

93–298, at 5 (1973); H.R. Rep. No. 93–1463, at 7 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538. The CIS is the primary means by which Congress sought to provide more adequate notice to the public. The Tunney Act requires that the CIS recite:

(1) The nature and purpose of the proceeding;

(2) A description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) An explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) The remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) A description of the procedures available for modification of such proposal; and

(6) A description and evaluation of alternatives to such proposal actually considered by the United States.

15 U.S.C. 16(b). In this case, the Department has satisfied all of these requirements. See CIS at 1–3 (explaining the nature and purpose of the proceeding), 3–6 (describing events that gave rise to the alleged violation of the antitrust law), 6–7 (explaining the proposed Final Judgment), 7 (explaining remedies available to potential private plaintiffs), 7–8 (explaining procedures available for modifying the proposed Final Judgment), and 8 (describing and evaluating alternatives to the proposed Final Judgment).

Professor Carstensen's comments purport to challenge the content of the CIS but are in fact criticisms of the Department's enforcement decisions, specifically the scope of the Complaint and the substance of the proposed Final Judgment. As explained below, these criticisms are without merit.

#### 1. The Department Is Not Required To Disclose in the Complaint or the CIS MCP's and CPI's Separate Market Shares in the Corn Syrup and HFCS Markets

The Complaint at, ¶¶ 19–20, sets out market concentration data, including individual capacity shares for ADM and CPMCP (the joint venture of MCP and CPI), in the relevant corn syrup and HFCS markets in the United States and Canada, alleging that these markets are highly concentrated and that the concentration levels will substantially

increase after the transaction.<sup>2</sup> This is a sufficient allegation of market concentration in a Section 7 case. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363–64 (1963) (noting that acquisition by a firm that would control 30% of the market after the acquisition threatens undue concentration and is presumptively unlawful). Professor Carstensen contends that the CIS should set forth separate market shares attributable to each of the CPMCP partners, MCP and CPI, so that the post-remedy change in the Herfindahl-Hirschman Index ("HHI") can be calculated. See Professor Carstensen's Comment at 5.<sup>3</sup>

But such precise calculations are neither required by law nor very informative in assessing the effectiveness of the remedy in this case.<sup>4</sup> As the Complaint alleges and the CIS explains, the harm from ADM's acquisition of MCP was an increased likelihood of successful anticompetitive coordination among the remaining firms. The goal of the proposed Final Judgment, therefore, is to preserve the number of effective independent competitors. An independent competitor is effective if it has enough productive capacity to increase its output significantly in response to anticompetitive price increases. The proposed Final Judgment accomplishes this goal by requiring that ADM and MCP dissolve CPMCP by December 31, 2002, thus preserving the number of effective independent competitors, including CPI.

Professor Carstensen suggests without explanation that ADM and CPI may not compete after acquisition. See Professor Carstensen's Comment at 7. Based on the Department's investigation, both ADM and CPI will have the ability and incentive to compete to increase their sales at their rivals' expense. There is excess capacity throughout the corn wet

milling industry, a condition that gives ADM, CPI, and their competitors the incentive to respond aggressively to any increase in price.

In summary, the Department found that ADM's acquisition of MCP, as originally structured, would have enhanced the prospects for coordination among the four remaining corn wet millers, likely raising domestic prices for corn syrup and HFCS above competitive levels. The Department has concluded that the restructuring of the acquisition as required by the proposed Final Judgment resolves these competitive concerns by preserving the pre-acquisition number of effective, competitive sellers of corn syrup and HFCS.

#### 2. ADM's Ownership Interest in Tate & Lyle Does Not Threaten Competition

Professor Carstensen contends that ADM "directly and indirectly" has a 25% stake in Tate & Lyle, the corporate parent of Staley, which is one of the five corn wet milling operations in the United States. In Professor Carstensen's view, this stake in Staley threatens competition, and so it should have been discussed in the CIS. See Professor Carstensen's Comment at 5–7.

The Complaint and CIS appropriately focus on the potential anticompetitive effects of the acquisition being challenged, not pre-existing or prior transactions, such as ADM's acquisition of Tate & Lyle stock. The relevance of the ADM-Staley cross ownership to this case is limited to whether ADM's acquisition of MCP should be analyzed as reducing the number of competitors from five to four or from four to three. The Department's investigation revealed that ADM and Staley should be treated as independent competitors.

Professor Carstensen overstates ADM's equity interest in Tate & Lyle. His own citations reveal that ADM has a 41.5% interest in Compagnie Industrielle et Financière des Produits Amylacs ("CIP"), a European firm with a 10% interest in Tate & Lyle.<sup>5</sup> ADM also has a direct 5.76% interest in Tate & Lyle. See Tate & Lyle, 2002 Annual Report 63 (2002). Thus, even assuming for purposes of analysis that ADM's 41.5% ownership of CIP gives ADM control of CIP's 10% interest in Tate & Lyle (and Staley), ADM's interest in Tate & Lyle is less than 16%, and its

<sup>2</sup> CPI and MCP were selling all of their corn syrup and HFCS products in the United States through the CPMCP joint venture, and so they effectively were competing as one firm.

<sup>3</sup> The Department uses the HHI to measure market concentration, and it is calculated by summing the squares of the individual shares of all firms in the market. See U.S. Department of Justice/Federal Trade Commission's *Horizontal Merger Guidelines* § 1.5 issued 1992, revised 1997, reprinted in 4 Trade Reg. Rep. (CCH) at ¶ 13,104, available at <http://www.atrnet.gov/policies/mergers>. A market is broadly characterized as being highly concentrated if its HHI is above 1800. See *id.*

<sup>4</sup> HHI statistics provide a useful framework, but they are only the starting point for merger analysis. See *Horizontal Merger Guidelines* at § 1.51(c). For the Court's information, however, the net effect of the acquisition and proposed relief is to decrease the relevant HHI in corn syrup by about 50 points, to increase the relevant HHI in HFCS 42 by about 300 points, and to increase the relevant HHI in HFCS 55 by about 100 points.

<sup>5</sup> See Archer-Daniels-Midland Co., 1998 Annual Report 5 (1998), <http://www.sec.gov/Archives/edgar/data/7084/0000007084-98-000029.txt>; Tate & Lyle, 2002 Annual Report 63 (2002), [http://www.tateandlyle.com/IR/financials/annual\\_reports/documents/2002\\_TL\\_AR\\_Full.pdf](http://www.tateandlyle.com/IR/financials/annual_reports/documents/2002_TL_AR_Full.pdf).