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HEARING ON OLIGOPOLY MARKETS

-- Note by the United States --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/oligopoly-markets.htm.

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UNITED STATES

1. Following on our submissions to previous OECD roundtables on oligopolies, notably the 1999 submission of the U.S. Department of Justice and the U.S. Federal Trade Commission on Oligopoly (describing the theoretical and economic underpinnings of U.S. enforcement policy with regard to oligopolistic behavior),[1] and the 2007 U.S. submission on facilitating practices in oligopolies,[2] this submission focuses on certain approaches taken by the Federal Trade Commission ("FTC") and the U.S. Department of Justice Antitrust Division ("DOJ") (together, "the Agencies") to prevent the accumulation of unwarranted market power and address oligopoly issues.

2. Pursuant to U.S. competition policy, the Agencies can address the welfare-reducing effects of oligopoly behavior through enforcement as well as other means. A primary enforcement mechanism to protect existing competitive market structures is to prevent the accumulation of unwarranted market power in the first place, by condemning under Section 7 of the Clayton Act mergers and acquisitions whose effect may be substantially to lessen competition. U.S. merger policy can thus avoid or eliminate some future oligopoly issues by preventing market concentration that would likely lead to higher prices, lower output, or reduced innovation. An effective non-merger tool is to challenge agreements among competitors that unreasonably restrain trade under Section 1 of the Sherman Act. While such agreements are unlawful whether express or tacit, the latter are more challenging to identify, analyze, and prove to a trier of fact. Conscious parallel conduct or other interdependent actions based on awareness of competitors' actions, without more, will not be enough to infer an agreement.[3] Conduct facilitating the exercise of market power is prohibited under Section 1 where firms have reached an express or tacit understanding. Invitations to collude that are not accepted fall outside Section 1's scope, but can be reached under Section 5 of the Federal Trade Commission Act.

3. This submission provides background on the use of both enforcement and non-enforcement activities in the United States to address oligopoly issues and presents recent examples. It begins with a discussion of merger enforcement and how it has evolved over time. Next it describes how the U.S. enforcement agencies seek to promote competitive market structure by engaging with government entities through statutory review authority and competition advocacy. Finally, the submission offers examples of enforcement against conduct facilitating the exercise of market power.

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1 The 1999 submission (DAFFE/CLP(99)25), available at https://www.ftc.gov/policy/reports/us-submissions-oecd-other-international-competition-fora#1999, also highlights the difficulties in and costs of imposing remedies for such conduct.

2 The 2007 submission (DAF/COMP/WD(2007)112 is available at https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/usfp.pdf.

3 *See* 1999 submission of the U.S. Department of Justice and the U.S. Federal Trade Commission on Oligopoly (DAFFE/CLP(99)25), available at https://www.ftc.gov/policy/reports/us-submissions-oecd-other-international-competition-fora#1999, for an explanation of the theoretical and economic rationale supporting this approach.

1. Merger Enforcement to Maintain Competitive Market Structures

4. In the mid Twentieth Century, two tenets of U.S. antitrust policy were that competition is apt to be quite weak in markets with few competitors[4] and that the Sherman Act's prohibition on agreements in restraint of trade is not sufficient to address oligopoly issues.[5] To remedy this statutory gap, Congress adopted new legislation in 1950,[6] which amended Section 7 of the Clayton Act to cover mergers and asset purchases, in addition to stock acquisitions, when there is a "reasonable probability" that an effect of the transaction would be "substantially to lessen competition."[7] Congress intended the amended Section 7 "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[8] Decisions of the Supreme Court citing this intention articulated what came to be known as the "incipiency doctrine."[9]

5. The amended Section 7 afforded an opportunity to implement a preventive (as opposed to corrective) antitrust policy,[10] and commentators argued that horizontal mergers violated Section 7 when the merged firm would control a substantial share of industry output,[11] or the merger would contribute to a trend to increased concentration.[12] In the 1963 *Philadelphia National Bank* decision, the Supreme Court declared

> *that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.*[13]

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4 The most prominent expositions of this view were Edward H. Chamberlin, Duopoly: Value Where Sellers Are Few, 44 *Quarterly J. of Economics* 63 (1929) and William Fellner, *Competition Among the Few* (1949).

