Tunney Act Comments on the proposed settlement of

United States v. Archer-Daniels-Midland Co and Minnesota Corn Processors, LLC
Federal District Court, District of Columbia
Civil Case No. 02-1768

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At a time when the U. S. government and the American public are demanding that private enterprises provide full and complete disclosure of essential information to avoid repetition of the scandals that have destroyed Enron, Worldcom, and Arthur Anderson, it is incumbent on the Department of Justice to make the same kind of full and complete disclosure of information and analysis in connection with its obligations under the Tunney Act. Only then, can the court and the public in fact judge the appropriateness of the proposed settlement of this or any other major antitrust case. The court should not grant approval to this proposed consent decree until the requirements of the Tunney Act are fully satisfied.

I am joined in these comments by two important organizations, the National Farmers Union and the Organization for Competitive Markets, concerned with competition policy and its impact on the markets for agricultural products as well as a group of seven scholars in the fields of economics and antitrust law. Appendix A provides additional background information about both the organizations and individuals supporting these comments.

The government is proposing to settle its challenge to Archer-Daniels-Midland's (ADM) acquisition of Minnesota Corn Processors (MCP) by allowing the acquisition on condition that MCP withdraw from a joint marketing arrangement with Corn Products International (Corn Products) concerning high fructose corn syrup (HFCS). As demonstrated below, the disclosure contained in the Competitive Impact Statement filed in connection with the proposed settlement of the government's does not satisfy the basic requirements of the Tunney Act.

The Competitive Impact Statement fails to disclose essential facts about the impact of this acquisition on the directly affected markets and ADM's status and role in those markets. Further it does not explain how the proposed decree, in light of those facts and an apparent failure to consider relevant relief options as well as the Antitrust Division's own Merger Guidelines, can successfully protect the identified markets from increased risks of anticompetitive conduct. Finally, the Competitive Impact Statement omits entirely any discussion of the impact of allowing this combination in the related ethanol markets in which ADM is by many orders of magnitude the largest firm and MCP is the second largest.

It is our position that the government must file a revised Competitive Impact Statement that discloses all relevant information and analysis relating to the competitive implications of this settlement. Without such disclosure, the record will not disclose "the competitive impact of such judgment" nor its "impact . . . upon the public generally . . . ." Clayton Act, Section 5 (e)(1) and (2);15 USC sec. 16(e)(1) and (2). As result, the District Court can not perform its obligation to "determine that the entry of such judgment is in the public interest." Section 5 (e); 15 USC sec. 16(e).

SUMMARY

In order to determine whether the proposed settlement of this merger case will serve the public interest in preserving competition in all the markets in which the combining enterprises both compete, it is essential that all relevant facts be fully disclosed. This acquisition will cause a substantial change in the market structure of the corn syrup, HFCS and ethanol markets. In all of these markets the effect of this transaction will or may be to increase concentration.

The initial focus of concern should be the analysis of the corn syrup and HFCS markets. Yet, the Competitive Impact Statement fails to disclose certain essential facts about those markets, ADM's position in them, and the government's basis for believing that the remedy proposed would eliminate the anticompetitive risks posed by the disclosed as well as undisclosed facts about those markets. First, there is no disclosure of MCP's separate market share in corn syrup or either of the two HFCS markets that the complaint and Competitive Impact Statement focus on. Hence, it is not possible to tell what impact this acquisition will have on concentration in these already concentrated markets where entry of new competitors is unlikely. Second, the Competitive Impact Statement does not disclose or discuss ADM's ownership directly and indirectly of 25% of the stock of the corporate parent of one of its major, putative competitors in these markets. Third, the Competitive Impact Statement does not report the decision of the 7th Circuit that examined the risks of anticompetitive, interdependent conduct in the HFCS markets and found them to be real and substantial. Fourth, the Competitive Impact Statement discussion of alternative remedies implies that the government did not consider obvious additional relief that would have both allowed this merger and reduced the ownership linkages among ostensible competitors within both the HFCS and ethanol markets. Finally, and most seriously, the Competitive Impact Statement does not explain why, in light of the foregoing facts, the proposed remedy, separating MCP from Corn Products but allowing its combination with ADM, is likely to achieve the goal of preserving and enhancing competition in these markets. Because of these omissions of facts and explanations of essential analysis, it is not possible for a court, under even the most lax version of the government's self-serving standard for review, to approve this proposed decree.

