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ROUNDTABLE ON COMPETITION ISSUES IN FOOD CHAIN INDUSTRY

-- Note by the United States --

This note is submitted by the United States to the Competition Committee FOR DISCUSSION under Item XII at its forthcoming meeting to be held on 30-31 October 2013.

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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") (collectively, "the Agencies") are pleased to provide our perspective on competition issues in the wide variety of markets that make up the U.S. food chain. The activities described range from 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]

3. Antitrust enforcement has an important role to play in fostering competitive markets throughout the food chain, which promotes efficient use of resources, low prices, and production improvements to the benefit of Americans and others who buy foodstuffs exported from the United States. Over the years, the Agencies have used a variety of tools to promote competition in these markets, including public workshops, research and studies, and the investigation and prosecution of suspected antitrust violations.

4. The U.S. antitrust laws do not invest the Agencies with authority to challenge mergers or business practices on non-competition grounds.[3] Thus, when making enforcement decisions, the Agencies do not balance effects on competition against other public policy interests, such as the environment and food safety and sanitation. Responsibility for non-competition public policy concerns rests with other

1 15 U.S.C. § 1 (2013).

2 *See, e.g.*, *United States v. Swift & Co.*, 122 Fed. 529 (N.D. Ill. Cir. Ct. April 18, 1903), *aff'd in part, Swift & Co. v. U.S.*, 196 U.S. 375 (1905) (upholding lower court's ruling that various meat dealers, who were in the business of buying butchered livestock in one state and selling fresh meat to retailers or agents in other states, violated the Sherman Act). *See also* Philip J. Weiser, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the Organization for Competitive Markets' Eleventh Annual Conference, "Toward a Competition Policy Agenda for Agriculture Markets," (Aug. 7, 2009), *available at* http://www.justice.gov/atr/public/speeches/248858.pdf (discussing the role that concerns about agricultural markets played in spurring enactment of the Sherman Act, and the DOJ's recent enforcement activities in the agricultural marketplace).

3 *Nat'l Society of Prof'l Engineers v. United States*, 435 U.S. 679, 688 (1978).

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.

1.1.2 Food Production and Processing Mergers

7. In October 2008, the DOJ sued to block the proposed acquisition by JBS S.A. ("JBS"), a Brazil-based firm that is the world's largest beef packer and the third-largest U.S. beef packer, of National Beef Packing Company LLC ("National Beef"), the fourth-largest U.S. beef packer. The merger would have substantially changed the structure of the U.S. beef packing industry, eliminating a competitively significant packer and placing more than 80 percent of domestic cattle packing capacity in the hands of three firms: JBS, Tyson Foods Inc., and Cargill Inc. The combined entity would have become the largest beef packer in the country, with more than one-third of the national fed cattle packing capacity. At the time, beef packers purchased $30 billion in fed cattle annually from feedlots, slaughtered them, and processed them into U.S. Department of Agriculture ("USDA") graded cuts of beef and other products. Packers then packaged the cuts as boxed beef for sale to wholesalers and grocery chains. The merger would have lessened competition among packers for the purchase of cattle in certain domestic regions, as well as lessened competition among packers in the production and sale of USDA-graded boxed beef nationwide. This would have resulted in lower prices paid to cattle suppliers and higher beef prices paid by consumers. In February 2009, JBS and National Beef announced their decision to abandon the transaction, and DOJ terminated the pending litigation.[10]

8. In the dairy sector, DOJ has enforced the antitrust laws to protect consumers in a number of cases. In 2010, for example, DOJ filed a lawsuit alleging that the 2009 acquisition by Dean Foods Co. ("Dean Foods"), the largest processor and distributor of milk and other dairy products in the U.S., of two processing plants from Foremost Farms USA Cooperative, would eliminate substantial competition between the two companies in the sale of milk to schools, grocery stores, convenience stores, and other retailers, in parts of three mid-western states.[11] In the fluid milk relevant market, the DOJ alleged the particular tri-state geographic market based on the locations of *customers* (*e.g.*, grocery stores), rather than the location of *competitors* (*i.e.*, fluid milk processing plants). This was because fluid milk processors could price discriminate, charging different fluid milk prices (net of transportation cost) to customers in different areas.[12] This price discrimination was possible because processors individually negotiated prices with many customers and delivered the fluid milk to their customers' locations, and customers could not eliminate price disparities through arbitrage, due in part to high transportation costs. The court-approved settlement of the case required Dean Foods to divest a significant milk processing plant and related assets, and to notify the DOJ before any future acquisition of milk processing plants when the purchase price exceeds $3 million.

