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ROUNDTABLE ON HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT

-- Note by the Delegation of the United States --

This note is submitted by the delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

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ROUNDTABLE ON HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT

-- Note by the United States --

1. Introduction

1. Under U.S. antitrust law, horizontal agreements relating to environmental objectives are treated the same as other horizontal agreements. U.S. antitrust law aims to safeguard the competitive process and therefore focuses on the competitive effects of the particular conduct. In the U.S. system, the task of balancing the public policy goals of competitive marketplaces and environmental preservation belongs to legislators, not antitrust enforcers. Importantly, though, the antitrust laws and the environmental laws can be complementary, as conduct that enhances competition and benefits consumers also can benefit the environment.

2. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits horizontal agreements that harm competition.[1] Therefore, competitors are free to enter into an agreement designed to promote a cleaner environment—for example, a joint venture among manufacturers to develop a "greener" technology—so long as the net effect of that agreement is not to restrain competition among those competitors or with others in the marketplace. Arguing that particular conduct benefits the environment is not a viable defense to conduct that is otherwise illegal under the antitrust laws.

3. This submission provides a general discussion of how U.S. antitrust law treats horizontal agreements in the environmental context. First, it describes generally the intersection of antitrust law and environmental regulation in the United States. Second, it offers examples of the application of U.S. antitrust laws to specific horizontal agreements that have an environmental nexus. These examples demonstrate the general rule that antitrust analysis in such cases is identical to that applied in other contexts and that the application of both bodies of laws can be complementary. In addition, the examples illustrate how environmental regulation and concerns may affect market conditions and the factual circumstances upon which antitrust analysis is based. For example, environmental regulation and awareness can increase entry barriers for potential manufacturers of products, or reduce demand for polluting or regulated products. Such market conditions do not alter the antitrust analysis, but are relevant circumstances to be considered when applying standard antitrust analysis.

2. The intersection of U.S. antitrust law and environmental regulation

4. The United States Congress has enacted a host of laws and regulations designed to protect the environment. Examples include the National Environmental Policy Act, 42 U.S.C. § 4321, which makes it the policy of the federal government to use all practicable means to administer federal programs in the most environmentally sound fashion; the Clean Air Act, 42 U.S.C. § 7401, which regulates air emissions from stationary and mobile sources; the Clean Water Act, 33 U.S.C. § 1251, which establishes the basic structure for regulating the discharge of pollutants into the waters of the United States; and the

[1] Violations of the Sherman Act are also deemed to be violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Comprehensive Environmental Response, Compensation, and Liability Act, 26 U.S.C. § 4611, which creates a "superfund" to clean-up certain hazardous waste sites and accidents. The federal Environmental Protection Agency (EPA) is a central player in U.S. environmental regulation. It promulgates regulations, enforces environmental statutes and regulations in court or in administrative proceedings, and studies environmental issues, among other activities. State and local governments have enacted similar laws and regulations and have created similar agencies to enforce them.

5. The U.S. antitrust laws serve the different goal of safeguarding the competitive process. The antitrust laws stand as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,"[2] establishing "a regime of competition as the fundamental principle governing commerce in [the United States]."[3] A court or an antitrust enforcer "focuses directly on the challenged restraint's impact on competitive conditions" and "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."[4]

6. Consequently, U.S. courts almost certainly would not allow parties to a horizontal agreement that restrains competition in violation of the antitrust laws to defend that restraint solely on the ground that it has environmental benefits.[5] Courts are not well-equipped to balance competitive harms against alleged environmental benefits as the two policies entail different types of consideration. Furthermore, attempting such a calculus on the basis of the antitrust laws arguably would take courts beyond their statutory mandate of safeguarding the competitive process. Accordingly, U.S. courts have held that harm to the environment is not a harm cognizable under the antitrust laws.[6]

7. It bears emphasis that the goals of a competitive economy and environmental preservation can be complementary. For example, an agreement among competitors *not* to develop an environmentally friendly alternative to a current product would harm both consumers and the environment. Conversely, the development of renewable energy resources has the potential not only to reduce environmental harm, but also to help deconcentrate wholesale-power markets.

8. The U.S. Department of Justice Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") (collectively, "the U.S. antitrust agencies") play an important role in the process of environmental regulation by helping legislators and policymakers understand the competitive effects of regulations and alerting them to possible unintended consequences of regulation. This allows legislators to make fully informed decisions in balancing potentially competing policy considerations.

