

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 unjustified 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 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.

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 Financière des Produits Amylacs 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 and 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 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 exceeds 10% (*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 over 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

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).

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.

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.