9. In 2001, the FTC challenged a merger involving two of the three leading U.S. makers of baby food, a market with annual sales of nearly $1 billion. At the time, the market had a clear leader, Gerber, which controlled approximately 65 percent of the market, with products sold in over 90 percent of U.S. supermarkets. The second- and third-largest manufacturers, Heinz and Beech-Nut, proposed to merge. Both firms, the Commission alleged, competed aggressively at the wholesale level to gain and maintain position as the second brand (in addition to Gerber) on retailer shelves. The Commission relied on the hypothetical monopolist test to exclude homemade baby food, citing several factors such as convenience,

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10 *See* Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit to Stop JBS S.A. From Acquiring National Beef Packing Co. (Oct. 20, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/238382.html.

11 *See* Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement With Dean Foods Company (Mar. 29, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/269072.htm.

12 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 5, at § 4.22 for a discussion of price discrimination and geographic market definition.

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* rehearing and will hear oral argument in October 2013.

11. In another case involving bakeries, DOJ alleged that the 2009 acquisition by Grupo Bimbo, a Mexican firm controlling the U.S. corporation BBU, of Sara Lee's North American Fresh Bakery business would substantially lessen competition in the market for sliced bread in eight relevant metropolitan geographic markets. BBU and Sara Lee were the largest and third-largest bakers and sellers of sliced fresh bread in the U.S. The eight cities each constituted a relevant geographic market, defined, as in the *Dean Foods* case described above, with respect to the location of customers (*e.g.*, grocery stores), rather than the location of manufacturers (*i.e.*, bakeries), because sliced-bread suppliers can price discriminate across local geographic markets. Sliced-bread suppliers compete by, among other things, offering lower wholesale list prices and larger promotional discounts, and have different pricing and promotional strategies that are influenced by the degree of competition in a particular area. BBU and Sara Lee aggressively competed head-to-head in these markets, and BBU's post-merger market share would range from approximately 52 to 63 percent, in highly concentrated markets, after the acquisition. The 2012 consent decree entered by the court required divestitures of the rights to sell various Sara Lee brands, along with associated manufacturing, distribution, and marketing assets required for effective competition.[15]

12. In 1999, DOJ challenged the merger of the second- and third-largest grain traders in North America, Cargill, Inc. and Continental Grain Company ("Continental"). DOJ was concerned that "unless the acquisition is enjoined, many American farmers and other suppliers likely will receive lower prices for their grain and oilseed crops, including corn, soybeans, and wheat."[16] The area of competitive concern was the grain terminals ("elevators") owned by the merging firms. As explained in the DOJ's court papers:

- Grain traders such as Cargill and Continental operate extensive grain distribution networks, which facilitate the movement of grain from farms to domestic consumers of these commodities and to foreign markets. Country elevators are often the first stage of the grain distribution system, with producers hauling wheat, corn, and soybeans by truck from their farms for sale to

13 *See* Brief for Plaintiff in Support of Motion for Preliminary Injunction, *FTC v. H.J. Heinz Co.*, No. 1:00CV01688 (D.D.C. July 14, 2000), *available at* http://www.ftc.gov/os/2000/07/heinzmemo.htm#N_30_. The district court, despite finding that jarred baby food was a relevant market in which to assess the competitive effects of the merger, denied the Commission's motion for a preliminary injunction, citing potential efficiencies. *FTC v. Heinz*, 116 F. Supp. 2d 190 (D.D.C. 2000). The appellate court reversed, *FTC v. Heinz,* 246 F.3d 709 (D.C.Cir. 2001), and the parties abandoned the merger.

14 *See* Brief for the U.S. Dep't of Justice and Fed. Trade Comm'n as Amici in Support of Rehearing, *In re Interstate Bakeries Corp.*, No. 11-850 (8th Cir. May 31, 2013), *available at* http://www.justice.gov/atr/cases/f297300/297300.pdf.

