ROUNDTABLE ON COMPETITION ISSUES IN FOOD CHAIN INDUSTRY

-- Note by the United States --

1. This paper responds to Chairman Jenny's letter of July 3, 2013, inviting submissions for the Competition Committee's upcoming roundtable on competition in the food chain industry. The U.S. Federal Trade Commission ("FTC" or "Commission") and Antitrust Division of the U.S. Department of Justice ("DOJ-2.5 (9uoc) (5fu0.007f5 (N)1tec)11.1 (t)8.1 (iv)12.9 (el)8.1 (y)12.9 (,)2 ("the A)6.8 (g)12.9 (encies)10.7 producing and processing markets to retail food markets, including groceries.

2. The first U.S. antitrust law, the Sherman Act,[1] was enacted in 1890 to respond to the emergence of trusts in many industries, including food products such as beef. Such combinations restricted total output, raised prices for consumers, and excluded new entry. Concerns about monopoly power and trusts in agriculture markets were essential to securing the passage of the Sherman Act, and once passed, early enforcement efforts focused on the conduct of agricultural trusts in beef and sugar.[2]

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regulatory authorities[4] and, ultimately, Congress. However, the competition regime may complement other regulatory regimes that further non-competition public policy objectives.

1. Food Production and Processing Markets

1.1 Review of Mergers

1.1.1 General Approach in Merger Reviews

5. The ultimate legal question in determining the lawfulness of an acquisition under the U.S. antitrust laws is whether the acquisition may substantially lessen competition. In answering this question, it is important to identify the relevant product and geographic markets in which plausible anticompetitive harm may occur. When reviewing proposed mergers between competing food manufacturers, the Agencies analyze individual products manufactured by each firm to identify products for which there are horizontal overlaps. Although in some sense, consumers have many choices for how to spend their food dollars, the Agencies focus on the demand for particular products and the alternatives that may constrain their pricing. This is consistent with the approach outlined in the Agencies' Horizontal Merger Guidelines[5] and has led to alleged product markets for sliced fresh bread, beer, carbonated soft drinks, seasoned salt products,[6] super-premium ice cream,[7] refrigerated pickles,[8] and baking powder,[9] to name a few.

6. The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms. The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power that significantly exceeds that existing absent the merger. Specifically, the test asks whether a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (the "hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market.

4 For example, the U.S. Food and Drug Administration is responsible for protecting the public health by ensuring that the U.S. food supply is safe, sanitary, and secure.

5 U.S. Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES § 4 (Aug. 19, 2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf) ("Market definition focuses solely on demand substitution factors, *i.e.*, on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis.").

6 *See In re McCormick & Co.*, FTC Docket No. C-4225, *available at* http://www.ftc.gov/os/caselist/0810045/index.shtm.

7 *See In re Nestle Holdings, Inc.*, FTC Docket No. C-4082, *available at* http://www.ftc.gov/os/caselist/0210174.shtm.

8 *See* Complaint, *FTC v. Hicks, Muse, Tate & Furst Equity Fund V, L.P.*, (D.D.C. Oct. 22, 2002), *available at*

http://www.ftc.gov/os/caselist/hicksmusetate.shtm.

9 *See In re Philip Morris Cos., Inc.*, FTC Docket No. C-3987, *available at* http://www.ftc.gov/os/caselist/c3987.shtm.

special formulations suitable for feeding infants, and the lack of evidence that home-prepared foods constrained the pricing of baby food sold in stores.[13]

10. The Agencies recently filed an *amicus curiae* brief in an appeal from a bankruptcy proceeding.[14] The case involves a national bakery that was the subject of a 1996 judicial decree following a DOJ merger challenge. At issue was whether a contract implementing a perpetual, exclusive license for a particular bread trademark, which was part of the decree, would survive the bankruptcy proceeding. The Agencies argued that antitrust decrees serve important remedial purposes in the public interest and should receive special consideration in bankruptcy proceedings, and that the appellate court should reconsider the issue *en banc*. The court granted *en banc*,.oi2y.eee2 w[e4510.l h.)1.1 (i2y)(.)1 o1.1 (ee (ide)10.8 th)119 (i)-,.nt3.1 Oc2y.tobi2y.1.

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17. However, some vertical acquisitions can be anticompetitive. Vertical mergers can create or raise entry barriers that lead to higher prices or lower quality or innovation for consumers. For example, in industries with extensive networks, many firms already have market power through their ownership of established networks or installed bases involving huge sunk costs. Vertical mergers can, in certain instances, increase those barriers to entry even more, raising rivals' costs and reducing innovation and quality for consumers. Second, a vertical merger can facilitate collusion in either the upstream or downstream market. For instance, the acquisition of a supplier by a purchaser may create opportunities to monitor the upstream supplier's competition. Also, a vertical merger may involve the purchase of a particularly disruptive downstream buyer. By eliminating a buyer who played one upstream firm off of another, such a merger may facilitate collusion in the upstream market. Yet antitrust enforcers must take great care when considering the nature and extent of the remedy in vertical merger cases. Since many vertical mergers result in procompetitive efficiencies, remedies should be crafted narrowly to permit procompetitive efficiencies to the extent possible.

primarily as mold inhibitors in high-moisture and high-sugar foods such as cheese and other dairy

2.1 The Use of Slotting Allowances

24. Access to sufficient retail space can be a significant issue for U.S. manufacturers of packaged

(generally referred to as stock-keeping units or "SKUs"), and have at least 10,000 square feet of selling space. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products.[29] Indeed, supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at other nearby competing supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores, and do not typically set or change their food and grocery prices in response to prices at other types of stores.

28. Although retail stores other than supermarkets also sell food and grocery products, including neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, these types of stores generally do not provide sufficient competition to effectively constrain prices at supermarkets. For example, they typically do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers who shop for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere, in response to a small but significant price increase by supermarkets.

29. The retailers competing in a given locale to provide consumers with this type of one-stop shopping experience can vary, however. In most areas, the FTC has found that competition from small neighborhood markets, convenience stores, specialty food stores, club stores, and mass merchants does not constrain pricing of food products sold in supermarkets. But in one case involving a merger of stores in Puerto Rico, the Commission concluded that Puerto Rican consumers regarded full-service supermarkets, supercenters, and club stores as reasonably interchangeable for the purpose of purchasing substantially all of their weekly food and grocery shopping requirements in a single shopping visit.[30] As a result, in challenging that merger, the FTC alleged a product market that included not only full-service supermarkets, but also club stores.[31] This outcome underscores that the FTC examines retail grocery market competition on a case-by-case basis, considers all of the relevant facts, and makes an informed decision regarding a proposed merger based on those facts.

30. In similar fashion, the FTC relied on a narrower market definition in an investigation of a merger of two food retailers with a specialized format. In *Whole Foods/Wild Oats*,[32] the Commission alleged that

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staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids.").

29 Because they often involve dozens, sometimes hundreds, of local markets and require the analysis of

4. Conclusion

37. In competitive markets, supply and demand are determined by consumers voting with their