Slotting Allowances and the Antitrust Laws

Testimony of
The Federal Trade Commission

presented by
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Bureau of Competition

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Mr. Chairman and Members of the Committee, my name is Willard K. Tom and I am the Deputy Director of the FTC's Bureau of Competition. I appreciate the opportunity to testify before you today about competition issues in agriculture and food marketing. I understand that other witnesses will address specific questions involving packers and stockyards, an area over which our jurisdiction is extremely limited in any event. I will focus instead on the way that slotting agreements are assessed under the antitrust laws. My written testimony states the views of the Federal Trade Commission on this subject, but my oral presentation and my answers to any questions that you ask will be my own. Let me add that the Commission has at least one nonpublic law enforcement investigation pending in this area, and so I respectfully request your indulgence if I don't reveal the investigative details.

The Federal Trade Commission is an independent agency that has the mission of ensuring that consumers have the benefits of free and fair competition. We enforce a number of antitrust statutes, such as the FTC Act and the Clayton Act with its merger provisions, which ensure that the marketplace remains competitive. We also enforce a number of consumer-protection statutes, which ensure that customers can make their selections in the marketplace on the basis of accurate rather than of deceptive information. Working together, the two main missions of the FTC ensure that consumers are able to go into a competitive marketplace and make free choices there.

Today's hearing asks how slotting allowances should be assessed within this framework. The term "slotting allowance" typically refers to a lump-sum, up-front payment that a food manufacturer must pay to a supermarket for access to its shelves. The term has been used to cover an extremely broad range of conduct, some of it clearly unlawful, some clearly lawful, and a great deal of it in the gray area in between, the legality of which can be determined only in light of all the surrounding facts and circumstances.

At the clearly unlawful end of the spectrum is commercial bribery. This is an under-the-table payment to a purchasing agent of a retailer that goes straight into the agent's pocket, in violation of the fiduciary duties owed by the agent to his principal. Allegations of this sort have arisen in public discussions of the issue, such as the recent hearings held by the Senate Committee on Small Business.[1] If such instances come to our attention, we will promptly refer the matter to the relevant state or local authorities for criminal prosecution. Only criminal sanctions can provide adequate deterrence for this sort of covert, blatantly illegal conduct, and it would not be appropriate for us to try to apply antitrust standards and remedies to conduct that is universally condemned for reasons wholly apart from antitrust.

At the other end of the spectrum are payments from a manufacturer to a retailer that really constitute only an ordinary price discount. For example, a short-term agreement for advance payments that does nothing more than obligate the retailer either to buy a certain number of units of a manufacturer's product or to return a proportionate share of the advance payment may be little different from a simple price cut. In such a situation, the retailer gets, in effect, a certain per-unit discount off the nominal selling price. The only difference is that the retailer receives the discount at the outset of the contract. If the retail market is competitive - a very important precondition - the discount is likely to be passed through to consumers and competition will not ordinarily be harmed.

In between these two extremes is a gray area. We have heard on occasion from small manufacturers that complain about activity in this area. For example, they have reported that strong buyers, such as supermarket chains, are demanding large up-front payments not tied to volume. In some cases, we have been told, these allowances are so large that some small manufacturers cannot aff(a)4(4(f)-702t.15 Td [(m)-bf)-7(f)-7nd e of ttad t3(t)-m(i)-2(e)4(h(ha)4(r)-7te)4(t)-2(h
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First, there are differences in the terms of the slotting allowances themselves. The actual allowances -- the payment from manufacturer to retailer -- are one side of a bargain, the other side of which can offer tremendous variety. What does the retailer offer in exchange for the payment?

Is it a payment simply to be carried somewhere in the store?

Is it for a fixed amount of shelf space?

Is it for preferential display -- the end-caps or eye-level shelves?

Is it for the right to be the exclusive, or nearly exclusive, supplier in that product

Given that slotting allowances can have such varied effects in various circumstances, how should an antitrust enforcement agency approach the issue, and how should it deal with those problems that do exist?

The first and most important step is surely merger enforcement. It is when either manufacturing or retailing becomes highly concentrated that we see the greatest potential for practices such as slotting allowances to have anti-consumer rather than pro-consumer effects. Merger enforcement is one way of setting some limits on increasing concentration.

