial on the merits, which suggests that the standard must necessarily be lower than what the Commission or a court should apply for finding ultimate liability. Individual Commissioners, of course, have different views on how much evidence is necessary to satisfy the reason to believe standard. Unfortunately, there does not appear to be a consensus view on what the standard requires. I respect Commissioner Wright's view that the standard was not met for him in this case. For the reasons identified in the majority statement in this matter, I determined that there is a credible basis on which to conclude that this merger may enhance the vulnerability to coordinated effects that already exists in the relevant market at issue.[1]

I further view this consent to be in the public interest. In my time as a Commissioner, I have advocated for transparency, predictability, and fairness across a variety of settings.[2] Those three critical goals apply equally to the merger context. A practical problem in our merger review process arises, however, where investigations are cut short by the merging parties, which, for business, strategic, or other reasons, offer staff and then ultimately the Commission a

[1] *See* 2010 HORIZONTAL MERGER GUIDELINES § 7.1.

[2] Those settings have included the use of disgorgement in competition cases, the proper scope of our standalone Section 5 authority, the intersection of intellectual property and antitrust, and the treatment of U.S. businesses by foreign antitrust jurisdictions. *See, e.g.*, Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re* Cardinal Health, Inc., FTC File No. 101-0006 (Apr. 17, 2015), *available at* https://www.ftc.gov/public-statements/2015/04/dissenting-statement-commissioner-maureen-k-ohlhausen-cardinal-health-inc (dissenting from consent involving disgorgement of profits for alleged Section 2 violation); Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1 (2014), *available at* http://www.ftc.gov/public-statements/2013/10/section-5-ftc-act-principles-navigation-0 (advocating for additional guidance on the FTC's use of its standalone Section 5 authority); Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re* Motorola Mobility LLC & Google, Inc., FTC File No. 121-0120 (Jan. 3, 2013), *available at* https://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-0 (dissenting from consent involving standalone Section 5 claim against holder of standard-essential patents); Testimony of Commissioner Maureen K. Ohlhausen, "The Foreign Investment Climate in China: U.S. Administration Perspectives on the Foreign Investment Climate in China," before the U.S.-China Economic and Security Review Commission (Jan. 28, 2015), *available at* https://www.ftc.gov/public-statements/2015/01/testimony-commissioner-maureen-k-ohlhausen-hearing-foreign-investment (discussing importance of foreign antitrust jurisdictions pursuing the goals of predictability, transparency, and fairness).

proposed remedy in lieu of responding to a Second Request or other compulsory process. In such cases, the available evidence may be sufficient to provide reason to believe the proposed transaction would violate Section 7, but a full investigation might (or might not) reveal additional evidence sufficient to counterbalance the available evidence and support closing the investigation altogether. In that situation, the goals of predictability and fairness counsel against forcing merging parties (and Commission staff) to incur the significant costs associated with a full-phase investigation. Merging parties also expend non-trivial amounts of time and money in developing and then proposing remedies to FTC staff; those good-faith efforts – particularly ones that involve coordination of remedies across antitrust jurisdictions – should not be discounted. The public interest analysis thus should take into account the need for predictability and fairness for merging parties in these circumstances.