15 *See* U.S. Dep't of Justice, Antitrust Case Filings: *U.S. v. Grupo Bimbo, S.A.B. de C.V.*, *available at* http://www.justice.gov/atr/cases/grupobimbo.html.

16 Complaint, *U.S. v. Cargill*, No. 99-1875 (D.D.C. July 8, 1999), *available at* http://www.justice.gov/atr/cases/f2500/2552.htm.

the country elevators. … The grain is then transported by truck, rail, or barge to larger distribution facilities, such as river, rail, or port elevators, … or to feedlots or processors.

- River elevators or rail terminals may receive grain directly from the farm or from country elevators. From the river elevator, grain typically moves outbound by barge to port elevators. From the rail terminal, grain typically moves outbound by rail to port elevators or to domestic feedlots or processors.

- The final stage in the grain distribution system for grain intended for export is a port elevator, where it is transferred to ocean vessels for shipment to foreign buyers.[17]

13. In this context, the DOJ alleged that the purchasing of wheat, corn, and soybeans each constituted a relevant product market and that many farmers and other suppliers located within overlapping Cargill/Continental draw areas depended solely on competition among Cargill, Continental, and perhaps a small number of other nearby grain companies to obtain a competitive price for their products. The merger, DOJ alleged, thus would significantly lessen that competition.

14. The case was settled with a judicial consent decree that required the merging companies to divest a number of port terminals to third parties in several regions, including the Pacific Northwest, Central California, and the Texas Gulf. For example, in the Pacific Northwest, Cargill's port elevator in Seattle competed with Continental's port elevator in Tacoma for the purchase of corn and soybeans. The overlapping draw area for these facilities included portions of five Midwestern states. Cargill was required to divest all of its property rights in the Seattle port elevator.

15. The DOJ also has taken enforcement action in the beer industry. Most recently, DOJ sued, and then in April 2013, announced a settlement with Anheuser-Busch InBev SA/NV ("ABI") and Grupo Modelo S.A.B. de C.V. ("Modelo") that required the companies to divest Modelo's entire U.S. business – including the licenses of Modelo brand beers, its most advanced brewery, Piedras Negras, its interest in a Modelo/Constellation Brands Inc. joint venture that sells Modelo beers in the U.S., and other assets – to Constellation, in order to proceed with their merger. The settlement, pending in U.S. federal district court, resolved DOJ's concerns that ABI's $20 billion acquisition of the remaining interest in Modelo that it did not already own, as originally proposed would substantially lessen competition in the U.S. beer market as a whole and in at least 26 metropolitan areas. The settlement also requires ABI to enter interim supply and transition services agreements with Constellation, which was added to the case as a defendant for purposes of settlement, to enable it to compete in the U.S. as it expands the capacity of the Piedras Negras brewery in compliance with the settlement to export to the U.S. As a result, Constellation will fully replace Modelo as a competitor in the U.S. ABI is the number-one brewer and marketer of beer in the U.S., with a 39 percent national market share; Modelo was the third-largest brewer of beer sold in the U.S., with a 7 percent market share.

1.2 Vertical Integration in the Food Chain

16. Vertical integration – the combination of noncompeting companies where one firm's product is a necessary component or complement of the other's – can achieve procompetitive efficiency benefits. Vertical integration can lower transaction costs, lead to synergistic improvements in design, production, and distribution of the final output product, and thus enhance competition. Consequently, few purely vertical transactions are challenged as anti-competitive.

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[17] Competitive Impact Statement, *U.S. v. Cargill*, *available at* http://www.justice.gov/atr/cases/f2500/2584.htm.

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.

18. The FTC recently considered competitive issues raised by vertical mergers between soft drink manufacturers and bottlers. In 2010, two of the nation's largest soft drink manufacturers proposed to buy their respective largest bottlers. These bottlers each distributed soft drink products under a license with a competing manufacturer.[18] The FTC raised concerns that each merger would give the manufacturer access to competitively sensitive business information provided by the competing soft drink maker to its bottler to help them bottle and distribute their products. Due to the highly concentrated and difficult-to-enter markets for branded soft drink concentrate and branded and direct-store-delivered carbonated soft drinks, the Commission charged that access to this information could reduce competition for soft drinks by eliminating direct competition or facilitating coordinated interaction in the industry. To settle these charges, the companies erected a "firewall" to prevent the sharing of competitively sensitive business information via the bottling subsidiary.