5 *See, e.g.*, George J. Stigler, The Case Against Big Business, *Fortune*, May 1952, at 123, 164 ("In industries dominated by a few firms there is no need for formal conspiracies . . . . An informal code of behavior gradually develops in the industry: Firm X announces the new price, and except in very unusual circumstances Y and Z can be relied upon to follow. So long as there are a few big businesses in an industry, we simply cannot expect more than the tokens of competitive behavior.").

6 Before 1950, the Sherman Act had been a basis for challenging mergers. A notable early success was *Northern Securities Co. v. United States*, 193 U.S. 197 (1904). A failure that spurred the 1950 legislation was *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

7 Senate Report No. 1775, 81st Cong., 2d Sess. at 6.

8 *Id.* at 4-5.

9 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962) (Section 7 provided "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."); United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966) ("Congress sought to . . . arrest[] a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies."); FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967) ("Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency.").

10 *See* George J. Stigler, Mergers and Preventative Antitrust Policy, 104 *U. Pa. L. Rev.* 176 (1955).

11 *See e.g., id.* at 182.

12 *See* Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 *Harvard L. Rev.* 226, 308-10 (1960).

13 United States v. Philadelphia Nat'l Bank, 374 US 321, 363 & n.38 (1963). Subsequent decisions articulated the rationale for the structural presumption. Judge Bork explained that "the theory [is] that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or

6. During the 1960s, Section 7 of the Clayton Act was used to prevent an increase in concentration, even in markets where concentration was still at a very low level.[14]

7. Merger enforcement standards have evolved significantly since the 1960s as the consensus shifted on the competitive concerns associated with moderate levels of concentration. The current U.S. Horizontal Merger Guidelines ("Guidelines") presume horizontal mergers are likely to enhance market power only when the increase in the Herfindahl-Hirschman Index (HHI) exceeds 200 points and the post-merger HHI exceeds 2500.[15] Additionally, the Agencies' assessment of coordinated effects now goes well beyond market shares and concentration to include previous attempts at collusion, the transparency of the terms of trade, the presence of homogeneous products, and whether sales are small and frequent or occur via large and long-term contracts. But the basic thrust of merger policy on coordinated effects remains the same. As the Guidelines explain:

> *Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.*
>
> *The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct . . . ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.*[16]

8. Illustrative of contemporary horizontal merger enforcement in the United States is the challenge by the DOJ to the proposed acquisition of an interest in Grupo Modelo by Anheuser-Bush InBev (ABI) that would have given ABI control over imports into the United States. The DOJ's complaint challenging the acquisition alleged that ABI was an established price leader in the United States, yet Modelo constrained ABI's ability to lead prices higher.[17] To maintain the competitive constraint imposed by Modelo, the decree resolving the case required divestiture of key Modelo assets to the U.S. distributor of the brands. The distributor acquired the rights to those brands in the United States as well as Modelo's newest brewery, located near the U.S. border.[18] The decree additionally required the distributor to greatly expand the capacity of the brewery it acquired so that it could produce the entire U.S demand for Modelo brands. Early indications are that the decree has worked as intended. Sales of Modelo brands in the United States have increased significantly, and new

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implicit understanding, in order to restrict output and achieve profits above competitive levels." FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986). Judge Posner explained that, "if conditions are ripe, sellers may not have to communicate or otherwise collude overtly in order to coordinate their price and output decisions; at least they may not have to collude in a readily detectable manner." FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989).

14 *See* n.9, *supra*.

15 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf. The Guidelines also state that mergers falling below those thresholds may raise significant concerns.

16 *Id.* § 7.1 (omitting internal cross references).

17 *See* Complaint, United States v. Anheuser-Busch InBev SA/NV, ¶¶ 3-5, 19, 44-61, No. 1:13-cv-00127 (D.D.C., filed Jan. 31, 2013), *available at* http://www.justice.gov/atr/cases/f292100/292100.pdf.

18 *See* Final Judgment and Competitive Impact Statement, United States v. Anheuser-Busch InBev SA/NV, 2013-2 Trade Cases (CCH) ¶ 78,564 (D.D.C. 2013), *available at* http://www.justice.gov/atr/cases/f301300/301335.pdf and http://www.justice.gov/atr/cases/f296000/296027.pdf.

brands have been introduced. The constraint placed on ABI's price leadership by the pricing of the Modelo brands appears to be at least as strong as it had been.