As everyone in this room knows, we have been in the midst of an enormous merger wave for some time now. Merger transactions reported under the Hart-Scott-Rodino Act have increased from 1529 in fiscal 1991 to 4679 last year, with no end in sight. The antitrust agencies have handled this dramatic increase in mergers with, at best, a modest increase in budget. Although this has put an obvious strain on Commission resources, the agency has been able to continue ferreting out the relatively few mergers that may harm competition, and has blocked or restructured them so that the interests of consumers are protected.

This merger program has been active at the retail level as well as at the manufacturer level. In recent decades the conventional wisdom was that retailing was characterized by a great deal of competition and low barriers to entry, so that few mergers there were likely to be anticompetitive. The retail world has been changing, however. When the agency investigated the proposed merger of Staples and Office Depot, the two largest of only three national office supply superstore chains, we learned that non-superstore retailers did not exercise a significant competitive constraint on these chains. Instead, we found that the chains were a market unto themselves. Consumer prices were higher in markets that had only two chains rather than three, and higher still in markets that had only one, regardless of what other types of outlets were present. Even the presence of Wal-Mart or other general merchandise discounters did not alter reaching its conclusion, the Commission carefully examined, and rejected, a variety of efficiency defenses that Toys 'R' Us offered to justify its conduct. The evidentiary record gave the Commission a high degree of confidence that Toys 'R' Us's practices were what they seemed to be -- a way of cutting off supplies to rivals in order to relieve the competitive pressure that had produced benefits for consumers. Controlling practices of this kind can go a long way toward ensuring a competitive landscape.

The Commission is committed to pursuing anticompetitive practices vigorously. The Commission recognizes that competition is at least potentially harmed, not only in the commercial bribery situations alluded to earlier, but also in cases where the slotting payments are associated with predatory pricing, price and other forms of discrimination, monopolization, or raising the distribution costs of rivals in order to make them less effective constraints on a dominant manufacturer's pricing. We remain alert to the possibility of harm in all these circumstances.

Conclusion

To sum up, the term "slotting allowances" covers a wide variety of practices under a wide variety of market circumstances, and the competitive effects are not always clear-cut. But five specific points can be fairly made in closing.

First, the Commission, under its statutes, looks to determine whether particular conduct has harmed the overall level of competition; this means that harm to an individual competitor is not necessarily an antitrust violation. Second, in practical effect some slotting allowances can be discounts off of list price and beneficial to competition, particularly when they are passed on to consumers. Third, the FTC nonetheless considers complaints about particular slotting allowances very carefully, precisely because their market effects can be so different. Fourth, the FTC does not receive many complaints in this area - perhaps one every three months on average.

Fifth, however, the FTC remains committed to pursuing evidence of antitrust violations when it finds them, and welcomes hearing from anyone who may be aware of such evidence. We would like to affirmatively encourage this by assuring small manufacturers that we are aware of their concerns about the possible business repercussions of complaining to the government, and that, accordingly, we always hold the names of complainants in confidence. We also look forward to working with this Committee as it continues to study this complex subject.

Thank you again for this opportunity to present the Commission's views.

Endnotes:

1. "Slotting: Fair for Small Businesses & Consumers?," Hearings before the Committee on Small Business, United States Senate (Sept. 14, 1999).

2. Another way this has been expressed is that the manufacturer's willingness to "put its money where its mouth is" signals a greater likelihood that the product actually will succeed.

3. *See, e.g.,* Standard Oil Co. v. United States, 337 U.S. 293 (1949).

4. *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997). In recent years the Commission has also devoted significant enforcement resources to mergers of consumer product manufacturers. *See, e.g.*, S. C. Johnson, FTC Dkt. No. C-3802 (acquisition of DowBrands conditioned on divestiture of "Spray 'n Wash," "Spray 'n Starch," and "Glass Plus" brands) (consent order) (1998).

5. FTC Dkt. No. 9278 (Opinion and Final Order, Oct. 13, 1998) (Comm'r Swindle concurring in part and dissenting in part), *appeal filed*, Dkt. No. 98-4107 (7th Cir., filed Dec. 7, 1998).