1.3 Cartel Cases Involving the Food Chain

19. The DOJ has a long history of prosecuting cartels in the food industry. In 1988, for example, DOJ brought its first case in a sustained criminal enforcement effort attacking bid rigging in the milk and dairy products industry. Over the next seven years, DOJ filed 126 criminal cases against 73 corporations and 80 individuals in 18 states, resulting in fines totaling $59 million. Twenty-nine of the individuals received jail sentences averaging almost seven months a piece. The defendants were rigging bids on contracts to supply milk to schoolchildren, including contracts for federally subsidized school lunch programs, as well as on contracts to supply dairy products to the United States military. Some of the conspiracies had been rigging bids since the late 1960s. In 1996, the DOJ successfully prosecuted Mrs. Baird's Bakeries for price fixing in the bread and bakery products market in Texas; after trial, the defendant was sentenced to pay a $10 million fine, which was many times higher than the previous court imposed record fine (as distinguished from an agreed-upon fine in a plea agreement).

20. DOJ has prosecuted other criminal conspiracies involving products that have a major impact on the food chain. As then-Assistant Attorney General Joel Klein observed of the global vitamins cartel in 1999, for example, "The criminal conduct of these companies hurt the pocketbook of virtually every American consumer – anyone who took a vitamin, drank a glass of milk, or had a bowl of cereal."[19] In the food preservatives industry, for 17 years the sorbates cartel fixed prices of chemical preservatives used

[18] *In re The Coca-Cola Co.*, FTC Docket No. C-4305, *available at* http://www.ftc.gov/os/caselist/1010107/index.shtm; *In the Matter of PepsiCo, Inc.*, FTC Docket No. C-4301, *available at* http://www.ftc.gov/os/caselist/0910133/100928pepscocmpt.pdf.

[19] Statement of U.S. Assistant Att'y Gen. Joel Klein (May 20, 1999), *available at* http://www.justice.gov/atr/public/press_releases/1999/2451.htm.

primarily as mold inhibitors in high-moisture and high-sugar foods such as cheese and other dairy products, baked goods, and other processed foods. The citric acid cartel was another worldwide cartel broken up by DOJ with record-breaking fines; citric acid is a flavor additive and preservative found in soft drinks and processed foods.[20]

2. Retail Food Markets

21. According to the USDA, American consumers spent over $1.3 trillion on food purchases in 2011. Due to the importance of this sector to household budgets as well as the economy as a whole, the Agencies have a long-standing interest in preventing anticompetitive mergers and business practices that threaten competition in markets for food products that consumers buy every day. Specifically, the FTC evaluates the impact of proposed acquisitions among companies that operate in retail markets for food products.

22. The Agencies' approach to analyzing competition in retail food markets follows the same approach used in other markets, as outlined in the Agencies' Horizontal Merger Guidelines.[21] The Agencies have challenged a number of mergers involving the retail sale of food and grocery products by supermarkets and other retailers. The Agencies' approach to analyzing mergers in food retailing is discussed in more detail below.

23. The FTC also has considered the extent to which unbranded or private-label food products constrain the pricing of branded food products. This is a very market-specific inquiry. Just as consumers' unwillingness to switch from one differentiated brand product to another in response to a change in relative prices can be important evidence in defining a relevant market, strong consumer preferences for manufacturer-branded products over private-label products may lead to the exclusion of private label products from the relevant market. Exclusion is proper whenever sales of private label products do not constrain the prices of manufacturer branded products. This analysis led the FTC to exclude unbranded or private-label products in markets for carbonated soft drinks,[22] seasoned salts,[23] and super-premium ice cream.[24] On the other hand, in some cases, the ability of the merged firm to raise prices will be constrained by the availability of private-label products. This was the case with ready-to-eat cereals where the acquired company was the primary manufacturer of private label cereals for several national supermarket chains.[25] The concern was that the acquisition, if consummated, might have the effect of lessening competition in the ready-to-eat cereal market by increasing the likelihood of the unilateral exercise of market power and simultaneously restricting the entry of new private label cereal products. Of particular concern was a provision in the merger agreement that would have restricted the new firm's ability and incentive to produce and sell private-label products. The merger proceeded once that provision was eliminated in settlement with the FTC.