9. The FTC's 2013 challenge to Ardagh Group's proposed acquisition of Saint-Gobain Containers, Inc. is another relevant example. In this matter, the FTC alleged that the merger would reduce competition in the market for glass containers for beer and spirits in the U.S. The FTC's complaint[19] noted that the U.S. glass bottle industry was dominated by three firms: the two merging firms and Owens-Illinois, Inc. Concentration was high in both the beer and spirits markets (pre-merger HHIs of 2,885 and 2,180) and the acquisition would substantially increase the HHIs (by 781 and 1,070 points). The Complaint alleged that the acquisition would increase the likelihood of anticompetitive coordination, pointing to market facts such as low demand growth, tight capacity, stable market shares, and high barriers to entry, and that the three major firms already recognized their mutual interdependence. Owens-Illinois, as a publicly traded firm, provided information in financial reports and public strategy documents, and both Ardagh and Saint-Gobain closely monitored and responded to that information. Furthermore, the three major competitors often succeeded in obtaining, through third parties, non-public information about rivals, and would on occasion act on that information. To remedy concerns about both coordinated and unilateral anticompetitive behavior following the acquisition, the FTC accepted a consent order in which the merging parties would divest six of Ardagh's nine manufacturing plants to a single buyer.[20] The divested plants were configured to produce glass bottles for beer and/or spirits and were geographically dispersed such that the buyer would have a footprint comparable to that of the pre-merger Ardagh.

10. In another 2013 matter, the DOJ challenged the merger of US Airways and AMR Corp. (American Airlines), alleging that the transaction would substantially lessen competition on many routes, largely because industry consolidation had led, and would lead, to cooperation on capacity reductions and fares.[21] The DOJ's allegations detailed how discounting on particular routes was deterred though rivals' pricing initiatives on other routes[22] and how cooperative capacity reductions eased downward pressure on fares generally.[23] The anticompetitive effects threatened by the merger were remedied through the divestiture to aggressive low-cost carriers of assets allowing them to initiate or expand service on many routes. The divested assets included 138 landing and takeoff slots at Washington's National Airport and New York's LaGuardia Airport and ground facilities at five other major airports.[24] In finding the remedy in the public interest, the court cited experience and research supporting the DOJ's prediction that the low-cost carriers' use of the divested assets would inject substantial new competition into many routes.[25] While the full impact of the divestitures is not yet known, low-cost carriers have doubled departures from Washington's National Airport, and the

19 *See* Complaint for Preliminary Injunction, FTC v. Ardagh Group S.A., Civil No. 13-1021 (D.D.C. filed July 2, 2013), redacted version *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf.

20 *See* Statement of the FTC, https://www.ftc.gov/system/files/documents/public_statements/298111/140411ardaghcommstmt.pdf.

21 *See* Amended Complaint, United States v. US Airways Group, Inc. ¶¶ 34-35, 42-47, 59-67, No. 1:13-cv-01236 (D.D.C., filed Aug. 13, 2013, amended Sept. 5, 2013), *available at* http://www.justice.gov/atr/cases/f300400/300479.pdf.

22 *Id.* ¶ 43.

23 *Id.* ¶ 59-67.

24 *See* Final Judgment and Competitive Impact Statement, United States v. US Airways Group, Inc., 2014-1 Trade Cases (CCH) ¶ 78,749 (D.D.C. 2014), *available at* http://www.justice.gov/atr/cases/f305400/305489.pdf and http://www.justice.gov/atr/cases/f301600/301618.pdf.

25 *See* Memorandum Opinion, United States v. US Airways Group, Inc., 2014-1 Trade Cases (CCH) ¶ 78,748 (D.D.C. 2014), *available at* http://www.justice.gov/atr/cases/f305400/305485.pdf.

total available seats have increased significantly. Low-cost carriers also have increased their service at New York's LaGuardia Airport and several of the airports at which ground facilities were divested.