In respect to the markets involving ethanol, the Competitive Impact Statement is totally silent. The facts are that ADM is the largest producer of ethanol with a very large market share, and MCP is the second largest producer. In addition, ADM is one of an apparently limited number of firms that have the resources to market and distribute ethanol to end users. Thus, this combination will substantially increase ADM's share of the ethanol production market and may further entrench its position in the marketing of ethanol. It is possible that there are good reasons why, despite these prima facie anticompetitive implications of this acquisition, it is unlikely to have such effects. Given that the government has chosen to challenge the combination of these two firms, and their respective position in the ethanol market is well known, it is incumbent on the government to explain why this aspect of the combination does not raise any antitrust concerns. The government, as is evident from its statement of its interpretation of the standard for review, takes an unjustifiedly narrow view of its obligation to the court and the public in explaining its enforcement decisions. It is notable that the Antitrust Division in other contexts and the FTC in the context of announcing a decision not to challenge a merger have been able to make informative statements about the merits of their decisions.

I. The Facts in the Case

ADM is a very large diversified company with extensive activities in a variety of markets. Among its major activities are the production of corn syrup, HFCS and ethanol. In the corn syrup and HFCS markets, ADM is a major producer. According to the government's complaint, it has 10% of the relevant production capacity for corn syrup, 33% for HFCS 42 and 25% for HFCS 55, the two distinct types of HFCS. The markets for all three of these products are, according to the government, highly concentrated and not amenable to entry even if prices are increased substantially above cost.

ADM is also the leading producer of ethanol.[1] Various estimates of its productive capacity and production exist. Its present share of production is unlikely to be less than 30% of all domestic production and may exceed 50%. In addition it is one of a relatively few firms with the specialized skills, equipment and volume to engage in the distribution and marketing of ethanol. As will be discussed infra, this may involve substantially more economies of scale and scope than actual production of ethanol. It also appears to be the case that ADM like the handful of other major marketers acts as a marketing agent for a number of producers who lack the skill, volume and specialized equipment to

[1] The Renewable Fuels Association (RFA) web site lists ADM with total capacity of 950 million gallons. www.ethanolrfa.org/eth_prod_fac.html (visited on Oct. 9, 2002).

market their own production.

MCP was originally a cooperative that operated two plants engaged in the “wet” milling of corn. From the wet milling process, it produced corn syrup, HFCS and ethanol. Its market share in the corn syrup and HFCS markets is not known. Prior to the conclusion of this merger, MCP sold its corn syrup and HFCS production through a joint venture with Corn Products. In combination, those two firms had productive capacity of 20% of corn syrup, 15% of HFCS 42 and 15% of HFCS 55. In production of ethanol, MCP was the second largest producer with 6% of total production capacity and one of only four firms, including ADM, with productive capacity exceeding 100 million gallons a year.[2]

The Antitrust Division’s challenge to this acquisition focused only on the corn syrup and HFCS markets. The Division proposes to settle its suit against this merger by obtaining termination of MCP’s joint venture with Corn Products concerning the marketing of HFCS and corn syrup. The settlement would then allow ADM to acquire MCP’s two facilities.

Although for litigation purposes a focus primarily on the HFCS markets is sensible because those are the best markets in which to challenge this merger, once the government has decided to settle the HFCS element based on a partial divestiture of unrelated facilities, then it becomes essential to examine the impact of the merger not only in the HFCS markets but also in the other markets where MCP and ADM have substantial, competitive market positions.

II. The HFCS Market

The government’s objection to this merger was based only on its impact on the HFCS market and the more general corn syrup market. HFCS comes in two varieties–HFCS 42 and HFCS 55 (signifying the percentage of fructose in each type). The government contends that each type has unique uses and no good substitutes, given current prices for alternative sweeteners. These markets are concentrated with a limited number of competitors. The government also contends that there are substantial barriers to entry into the production of corn syrup or either type of HFCS. Hence, normal market forces are unlikely to reverse any increase in concentration. For these reasons, a substantial merger within these markets creates significant risks of anticompetitive harms. Those risks are, first, the danger of tacit or explicit coordination among competitors to impose higher prices on buyers and, second, that a sufficiently dominant firm can engage in unilateral, anticompetitive acts that exclude new competition and/or exploit existing buyers.

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[2] The RFA site, see note 1 supra, reports that MCP has a capacity of 140 million gallons. Williams Bio-Energy (135 million) and Cargill (110 million) are the only other producers with a capacity over 100 million gallons according to this source.

Prior to this merger, there were 5 producers of HFCS, treating the MCP-Corn Products combination as a single firm because of the joint marketing arrangement. It appears from the Competitive Impact Statement and complaint that MCP has substantial corn syrup and HFCS production capacity. Neither the complaint nor the Competitive Impact Statement provides the breakdown in capacity between MCP and Corn Products.[3] As a direct result of that omission, neither the public nor the court can determine the impact of acquisition of MCP's facilities on the concentration levels in any of these markets.

