

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 national 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 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.<sup>7</sup> In fact, it would seem that under 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 possible 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

<sup>7</sup> 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 allocation of market share among firms within a market.

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.<sup>8</sup> 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.<sup>9</sup> Before the public can effectively comment on the proposed decree, it is essential for the government to revise the Competitive 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 D.C. 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 court not consider alleged anticompetitive conduct not included in the complaint. In that case,

<sup>8</sup> Section 5(e) 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.

<sup>9</sup> 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.