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20 *See U.S. v. Haarmann & Reimer Corp.*, *available at* http://www.justice.gov/atr/cases/f1000/1064.htm.

21 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 5.

22 *FTC v. The Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986).

23 The parties resolved the Commission's competitive concerns with a negotiated settlement. *See In re McCormick & Co.*, FTC Docket No. C-4225, *available at* http://www.ftc.gov/os/caselist/0810045/index.shtm.

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

25 Complaint, *In re General Mills Corp.*, 123 F.T.C. 1380 (May 16, 1997), *available at* http://www.ftc.gov/os/1997/05/c3742cmp.pdf.

2.1 The Use of Slotting Allowances

24. Access to sufficient retail space can be a significant issue for U.S. manufacturers of packaged consumer foods. One area that has generated particular interest is slotting allowances, which are payments made by a manufacturer or supplier to a retailer as a condition for placement on the retailer's shelves or possibly for access to the retailer's warehouse space. Slotting allowances can have procompetitive and anticompetitive effects. For example, payment of a slotting allowance may signal the quality of a new product, which can help retailers screen from among several products to determine which to stock, and increases incentives for manufacturers to make demand-enhancing investments.[26] In some instances, payments from a manufacturer to a retailer may reflect an ordinary price discount. On the other hand, manufacturers could use slotting to foreclose or otherwise disadvantage rivals, raising the costs of entry and ultimately leading to reduced incentives to innovate and a narrowing of product variety, as well as higher prices.

25. Given that slotting allowances can have such varied effects depending on the circumstances, the FTC's approach is to look for those situations in which slotting allowances are most likely to present competitive problems. If the retail market is competitive, slotting allowances are likely to be passed through to consumers and competition will not ordinarily be harmed: consumers will receive the benefits of low prices and wide product selection. Thus, when examining proposed mergers of competing manufacturers or retailers, the FTC will work to prevent combinations that result in high levels of concentration, when they have the greatest potential for practices such as slotting allowances to have anti-consumer rather than pro-consumer effects.

2.2 Retail Food Mergers

26. As noted above, the FTC has a robust program for reviewing proposed mergers among food retailers. Following the fact-specific approach outlined in the Agencies' Horizontal Merger Guidelines, the FTC has challenged a number of mergers involving the retail sale of grocery products.[27] Virtually all of those challenges have involved combinations of "supermarkets."

27. When reviewing mergers, the FTC has previously defined supermarkets as full-line grocery stores that carry a wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase all or substantially all of their food and other grocery shopping requirements in a single shopping visit.[28] Supermarkets typically carry more than 10,000 different items

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26 The "quality signal" theory assumes that manufacturers have better information than retailers about the likely success of a new product. Thus, if a manufacturer believes its product is very likely to succeed, it is more likely to pay a significant slotting fee, knowing that it is likely to recover this expense through profits from future sales. Similarly, retailers infer that a new product is more likely to succeed if a manufacturer is willing to pay a slotting fee (or a significant slotting fee). Based on this inference, retailers are more likely to stock products for which higher slotting fees are paid in part because they expect such products to be more highly valued by consumers and to generate greater profits. *See* Federal Trade Comm'n Staff Study, "Slotting Allowances in the Retail Grocery Industry, Selected Case Studies in Five Product Categories," at 1 & 62 (Nov. 2003), *available at* http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf.

27 For a recent list of FTC retail food merger challenges, *see* http://www.ftc.gov/bc/caselist/industry/cases/retail/RetailGrocery.pdf.

28 *See, e.g.*, Complaint at 2, *In re Koninklijke Ahold N.V.*, FTC Docket No. C-4367 (Aug. 17, 2012), *available at* http://www.ftc.gov/os/caselist/1210055/120817konkinlijkecmpt.pdf (defining, for purposes of the Complaint, a supermarket as "a full-line grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, including fresh fruits and vegetables,

(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 extensive retail pricing data, supermarket merger investigations can be very time- and resource-intensive.