Tate & Lyle, based in the U.K., is a processor of corn products operating on a global basis. Its American subsidiary, A.E. Staley, is among the five leaders in the HFCS market. Staley also has an ethanol plant in Tennessee with a capacity of 60 million gallons. ADM is the largest single shareholder in Tate & Lyle with 15.8% of its voting stock.[4] In addition, ADM owns 41% of Compagnie Industrielle et Financiere des Produits Amylaces SA (CIP) and refers to it as an "affiliate" in its most recent 10-K.[5] CIP in turn holds 10% of Tate & Lyle's stock.[6] Thus, directly and indirectly ADM has a 25% stake in its ostensible competitor. While neither its direct nor its total stake gives ADM an absolutely controlling position, a block this size confers substantial leverage. It is obvious that Tate & Lyle's management would be foolish indeed to initiate vigorous competition in the corn syrup, HFCS or ethanol markets with its largest shareholder.

Given the dissolution of the MCP-Corn Products deal, there will remain five separate producers in the corn syrup and HFCS markets, but one, ADM, will be larger and another, Corn Products, will be smaller. Unfortunately, the Competitive Impact Statement does not say how much larger ADM will be. Although current theories of merger enforcement emphasize the examination of the likely competitive effects of a merger, it is still the case that the initial, prima facie, case rests on a change in the HHI statistic. Where there is a partial transfer of market share, the resulting change in the HHI requires

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[3] ADM and probably Corn Products act as agents for the sale of HFCS and corn syrup produced by smaller local plants including cooperatives. Presumably, given the contractual control over such output, it has been included in the market share totals that the government has identified for the major market participants. If such controlled production has not been included, it would increase the market share of ADM in particular and so only make the structural impact of this acquisition more significant.

[4] *Tate & Lyle Annual Report, 2002*, at page 63.

[5] The stock ownership in CIP is reported in ADM's 1998, 10-K at Item 1, page 5; Exhibit 13, of ADM's 10-K for 2002, describes CIP is an "unconsolidated affiliate" of ADM.

[6] *Tate & Lyle Annual Report, 2002*, at page 63.

comparing the sum of the buyer's share and acquired share to the share retained by the seller (or former joint venturer). If the sum from the merger is greater than the retained share, the result will be an increase in the HHI; if the sum is less, then the HHI will decline. Thus to determine the likely HHI effect of the combination of MCP's position with ADM's given the reduction in Corn Products's share it is essential to know the relative shares of MCP and Corn Products.

Even without that information, some general conclusions exist. Concentration is well above the 1800 level, pre-merger, in all three markets. It is highest in the "42" market where the pre-merger HHI exceeds 3000; in corn syrup and HFCS 55, it is about 2600, pre-merger. In the syrup market, unless the capacity transferred exceeds10% (i.e., ADM's new position exceeds 20% in total) the HHI will remain the same or decline. **In the case of the HFCS markets, the HHI is certain to increase** because market share is moving from a smaller factor to a larger one. The only question in those markets is how much the HHI will increase. **In the "42" market** where concentration is higher and ADM's share is large, **the transfer of 3% or more will result in a net increase of HHI by more than 100 points**. In the "55" market, a transfer of more than 4% would also yield an increase of 100 or more points. As MCP's share increases in the two HFCS markets, there would be an even greater increase in the HHI. Without capacity information on MCP, the net effect on the HHI in corn syrup or the extent of the increase in the HFCS markets is unknown. But it appears substantially likely that there will be a more than 100 point increase in the HHI in one or both of the HFCS markets. Further, if ADM has influence over A.E. Staley's competition in these markets because of ADM's stake in Tate & Lyle, the implications of resulting change in the HHI would be even more pronounced because the disparity between ADM/Staley/MCP and Corn Products will be even greater.

This merger will thus increase the level of concentration in both HFCS markets. Section 1.51(c) of the Merger Guidelines states that: "*Where the post-merger HHI exceeds 1800, **it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise**. The presumption may be overcome by a showing that factors set forth in sections 2-5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise* . . . ." (Emphasis added.) Moreover, the HFCS markets are ones that, on objective criteria of the sort set forth in sections 2-5 of the Guidelines, are vulnerable to collective action by competitors. The products are homogeneous, the entry barriers are high, and there is excess capacity that can be used to discipline competitors who break ranks. While some buyers are very large, e.g., Coke and Pepsi, the vast majority of sales are to smaller businesses with little bargaining power. A further reason for concern is that the key players, notably ADM, have a history of unlawful collusion in other comparable product markets. See, e.g., U.S. v. Andreas, 216 F3d 645 (7th Cir. 2000)(affirming conviction of ADM executives for pricing fixing of lysine). To allow ADM to increase its direct ownership of HFCS capacity while retaining its substantial stake in Tate & Lyle would seem to exacerbate the risks of tacit or express collusion.

