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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

ĦEARING ON OLIGOPOLY MARKb6b

UNITED STATES

1. Following on our submissions to previous OECD roundtables on oligopolies, notably the 1999 submission of the U.S. Department of Justice and the U.S. Federal Trade Commission on Oligopoly (describing the theoretical and economic underpinnings of U.S. enforcement policy with regard to oligopolistic behavior),[1] and the 2007 U.S. submission on facilitating practices in oligopolies,[2] this submission focuses on certain approaches taken by the Federal Trade Commission ("FTC") and the U.S. Department of Justice Antitrust Division ("DOJ") (together, "the Agencies") to prevent the accumulation of unwarranted market power and address oligopoly issues.

2. Pursuant to U.S. competition policy, the Agencies can address the welfare-reducing effects of oligopoly behavior through enforcement as well as other means. A primary enforcement mechanism to protect existing competiti8 Tmsts oli

6. During the 1960s, Section 7 of the Clayton Act was used to prevent an increase in concentration, even in markets where concentration was still at a very low level.[14]

7. Merger enforcement standards have evolved significantly since the 1960s as the consensus shifted on the competitive concerns associated with moderate levels of concentration. The current U.S. Horizontal Merger Guidelines ("Guidelines") presume horizontal mergers are likely to enhance market power only when the increase in the Herfindahl-Hirschman Index (HHI) exceeds 200 points and the post-merger HHI exceeds 2500.[15] Additionally, the Agencies' assessment of coordinated effects now goes well beyond market shares and concentration to include previous attempts at collusion, the transparency of the terms of trade, the presence of homogeneous products, and whether sales are small and frequent or occur via large and long-term contracts. But the basic thrust of merger policy on coordinated effects remains the same. As the Guidelines explain:

> *Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.*
>
> *The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct . . . ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.*[16]

8. Illustrative of contemporary horizontal merger enforcement in the United States is the challenge by the DOJ to the proposed acquisition of an interest in Grupo Modelo by Anheuser-Bush InBev (ABI) that would have given ABI control over imports into the United States. The DOJ's complaint challenging the acquisition alleged that ABI was an established price leader in the United States, yet Modelo constrained ABI's ability to lead prices higher.[17] To maintain the competitive constraint imposed by Modelo, the decree resolving the case required divestiture of key Modelo assets to the U.S. distributor of the brands. The distributor acquired the rights to those brands in the United States as well as Modelo's newest brewery, located near the U.S. border.[18] The decree additionally required the distributor to greatly expand the capacity of the brewery it acquired so that it could produce the entire U.S demand for Modelo brands. Early indications are that the decree h

total available seats have increased significantly. Low-cost carriers also have increased their service

19. An example of anticompetitive information-sharing among competitors is the FTC's case against the National Association of Music Merchants (NAMM).[40] In this matter, the FTC challenged the trade association's rules, which enabled and encouraged its members to exchange competitively sensitive price information, thereby enhancing opportunities for members to coordinate price increases. A key aspect of the FTC's consent order resolving the matter involved barring NAMM from coordinating the exchange of price information and certain discussions concerning conditions of sale among musical instrument manufacturers and dealers.[41]

20. Another case arose from a Federal Communication Commission auction for licenses for broadband radio spectrum used for personal communications services. Licenses were simultaneously auctioned in 493 geographic areas, called "Basic Trading Areas" or BTAs, each assigned a three-digit code. The auction was conducted in rounds, and in each round bidders could not only place bids but also could withdraw bids. The auction continued until a round passed with no new high bids, requiring 276 rounds in all. This format allowed bids to be used to communicate and coordinate: In order to induce a rival to drop out in BTA 444, one bidder first submitted, then withdrew, new high bids in two other BTAs in which the rival had been the high bidder. Those new high bids ended in the digits 444. The rival ceased bidding in BTA 444, and the first bidder submitted bids less than those of the rival in the two other BTAs. The Department of Justice filed three civil cases charging collusion in the auction.[42] The cases were settled by consent decrees prohibiting both unlawful bidding agreements and the sort of signaling that led to the agreements.[43]

21. Firms in oligopoly industries sometimes attempt actual price fixing. An invitation to collude that is not accepted has no redeeming feature and creates a substantial risk of anticompetitive behavior. Although unaccepted invitations to collude cannot be challenged under Section 1 of the Sherman Act,[44] they can be challenged under Section 5 of the FTC Act as an "unfair method of competition." The FTC has brought a number of those cases when such an invitation has not been accepted.[45] For example, in 2014, the FTC settled cases alleging that two online UPC barcode

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40 FTC, Press Release, "National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition ," March 4, 2009, *available at* https://www.ftc.gov/news-events/press-releases/2009/03/national-association-music-merchants-settles-ftc-charges.

41 *See* Decision and Order, *available at* https://www.ftc.gov/sites/default/files/documents/cases/2009/04/090410nammdo.pdf.

42 United States v. Omnipoint Corp., No. 1:98CV02750 (D.D.C. Nov. 10, 1998); United States v. Mercury PCS II L.L.C., No. 1:98CV02751 (D.D.C. Nov. 10, 1998); United States v. 21st Century Bidding Corp., No. 1:98CV02752 (D.D.C. Nov. 10, 1998).

43 *See* Final Judgment and Competitive Impact Statement, United States v. Mercury PCS II L.L.C., 1999-2 Trade Cases (CCH) ¶ 72,707 (D.D.C. 1999), *available at* http://www.justice.gov/atr/cases/f2000/2069.pdf and http://www.justice.gov/atr/cases/f2000/2063.htm; Final Judgment and Competitive Impact Statement, United States v. 21st Century Bidding Corp., 1999-1 Trade Cases (CCH) ¶ 72,473 (D.D.C. 1999), *available at* http://www.justice.gov/atr/cases/f2000/2073.htm and http://www.justice.gov/atr/cases/f2000/2072.pdf; Final Judgment and Competitive Impact Statement, United States v. Omnipoint Corp., 1999-1 Trade Cases (CCH) ¶ 72,472 (D.D.C. 1999), *available at* http://www.justice.gov/atr/cases/f2000/2065.pdf and http://www.justice.gov/atr/cases/f2000/2066.pdf.

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