30 Supercenters are full-service supermarkets co-located with a mass merchandiser outlet, and club stores are stores that offer a wide selection and deep inventory of food and grocery items, and general merchandise – often in large packages or in packages of two or more conventional-sized items – to businesses and individuals that have purchased club memberships. *See* Complaint at 3, *In re Wal-Mart Stores, Inc.*, FTC Docket No. C-4066 (Nov. 21, 2002), *available at* http://www.ftc.gov/os/caselist/c4066.shtm.

31 *See id*. To settle FTC charges that the proposed merger would reduce competition, Wal-Mart agreed to sell four stores.

32 *FTC v. Whole Foods Market, Inc. and Wild Oats*, No. 07-cv-01021, case materials are available at http://www.ftc.gov/os/caselist/0710114/0710114.shtm. Following a brief trial on the Commission's motion for a preliminary injunction, the district court found that premium natural and organic supermarkets was not a distinct market and that Whole Foods and Wild Oats compete within the broader market of grocery stores and supermarkets. The parties merged, with some stores shutting down by the time an appellate court reversed the district court's ruling on the basis that it had ignored important evidence supporting a market for premium natural and organic supermarkets. *See FTC v. Whole Foods Market, Inc.*,

the two companies were each other's closest rival in the operation of premium natural and organic supermarkets. Based on evidence collected during its investigation, the FTC asserted that premium natural and organic supermarkets differed from traditional supermarkets in the breadth and quality of perishables (produce, meats, fish, bakery items, and prepared foods) and breadth of natural and organic products and services and amenities. As compared to conventional supermarkets, premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way. As compared to other organic markets, they offer an extensive selection of natural and organic products to enable one-stop shopping.

31. Other issues the Agencies address in reviewing food retailing mergers include the appropriate scope of the geographic market and barriers to entry. In most cases, food retailing competition is localized, typically limited to the distance consumers are willing to drive for weekly shopping trips. The exact scope will depend on factors specific to each store location, such as population density, road networks, natural barriers (for example, rivers or railroad tracks), and store size. In addition, significant entry barriers include the time and costs associated with conducting market research, selecting an appropriate location, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

32. Finally, when assessing the central question of whether a merger involving food retailers may substantially lessen competition, the FTC has assessed the likelihood of both unilateral effects and coordinated effects. For instance, in the *Whole Foods/Wild Oats* merger, the FTC alleged that the companies were often viewed by their shoppers as the other's next best substitute, resulting in the loss of direct and unique price and non-price competition. In other cases, the FTC challenged the merger out of concern that the elimination of direct competition would increase the likelihood and success of coordinated interaction among remaining firms post-merger.

3. U.S. Research on competition in the food chain

3.1 DOJ/USDA Workshops on Agriculture and Competition

33. In 2010 the DOJ and USDA held five public workshops on different aspects of competition in agriculture and food markets. The workshops featured more than 10 hours of public testimony, and the participation of Attorney General Eric Holder and Secretary of Agriculture Tom Vilsack. Competitive conditions in the food chain were discussed in some form at commodity-specific workshops covering corn, soybeans, and hogs; dairy; poultry; and livestock. The goal for the final workshop was to focus on profit margins or price spreads at various levels of the supply chain across several different agricultural industries. This workshop encompassed several areas not previously highlighted, such as retail consolidation and monopsony power. In May 2012, the DOJ issued its report entitled "Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in Our 21st Century Economy and the Way Forward."[33] The report summarizes the major issues discussed at the workshops. One lesson of the workshops is that antitrust enforcement and competition advocacy play a crucial role in fostering a healthy and competitive agriculture sector. But it is also clear that many of the challenges facing the agriculture sector today fall outside the purview of the antitrust laws and will require public and private cooperation to find solutions.

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548 F.3d 1028 (D.C. Cir. 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080729wholefoodsopinion.pdf.

33 The report is *available at* www.justice.gov/atr/public/reports/index.html. Transcripts and video of the workshops, as well as links to more than 18,000 public comments, are *available at* www.justice.gov/atr/public/workshops/ag2010/.