Even more directly relevant, ADM and its "competitors" (A.E. Staley, Cargill, American Maize-Products, and Corn Products) have been charged in a buyer class action with overt price fixing in HFCS (Corn Products has actually settled with the plaintiffs already) from 1988 to 1995. Although the trial court dismissed the suit on summary judgment, the 7th Circuit in an opinion written by Chief Judge Posner in June of this year reversed. *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F3d 651 (7th Cir. 2002). Judge Posner's analysis of industry structure and context is that this is an industry with characteristics and incentives to engage in collusive behavior. "[D]efendants pretty much conceded that the structure of the HFCS market, far from being inimical to secret price fixing, is favorable to it." *Id*. at 656. The opinion pointed out a number of factors that demonstrated the capacity and incentive to engage in collusive conduct. However, the opinion focused on the claim that there was express agreement and not merely tacit, interdependent price setting. On that issue, it found that the HFCS markets are ones where "the overall evidence of conspiracy . . . was abundant although not conclusive." *Id*. at 655. Despite the manifest relevance of this detailed analysis of the nature of the HFCS markets, pre-merger, to the likely effect of this acquisition on competition in those markets, the Competitive Impact Statement makes no reference whatsoever to it.

The anticompetitive conduct at issue in the 7th Circuit decision occurred in the context of five firm competition in these markets with a lower HHI than will exist after ADM acquires MCP. Thus, it would seem that allowing this acquisition without any other change in the structure, e.g., terminating ADM's stake in Tate & Lyle, will continue and potentially make more likely interdependent conduct among the producers of HFCS.

The Competitive Impact Statement fails to reference or discuss MCP's share of the corn syrup, HFCS 42 or HFCS 55 markets; it makes no mention of ADM's continuing stake in Tate & Lyle or the option of requiring divestiture of this stake as an added element of remedy; it does not refer to the 7th Circuit decision; nor does it discuss the Guideline factors that make collective anticompetitive conduct likely. It focuses on the dissolution of the MCP-Corn Products joint venture and the obligation of ADM to compete independently of Corn Products. The essential rational is that "the decree will ensure that there are at least five **independent** (sic) competitors in the corn syrup and HFCS markets, and will preserve and encourage ongoing competition between ADM and Corn Products." (Emphasis added.)

The government's implicit contention is that because the number of legally distinct firms with separate marketing capacity will remain the same, competition will not be harmed. But it was that number of competitors that created the conditions for collusion. No basis is given for the optimistic assessment that ADM and Corn Products will now compete. Nor is there any basis in this declaration to believe that ADM will not influence the competition of Tate & Lyle. Indeed, the statement provides no clue as to incentives or economically rational motivations that would bring about competition given the history of these specific markets and ADM. Hence, some additional rational should exist to justify continuing the present number of competitors and increasing the HHI.[7] In fact, it would seem that under

[7] It deserves emphasis here that the antitrust authorities moved to the use of the HHI index to measure market power because of the conclusion the firms with larger market shares present greater risks of anticompetitive conduct. Unlike simple concentration ratios, the HHI is sensitive to the

the Guidelines, this merger remains presumptively illegal. See, Guidelines 1.51(c), *supra*. It is imaginable that the government's lawyers have some logical and plausible explanation for allowing this acquisition despite all these negative implications. But their duty under the Tunney Act is to make a public statement of those reasons so that the public and the court can determine whether those claims are in fact plausible.

On the other hand, given the 7th Circuit decision, it seems plausible to argue that the Corn Products-MCP agreement together with ADM's stake in Tate & Lyle should have been the target of antitrust enforcement together with barring the acquisition of MCP by ADM. Such a strategy would have increased the number of separate firms from 5 to 6 and ensured that each was economically independent of all the others.

The discussion of alternative remedies in the Competitive Impact Statement implies by its silence that the government did not consider the foregoing alternative.[8] This raises a separate but very important issue in this case. It would seem to be a serious failure in basic enforcement if the government elected to settle a case involving markets with high concentration, serious risks of anticompetitive conduct, and cross ownership of stock among major competitors without considering whether a more comprehensive review of the relationship among industry participants was necessary and whether further separation of those ties would be appropriate.

In sum, the Competitive Impact Statement is so flawed that it does not provide the court or the public with a basis to determine whether the increase in concentration resulting from this merger is substantial (the MCP market shares must be given as must those of Corn Products to allow any kind of evaluation of the structural claims of the government) or why the acquisition will not increase the already significant risk of anticompetitive collaboration within the HFCS markets.[9] Before the public can effectively comment on the proposed decree, it is essential for the government to revise the Competitive

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allocation of market share among firms within a market.