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2 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

3 City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 (1978).

4 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

5 *Cf.* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462-63 (1986) (concluding that a group of dentists who agreed not to provide dental x-rays to insurers, and thereby restrained competition with respect to services provided to their customers, could not defend this restraint on the ground that it was necessary to protect the welfare of patients).

6 *See* Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 414 n.9 (3d Cir. 1997) ("[W]hile the environmental quality of energy sources may be a worthwhile concern, it does not appear to be a problem whose solution is found in the Sherman Act."); In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 236 (9th Cir. 1976) (explaining that the antitrust laws do not provide "a broad license to the court to issue decrees designed to eliminate air pollution").

3. Application of U.S. antitrust laws to horizontal agreements concerning the environment

9. The Secretariat's invitation for submissions defines horizontal agreements to include cartels, joint ventures, and mergers. This section describes how these types of agreements likely would be analyzed under U.S. antitrust law. In each case, the antitrust laws permit competitively benign horizontal agreements that advance environmentally friendly goals, but do not permit competitors to suppress competition under the guise of protecting the environment.

3.1 Agreements and joint ventures

10. Section 1 of the Sherman Act prohibits agreements that restrict competition unreasonably.[7] U.S. courts and antitrust enforcers analyze most agreements under the rule of reason, which requires an analysis of the agreement's actual effect on competition. The rule of reason entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. However, some types of agreements, for example, horizontal price-fixing agreements, are so likely to harm competition and lack any procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. These agreements are conclusively presumed to harm competition and deemed illegal per se.

11. Section 1 has been used to prohibit an agreement to suppress the development of environmentally friendly technology. For example, in 1969, the United States brought a civil antitrust action against the major domestic automobile manufacturers, alleging that they had conspired to eliminate competition among themselves in the research, development, and manufacturing of air-pollution control equipment in violation of Section 1. The United States alleged that, among other conduct, the defendants had agreed that efforts to develop air-pollution control equipment should be undertaken on a non-competitive basis and to delay the installation of air-pollution control equipment.[8] The action was settled by entry of a judicial consent decree enjoining the defendants from engaging in the allegedly illegal conduct.

12. It is highly unlikely that competitors could defend successfully a Section 1 claim on the ground that their anticompetitive agreement has environmental benefits. In *National Society of Professional Engineers v. United States*,[9] the U.S. Supreme Court rejected an analogous defense. In that case, the United States brought a civil antitrust action against a trade association for engineers, charging that a provision in the association's code of ethics prohibiting competitive bidding for engineering services violated Section 1. The association defended this provision on the ground that price competition would cause engineers to sacrifice quality of service, thereby endangering public safety. In affirming the lower court's ruling that the provision violated Section 1, the Supreme Court characterized the association's "public-safety defense" as "nothing less than a frontal assault on the basic policy of the Sherman Act" and explained that "the statutory policy precludes inquiry into the question whether competition is good or bad."[10] Considering examples from the invitation for submissions, competitors arguing that output restrictions would benefit the environment by reducing carbon dioxide or that they need to pass on the cost of complying with new environmental regulations to consumers are likely to meet the same legal fate, with

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7 15 U.S.C. § 1 (2009) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.").

8 *See* Complaint at 5-8, United States v. Automobile Mfrs. Ass'n, Inc., 307 F. Supp. 617 (C.D. Cal. 1970) (No. 69-75-JWC).

9 435 U.S. 679 (1978).

10 *Id.* at 695.

a court concluding that it "cannot indirectly protect the public against [environmental] harm by conferring monopoly privileges on the manufacturers."[11]

13. Legitimate joint ventures among competitors are analyzed under the rule of reason. The U.S. antitrust agencies recognize that "[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs" and that these collaborations "often are not only benign but procompetitive."[12] For example, in analyzing a research-and-development joint venture, the agencies would consider whether the collaboration "may enable participants more quickly or more efficiently to research and develop new or improved goods, services, or production processes" or whether it could "increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants' individual competitive R&D efforts."[13]