3.2 FTC Studies on Retail Food Competition

34. Between 1998 and 2011, the FTC investigated retail food mergers that affected 176 markets and challenged mergers that affected 152 of those markets.[34] To help inform assessments of likely competitive effects of conduct and transactions in retail grocery markets, FTC economists published a paper in December 2012 regarding the pricing impacts of some of these mergers.[35] The paper examined data from 14 retail food mergers that took place in 2007 and 2008 in markets of various size and pre-merger concentration levels. Several econometric techniques were used to estimate the price impact of these mergers, as well as counterfactual prices that would have prevailed absent the merger. The main finding of this study was that mergers in already concentrated retail food markets most frequently yielded significant price increases, while mergers in less concentrated markets were often associated with price decreases.

35. FTC economists have also looked at trends in retail formats, focusing on entry, exit, and growth.[36] In 2009, the most prevalent format was large supermarket chains of over 100 stores (41 percent of stores), followed by single store supermarkets (23 percent), then small supermarket chains of 2 to 100 stores (21 percent), and finally supercenters (11 percent) and club stores (4 percent).[37] The study showed that while the number of retail grocery outlets stayed roughly constant at 31,000 nationally from 2004-09, the number of supermarkets declined and the number of supercenters and club stores increased. The study also found significant shifts in brand market share over time with most of the changes in local market structure coming from incumbent chains either expanding (opening new stores) or contracting (closing stores), not entry.

36. Another area examined by the FTC is slotting allowances. The FTC has conducted public workshops on the topic of slotting allowances, provided testimony to Congress,[38] and issued several reports. The most recent, published in 2003,[39] examined the practices of seven retailers and eight suppliers (six manufacturers and two food brokers) regarding five product categories: fresh bread, hot dogs, ice cream and frozen novelties, shelf-stable pasta, and shelf-stable salad dressing. This study constituted the first systematic analysis of product-level data on slotting allowances directly from retailers, and was important to the FTC's understanding of the use and magnitude of slotting allowances in the retail grocery industry. However, due to significant variation in the way retailers documented slotting allowances and the small data sample, FTC staff were not able to extrapolate any findings across the entire grocery industry.

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34 Federal Trade Comm'n, HORIZONTAL MERGER INVESTIGATION DATA: FISCAL YEARS 1996-2011 (Jan. 2013), at 2 n.8 & 8, *available at* http://www.ftc.gov/os/2013/01/130104horizontalmergerreport.pdf.

35 Daniel Hosken, Luke M. Olson & Loren K. Smith, "*Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*," Federal Trade Comm'n Bureau of Econ. Working Paper No. 313, (Dec. 2012), *available at* http://www.ftc.gov/be/workpapers/wp313.pdf.

36 Daniel Hanner, Daniel Hosken, Luke M. Olson & Loren K. Smith, "*Dynamics in a Mature Industry: Entry, Exit, and Growth of Big-Box Retailers*," Federal Trade Comm'n Bureau of Econ. Working Paper No. 308 (Sept. 2011), *available at* http://www.ftc.gov/be/workpapers/wp308.pdf.

37 *See* Section II.B. & fn. 32, *supra*, for a more detailed discussion of supermarkets, supercenters, and club stores.

38 *See* Testimony of the Fed. Trade Comm'n before the U.S. H.R. Comm. on the Judiciary, "Slotting Allowances and the Antitrust Laws," Oct. 20, 1999, *available at* http://www.ftc.gov/os/1999/10/slotting991020.htm.

39 *See* Federal Trade Comm'n Staff Study, "Slotting Allowances in the Retail Grocery Industry, Selected Case Studies in Five Product Categories," *supra* note 28.

4. Conclusion

37. In competitive markets, supply and demand are determined by consumers voting with their dollars. This is certainly the case in markets involving retail food products, where consumer spending has a direct impact on household budgets and consumers face a number of options. To maximize profit, a producer must satisfy consumer preferences for products, packages, and methods of distribution in the most efficient manner. Less efficient producers are driven from the market, thus freeing up scarce resources for uses that consumers value most highly. The Agencies play an important role in seeking to ensure that these markets operate competitively.