[8] Section 5(e)1 calls for the court in reviewing the proposed decree to have the opportunity to consider "alternative remedies actually considered" by the government. In order to accomplish that goal, the government in Section VI of the Competitive Impact Statement reported the only alternative that it actually "considered" consisted of taking this case to trial.

[9] It is undoubtedly the case that the firms engaged in the HFCS market have very good information about the market positions of their competitors. Hence, this information is not competitively sensitive nor is its disclosure going to threaten the business strategy of any firm in this market. The only real effect of concealing this information is to impose a significant handicap on the public in commenting on the proposed settlement. It ought to be axiomatic that the government must disclose the post-transaction HHI shares of any merger or acquisition which it proposes a court approve under the Tunney Act.

Impact Statement to make full disclosure of necessary factual information and its reasoning. Similarly, it is impossible for a court to determine, based on this submission, whether or not the proposed judgment is in the public interest.

II. Ethanol

Neither the settlement nor the Competitive Impact Statement address the apparently high and increased concentration in ethanol production resulting from this combination. Even more troubling, there is no analysis of the impact of this acquisition on the marketing and distribution of ethanol. It is true, as the government emphasizes in its filing, that the DC Court of Appeals in *U.S. v Microsoft*, 56 F3d 1448 (D.C. Cir. 1995), took the position that in reviewing a consent decree under the Tunney Act, a district could not consider alleged anticompetitive conduct not included in the complaint. In that case, the additional issues that the district court wanted considered were not directly related to the specific competitive practices challenged in that case.[10] In the present case, in contrast, the ethanol production and distribution capacity of both firms is inextricably linked with their HFCS production capacity. Therefore, approving this decree allowing the acquisition of MCP necessarily affects directly this related market. Hence, in order to perform its obligation to "determine that the entry of such judgment is in the public interest[]", Section 5 (e); 15 USC sec. 16(e), the court must be informed about the other competitive effects of the merger. This is necessary even if the court's ultimate standard may only be whether the "settlement is within the reaches of the public interest." 56 F3d at 1460 (internal quotations omitted).

Prior to the acquisition, ADM was, by a very large margin, the leading producer of ethanol. Its share ranged from something over 30% to more than 50% depending on whether the base is capacity including that under construction or actual production. MCP had about 6% of current capacity. Thus the pre-merger HHI was at least mildly concentrated around the 1600 level, and this merger will increase that level by 350 to 600 points resulting in a post-merger concentration of 2000 to as much as 2300. This falls well into the highly concentrated level.[11]

It appears that ethanol is a distinct product both because it has distinct production technology and because it is an ingredient in gasoline intended to reduce its pollution effects.[12] There was another

[10] Subsequent history has in fact vindicated the district court's concerns. U.S. v. Microsoft, 253 F3d 34 (DC Cir. 2001) cert. den. __U.S.__, 122 S.Ct. 350.

[11] It has been suggested that ADM might actually control 55% of existing production capacity. In that case, the level of concentration would be significantly higher (a 55% share is an HHI of 3025; and the post merger HHI would increase by 660 to 3685).

[12] The following market analysis is based on interviews, web materials and newspaper articles available to Professor Carstensen.

product, methyl tertiary butyl ether (MTBE), that has recently been banned in California, one of the largest areas of consumption, because of its polluting effects on ground water. Thus, a firm able to control the production or marketing of all ethanol would have significant power over price. The geographic market seems to be national.

There are two methods of producing ethanol. The “dry” method involves grinding corn into a mash and fermenting it to create ethanol which must then be separated from the water and the residual solids. The ethanol is concentrated to achieve 100% purity and then “denatured” by the addition of some gasoline making it unfit for human consumption. The remaining solids are dried and sold as cattle feed (this is a high protein feed that appears to have significant commercial value). All new ethanol plants under construction apparently use the dry process.

The “wet” process involves a similar production of mash which is then treated to convert the carbohydrates to sugar from which various products are produced: corn syrup, high fructose syrup, and ethanol by subsequent fermentation of the sugar. Based on some comments on a couple of web sites, it appears that there is flexibility in the wet process to choose among the types of products that will be extracted. Most of ADM’s facilities and MCP’s two plants are wet.

In 2001, total American production of ethanol was about 1.77 billion gallons; it is expected to rise to 2 billion in 2002 and may exceed 5 billion within a few years especially if the Senate version of the energy bill is ultimately adopted because it strongly favors ethanol. Although this section of the Senate bill was adopted in conference, no final legislation emerged from Congress this session.