14. A joint venture among competitors to develop an environmentally friendly technology that does not harm competition, then, will be consistent with the antitrust laws. For example, in 1994, the DOJ issued a business review letter[14] to the Fuel Cell Commercialization Group ("FCCG"), a cooperative research-and-development venture composed principally of electric and gas utilities. The letter stated that the DOJ had no present intention of challenging FCCG's plan to promote the development of a clean and reliable alternative source of electrical power. FCCG planned to provide technical assistance to Energy Research Corporation ("ERC") in support of ERC's efforts to develop and commercialize a molten carbonate fuel-cell plant, and individual FCCG members pledged to provide financial assistance to ERC. The DOJ concluded that the utilities' limited cooperation in FCCG would not facilitate collusion in markets for residential or commercial customers, that competition in the research and development of fuel-cell technology would not be affected significantly given that individual FCCG members were free to participate in other research-and-development programs, and that the plan could accelerate the development of more energy efficient power-generation plants.[15]

3.2 Mergers

15. Section 7 of the Clayton Act, 15 U.S.C. § 18 (2009), prohibits mergers that may lessen competition substantially. In analyzing horizontal mergers, the U.S. antitrust agencies ascertain whether the merger in question is likely to create, enhance, or entrench market power or facilitate its exercise. The U.S. antitrust agencies' analysis accounts for efficiencies stemming directly from the merger, and the U.S. antitrust agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. Such efficiencies

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11 *Id.* at 695-96.

12 Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors 1 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

13 *Id.* at 14.

14 Persons concerned about the legality under U.S. antitrust law of proposed business conduct may ask the U.S. Department of Justice for a statement of its current enforcement intentions with respect to that conduct, pursuant to the Department's Business Review Procedure. *See* 28 C.F.R. § 50.6 (2010). Statements issued pursuant to this procedure are commonly referred to as business review letters.

15 *See* Letter from Anne K. Bingaman, Assistant Attorney Gen., U.S. Dep't of Justice, to Stephen M. Soble, Esq. (Apr. 20, 1994), *available at* http://www.justice.gov/atr/public/busreview/211835.htm.

potentially could include research-and-development efficiencies that may bring environmentally friendly products or services to market more quickly or more cheaply.[16]

16. An FTC review of a 1999 merger in the lead antiknock compounds industry provides an example of the application of standard antitrust analysis in an environmental context, and also demonstrates how this context can affect market circumstances. Lead antiknock compounds are gasoline additives containing tetraethyl lead used to increase the octane rating of gasoline, thereby eliminating gasoline engines' knock during the combustion cycle and improving fuel efficiency. Worldwide use of lead antiknock compounds has been significantly declining since the 1970s, due to environmental regulation and concerns.

17. The proposed merger was between Associated Octel Company Ltd. ("Octel") and Oboadler Company ("Oboadler"), two of the world's three largest manufacturers of tetraethyl lead.[17] Under the acquisition agreement, Octel was required to supply lead antiknock compounds to Oboadler's U.S. distributor, Allchem Industries, Inc. ("Allchem") for resale in the U.S. After reviewing the proposed transaction, the FTC filed an administrative complaint, alleging that the acquisition would substantially lessen competition in the relevant market by (i) eliminating direct actual competition between Octel and Oboadler; (ii) increasing the likelihood of coordinated interaction between the remaining competitors in the market; and (iii) increasing the likelihood that consumers of lead antiknock compounds will be forced to pay higher prices. The complaint further alleged that market entry would not have been timely, likely and sufficient to deter or counteract the adverse competitive effects of the proposed acquisition. The length of entry was due, in part, to environmental regulations pertaining to manufacturing that uses lead, the ongoing decline in worldwide demand for lead antiknock compounds, and the cost of environmental remediation at the manufacturing site when, due to decline in demand, production would no longer be commercially practicable.[18]

18. Applying standard antitrust analysis, the FTC approved the acquisition subject to a consent order that required Octel to enter into a long term supply agreement with Allchem. The agreement obliged Octel to provide Allchem with unlimited quantities of lead antiknock compounds for resale to U.S. customers, and gave Allchem sole right to choose the U.S. customers to whom to sell, as well as the terms and conditions of such resale. The consent order was thus designed to protect U.S. consumers of lead antiknock compounds from the exercise of market power resulting from the proposed acquisition. Since the order ensured competitive lower consumer prices for an environmentally hazardous product this case is, perhaps, an example of an antitrust enforcement action that was not complementary with environmental goals.