With respect to the production of ethanol, the barriers to new entry seem to be low. An efficient, modern plant with a capacity of 40 million gallons costs about $55 million to build and construction takes about a year and half after regulatory and zoning approval. It seems easy to expand to 80 million gallons, but after that there can be serious input constraints caused by the need to buy very large volumes of corn. Also, the market for the cattle feed solids may be saturated in the immediate area. There are as many as ten or more plants under construction; most of these have a capacity of 40 million gallons, and a significant additional number are in the planning stage. This means that efficient entry can occur with a capacity that represents about 2% of present total production and less than 1% of expected production in the next few years. This suggests that adding a new plant will not disrupt the market and so entry should not be difficult. Hence, while ADM is and will remain for the foreseeable future, by a very substantial margin, the largest ethanol producer in the market, it does not appear that its acquisition of MCP will significantly alter its market power in the ethanol production market. Presumably this is the view of the government as well.

However, this merger may create significant competitive issues in the distribution and marketing of ethanol. Marketing involves both specialized equipment and skills that are subject to economies of scale and scope. Ethanol is shipped in railroad tanker cars, barges and tanker trucks from various places of production in the Midwest to California or the east coast, for example. Ethanol is often added to gasoline at the point when a tanker truck is picking up a load of gas for delivery to service stations. For this reason, access to terminal tank farms is very important in the marketing process. If a firm can not get space in the farm, the marketing of ethanol in this context is more costly (separate location means two stops and delay). A key issue can be getting such access. While the costs of specialized equipment including a dedicated tank may not be substantial, getting access in the first place may be difficult given limited space and the potential that established ethanol suppliers may have or obtain exclusionary rights in their contracts.

It appears, therefore, that there are significant economics of scale and scope in the marketing process. The high volume marketer can get discounts and preferred service from railroads. It can afford to operate or lease barges, develop terminal storage facilities to concentrate the quantity of product for its delivery to refiners or gasoline terminal locations. Finally a major trader can get access to terminal facilities when small dealers might be excluded and/or get access on more favorable terms.

ADM is undoubtedly the largest marketer of ethanol. ADM has volume, special equipment (barges and rail cars) as well as good access to terminals and pipelines. There are two other major integrated marketers: Cargill (number 4 in ethanol production) and Williams Companies (number 3 in production) a major pipeline operator and dealer in petroleum products. Cargill and Williams have overall marketing resources comparable to ADM because of their multiple lines of business and their substantial ethanol production capacity. All three of these companies use marketing agreements to obtain additional supplies of ethanol.[13]Although presumably the government's lawyers have examined these marketing agreements, they are not available to the public. The impression is that they usually entail exclusive dealing commitments involving a 5 year or longer obligation (early termination terms unknown) which may provide economically questionable compensation terms for the marketer in that the contracts do not provide appropriate incentives for effective and efficient marketing. Thus, such contracts are likely to confer substantial control over the marketing of ethanol on a limited group of firms.

There also appear to be a few unintegrated or less integrated firms offering distribution services as well. One such firm is Murex NA.[14] Another trader–Ethanol Products–is associated with Broin Engineering, an ethanol plant builder, that represents 10 production facilities with 300 million gallons of

[13] Williams' web site claims that it markets for 14 production facilities. Cargill's cite did not provide specific information, but clearly it is seeking to act as a marketer.

[14] The brief web cite description of this company (http://www.murexltd.com/Home1.htm) suggests that it markets ethanol and other products. Its web cite reports that the company provides marketing, owns specialized railcars for transporting ethanol, and has storage facilities in key locations to hold supplies until they can be delivered. It claims to represent 60 million gallons of capacity currently but to have contracts covering 200 million gallons in place for production in 2003. This is about 10% of the 2002/3 national production capacity.

capacity and claims another 115 million in development. There may be one or two additional marketers, but no other web sites provided very much information.

There is a plausible basis for concern that the impact of this merger in the marketing and distribution of ethanol is likely to be anticompetitive: ADM has a record of conspiring to cartelize various markets;[15] Cargill the second or third largest marketer of ethanol is also in the group of defendants in the HFCS litigation; and the Williams Companies, the other large marketer of ethanol has recently settled claims that it overcharged California energy customers with a payment of more than $400 million and a restructuring of its supply contracts that may save customers another 1$1 billion.[16] Thus, all three major marketers of ethanol have recent histories of anticompetitive conduct and exploitation of consumers. The acquisition of MCP will increase concentration of control over distribution which will make both tacit collusion among these leading marketers more likely and increase the potential for unilateral anticompetitive conduct by ADM which remains the overwhelming dominant marketer in this business.

To determine the seriousness of these risks, it is important to have a good estimate of the volume needed to achieve minimum efficient scale for marketing ethanol. Assuming Murex with a 200 million gallon share is an efficient competitor,[17] then additional entry into distribution may occur as the volume expands. Other middle-sized petroleum marketing organizations might exist that have substantial volumes of goods going to market through the same networks. Entry into ethanol marketing may not be difficult for such firms if they exist and can easily add ethanol sales to their existing marketing efforts. Key here is the minimum size needed to make effective use of dedicated facilities such as terminal tanks, railcars, etc., that must be used in an ethanol specific way. Thus, the question is what are the product specific economies of scale and scope.

Given the foregoing market information, it would be possible to determine whether ADM's control over the marketing of ethanol, including its own production, that of MCP, and that under contract to the resulting firm, together with the market shares of the other two major, integrated marketers, would have an adverse effect on entry or expansion by independents in the marketing arena. If it takes 200 million gallons of volume for product-specific economies, then the current set of 5 or 6 marketers may be all that can be accommodated given ADM's dominance. Even with substantial

[15] A.E. Staley in whose parent ADM holds a 25% stake is another ethanol producer and coconspirator in the HFCS litigation.

[16] See David Barboza, A Big Victory by California in Energy Case, New York Times, Nov. 12, 2002, at C1.

[17] Murex markets other petroleum products and so in terms of dealing with railroads, barges, terminals or pipeline has more relevant volume than just its ethanol)

growth in the total volume,[18] it may be difficult to make entry into marketing because the increments of new plants–circa 40 to 80 million gallons–will be insufficient to warrant entry into marketing unless the entrant can get additional clients. But from the perspective of the owner of a new plant, the question will be whether to select an established marketer or affiliate with a new entrant that needs additional volume to be efficient.

[18] 200 million gallons is 10% of current volume estimates but only 4% of the projected 5 billion gallon volume of the future.

If economies of scale within ethanol marketing are significant, entry is difficult, and a few firms control the majority of product being marketed, it becomes possible to withhold some product as the new energy requirements kick in and drive up price (compare Enron or El Paso in California electric markets). In addition, because both ADM and MCP use the wet process, it is possible to manipulate ethanol supplies by shifting plant output to other products, e.g., HFCS. This means that as the dominant firm, ADM may be able to have unilateral, anticompetitive effect in the marketing of ethanol by manipulating supply. On the other hand, ethanol is a uniform product with growing demand. Moreover, that demand is unlikely to be very price elastic (10% of a gallon of gas is not going to effect the price at the pump very much).[19] So, assuming limits on effective entry in the marketing level, existing marketers may engage in interdependent price setting to the detriment of the competitive market. The history of ADM's conduct in comparable markets and the presence in ethanol of some of its co-conspirators from other cartelistic efforts, strongly reinforces the proposition that there is a risk of such conduct if it is economically feasible.

The Merger Guidelines speak to these risks. *"Where products are relatively undifferentiated and capacity primarily distinguishes firms . . . the merger firm may find it profitable unilaterally to raise price and suppress output. . . . Where the merging firms have a combined market share of at least thirty-five percent, the merged firms may find it profitable to raise price and reduce joint output . . . ."* Guidelines 2.21. While this statement creates no presumption, it identifies the unilateral effect that is a possible consequence of this acquisition in addition to the potential for collusive reductions in output based on control of the marketing-distribution process. Recent news reports, after the filing of the Competitive Impact Statement, indicate that traders believe that ADM has the capacity and incentive to withhold supplies and drive up prices.[20] This is exactly the anticompetitive risk that this market structure posses.

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[19] The price of corn which is largely a function of broader demand considerations will influence the supply side of the market significantly as will the market price for animal feed products that ethanol production also yields.

[20] "Ethanol prices have risen 29 percent in the past six months. . . . Todd Kruggel, a broker . . . [said:] 'ADM and the other big boys may be storing what they're making until California demand gears up some more.'" Bloomberg News Service, Price of gas additive ethanol keeps rising, Wisconsin State Journal (Madison, Wisconsin), Nov. 12, 2002 at C9

The Competitive Impact Statement filed by the government explaining its analysis of the ADM-MCP merger does not even advert to the fact of ADM's leading position in ethanol production and marketing or MCP's substantial market share. As a result, it is not possible to tell whether the government has examined both the marketing and production aspects of ethanol. While it is probable that the government lawyers have in fact investigated at least some of the ethanol aspects of this merger, there is no public record of what aspects they examined or what conclusions they reached. If the government had simply sued the merger, the ethanol issues would have been subsumed under the corn syrup and HFCS issues because of the unitary nature of the production process. Once the government has elected to settle the case by allowing the acquisition, the impact of the acquisition in the related market where the parties have such large market shares becomes a very important aspect of a public interest analysis: "the court may consider . . . any other considerations bearing upon the adequacy of such judgment. . . ." Clayton Act, sec. 5(e); 15 USC sec. 16(e).