3.3 Antitrust enforcement in a regulatory context

19. The existence of applicable regulations – environmental or otherwise – can affect antitrust analysis in some circumstances. Conduct undertaken pursuant to state laws or regulations may be immune from the antitrust laws in certain circumstances.[19] Likewise, conduct intended to influence legislative or administrative processes may be immune from the antitrust laws in certain circumstances.[20] Furthermore,

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16 *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

17 See *In matter of The Associated Octel Company Ltd.,* File No. 991 0288, Docket No. C-3913, of December 22, 1999. All related documents available at http://www.ftc.gov/os/caselist/c3913.shtm.

18 See FTC Complaint, available at http://www.ftc.gov/os/1999/12/associatedoctelcmp.htm, ¶11.

19 *See generally* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

20 *See generally* United Mine Workers v. Pennington, 381 U.S. 657 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961).

federal laws or regulations sometimes permit conduct that otherwise would violate the antitrust laws. U.S. antitrust enforcers are careful, however, to make sure that parties stay within the boundaries of any such immunities. In addition, the U.S. antitrust agencies have cautioned against undue expansion of antitrust immunities, as such expansion may harm consumers.[21]

20. For example, in 1994, the DOJ issued a business review letter to the Portable Power Equipment Manufacturers Association ("PPEMA"), a trade association representing manufacturers of chain saws, string trimmers, blowers, and similar equipment. The letter stated that the DOJ had no current intention to challenge PPEMA's participation in a rule-making proceeding conducted by the Environmental Protection Agency. PPEMA planned to serve on a committee established by EPA to develop emissions regulations for small engines. PPEMA stated that, in accordance with EPA protocols, it would not disclose its members' confidential business information and its members would not enter into any agreements having anticompetitive effects apart from any effects of the regulations. The DOJ concluded that these steps reduced the risk that actions by PPEMA members outside the regulatory process would violate the antitrust laws or that their participation in the process would have anticompetitive effects that are not incidental to petitioning the government.[22]

21. Similarly, in 2000, the DOJ issued a favorable business review letter to the Akutan Catcher Vessel Association ("ACVA"), a group of owners of Alaskan fishing vessels with processing capabilities. For environmental and economic reasons, the U.S. government set an annual quota for Alaskan pollock harvested from certain waters, and ACVA members were licensed to harvest a portion of this quota. Previously, ACVA members had harvested their collective allotment under an "Olympic" system, which allowed each participant to harvest as much of the allotment as it could and thus incentivized them to harvest as fast as they could. ACVA members proposed to replace this system with a suballocation of the quota amongst themselves, arguing that the new system would permit them to maximize the value of product obtained from pollock and reduce the amount of incidental by-catch of other fish species. The DOJ determined that the proposed system did not appear to have any incremental anticompetitive effect in this regulated setting and could increase processing efficiency.[23] It explained that the elimination of a race to gather an input whose output is fixed by regulation seemed unlikely to reduce output or increase price and that the elimination of the race could increase processing efficiency and reduce the inadvertent catching of other fish species (species whose preservation also is a matter regulatory concern).

4. Conclusion

22. U.S. antitrust law focuses on the competitive effects of challenged conduct. The task of balancing the public policy goals of competitive markets and preservation of the environment belongs to legislators, not courts or antitrust enforcers. Thus, horizontal agreements relating to environmental objectives are treated the same as other horizontal agreements for purposes of antitrust analysis.

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21 See *e.g., An Overview of Federal Trade Commission Antitrust Activities (Prepared Statement of the FTC before the Committee on the Judiciary, Antitrust Task Force, U.S. House of Representatives, July 24, 2003)* available at http://www.ftc.gov/os/2003/07/antitrustoversighttest.htm; *Antitrust Immunities (Assistant Attorney General Christine A. Varney Remarks as Prepared for the American Antitrust Institute's 11th Annual Conference, Washington, D.C., June 24, 2010)* available at http://www.justice.gov/atr/public/speeches/262745.htm.

22 *See* Letter from Anne K. Bingaman, Assistant Attorney Gen., U.S. Dep't of Justice, to Mac S. Dunway (July 5, 1994), *available at* http://www.justice.gov/atr/public/busreview/211886.htm.

23 *See* Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, to Bruce M. Hull, Esq. (Feb. 29, 2000), *available at* http://www.justice.gov/atr/public/busreview/4241.htm.