The government's failure to report the conclusions of its investigation of the ethanol market is, therefore, another serious flaw in this case. Given ADM's market position and its history, the government ought to have explained why it did not believe that there was any serious anticompetitive risk in these markets given its willingness to allow ADM to acquire the second largest producer of ethanol.

It can be argued that disclosure concerning the ethanol market is inconsistent with the confidentiality requirements imposed on merger filings. As the DOJ's comments to the DOT in the Hawaiian airlines case demonstrates, it is possible for the DOJ to report not only its conclusions about competitive effects but also explain in some detail its reasoning on the public record even when it has "confidential" information. See, *PUBLIC COMMENTS OF THE DEPARTMENT OF JUSTICE*, Joint Application of ALOHA AIRLINES, INC. and HAWAIIAN AIRLINES, INC., DOT Docket No. OST-2002-13002, filed Aug. 30, 2002. Indeed, the FTC has recently demonstrated exactly such a responsible approach in connection with the cruise line merger investigation. See, *Statement of the Federal Trade Commission, Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc*, FTC File No. 021 0041, October 4, 2002; *Dissenting Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, id.*

The public information about the ethanol markets–both production and marketing–does not demonstrate the kind of obvious anticompetitive risks that are manifest in the case of HFCS and corn syrup. Nevertheless, this acquisition will work a very substantial change in those markets that will increase concentration and so will necessarily tend to reinforce any anticompetitive potentials that may exist. Thus, another serious deficiency in the present Competitive Impact Statement is that it totally ignores the impact of this acquisition on ethanol. If it were in fact that case the government had completely failed to consider the competitive implications of that aspect of this merger, then it would also be clear that the government had failed in the most basic obligations of its responsibility to analyze the competitive implications of the transaction. It seems more likely that the government has examined at least some of the ethanol related issues and satisfied itself that this acquisition will not result in a significant risk of a "substantial[] lessen[ing] of competition" of the sort prohibited by Section 7 of the Clayton Act. But if that is so, it owes it to the court and the public to explain what markets it considered (did it review both the production and the marketing components of ethanol?) and what its conclusions were on the questions of entry, economies of scale and scope in distribution, and the potential for either unilateral or collusive conduct in this important, developing market.

This is not a situation where the government has conducted an investigation and concluded that no action was required. Here it has elected to object to the acquisition and highlighted, for purposes of that litigation, the most troublesome aspects of the merger. But its settlement, by failing to block the acquisition, necessarily has an effect in other markets in which these firms compete. A complete Competitive Impact Statement must advise the court and the public of the implications of the settlement for competition in those other markets. Without such disclosure, the record will not disclose "the competitive impact of such judgment" nor its "impact . . . upon the public generally . . . ." Clayton Act, Section 5 (e)(1) and (2);15 USC sec. 16(e)(1) and (2). As result, the District Court can not perform its obligation to "determine that the entry of such judgment is in the public interest." Section 5 (e); 15 USC sec. 16(e).

Conclusion

In *Philadelphia Bank*, the Court stated that ". . . if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *U.S. v. Philadelphia National Bank*, 374 US 321, 365, n. 42 (1963). The HFCS markets are such markets, characterized by substantial risks of anticompetitive conduct. The ethanol market as it presently exists is also concentrated and the forces of deconcentration might well be frustrated if the leading firm can retain a dominant position in production and that reinforces and entrenches its dominance in marketing. It would appear that blocking this merger and critically reviewing the MCP-Corn Products marketing agreement in HFCS as well as ADM's links to Tate & Lyle would have been a much more appropriate enforcement strategy based on the observable facts.

The Antitrust Division may have more information that might possibly negate the apparent anticompetitive risks in both the HFCS and ethanol markets that this acquisition would seem to create. It is the duty of the government to explain and justify its actions under the Tunney Act. It has not done so. In the absence of such information, the District Court should not approve this settlement because it lacks the basis on which to make the essential public interest determination that Congress has required.

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Appendix A

Background information concerning the supporters of this information:

Organizations:

The National Farmers Union

The National Farmers Union is officially called the Farmers Educational and Cooperative Union of America. It was founded in 1902 and is general farm organization with membership of nearly 300,000 farm and ranch families throughout the United States.

The Organization for Competitive Markets

The Organization for Competitive Markets is a multidisciplinary nonprofit group made up of farmers, ranchers, academics, attorneys, political leaders and business people. OCM provides research, information and advocacy towards a goal of increasing competition in the agricultural marketplace and protecting those markets from abuses of corporate power. OCM views the current consolidation of agriculture as market failure resulting in misallocation of resources and the destruction of rural economies and culture.

Scholars (faculty positions given for informational purposes only)

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