11. The FTC's challenge of the CCC Information Services/Mitchell International Inc. merger provides additional illustration of the Commission alleging increased incentives for post-merger coordination in concentrated industries. In November 2008, the FTC issued an Administrative Complaint and filed suit in federal court to block the transaction. The Commission alleged the merger would hinder competition in the market for electronic systems used to estimate the cost of collision repairs and the market for software systems used to value totally destroyed passenger vehicles. According to the FTC's complaint, the merger of CCC and Mitchell would eliminate head-to-head competition between the companies and the post-merger market share of the company would be far more than half of the sales in these two product markets. It was also alleged that the merger would facilitate coordination between the remaining two competitors, CCC/Mitchell and Audatex.[26] On March 9, 2009, the U.S. District Court for the District of Columbia granted a preliminary injunction preventing the parties from consummating the transaction pending a full administrative trial on the merits.[27] The Court's decision discusses at length the potential of post-merger coordination. While the Court found that the products were somewhat differentiated and that pricing was shrouded, it also found there were few incentives for the post-merger firms to engage in healthy competition in a highly concentrated market, with stable market shares, low growth rates and significant barriers to entry. On March 13, 2009, following the respondents' announcement that they decided not to proceed with the proposed merger, the FTC dismissed the Administrative Complaint.

2. Use of Statutory Review Authority and Competition Advocacy to Promote Competitive Market Structure

12. As a key part of their missions, DOJ and FTC seek to promote competition in sectors of the economy that are subject to regulation and/or oligopolistic market structure. These sectors include federally regulated industries, such as communications, banking, agriculture, securities, transportation, and energy, as well as state or locally regulated industries, such as insurance, housing, health care, public utilities, professional and occupational licensing, certain aspects of banking, and real estate. The Agencies' advocacy work includes participation on Executive Branch policy-making task forces, preparation of comments and testimony on legislative initiatives, and participation in regulatory agency proceedings. The Agencies' advocacy work over the years have been a key part of efforts leading to substantial deregulation in a wide number of industries including motor carriers (road freight transport), airlines, telecommunications, electric power, and natural gas pipelines.

13. The DOJ has engaged in competition advocacy with regulatory agencies responsible for industries such as airlines and telecommunications. It has advised the Federal Aviation Administration on the allocation of landing and take-off slots at congested airports in Chicago, New York, and Washington. Furthermore, the DOJ recommended the adoption of market-based principles, such as auctioning slots to the highest bidder, to enhance the efficiency of slot allocation and to promote competition.[28] In telecommunications, the DOJ has advised the Federal Communications

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26 *See* Administrative Complaint, In re CCC Holdings Inc., FTC Dkt. No. 9334 (Nov. 25, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/11/081125cccmitchelladmincmpt.pdf; Complaint for a Temporary Restraining Order and Preliminary Injunction, Civil No. 08-2043 (D.D.C. filed Nov. 26, 2008), *available at* https://www.ftc.gov/system/files/documents/cases/081126ccccmplt.pdf.

27 FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (2009).

28 *See* Reply Comments of the United States Department of Justice, Notice of Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport and Solicitation of Comments on Grant of Petition with Conditions, Docket No. FAA-2010-0109 (Apr. 5, 2010), *available at* http://www.justice.gov/atr/public/comments/257467.pdf; Comments of the United States Department of Justice, Notice of Petition for Waiver of the Terms of the Order Limiting Scheduled

Commission ("FCC") on how best to allocate radio spectrum in keeping with its statutory objective of "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses."[29] The DOJ publicly advised the FCC to take certain steps to assure that small competitors get the spectrum they need to be successful.[30]

14. In a few industries, the United States government controls scarce rights or resources essential to competition. The DOJ advises the responsible agencies on general policies for allocating the rights or resources to promote competitive market structure, often in consultation with the FTC. For example, the U.S. government owns the rights to substantial coal and petroleum resources, leases to which are issued by bureaus within the Department of the Interior. The Bureau of Ocean Energy Management is responsible for rights to explore and develop petroleum resources on the Outer Continental Shelf.[31] Before acceptance of bids in each lease sale, the DOJ, in consultation with the FTC, may review "the likely effects the issuance of such leases would have on competition," and a lease issuance can be denied on the basis that it "may create or maintain a situation inconsistent with the antitrust laws."[32] The Bureau of Land Management has similar responsibilities with respect to leasing the coal resources owned by the U.S. government in western states. Before a coal lease is issued, the proposed lease is referred to the DOJ for a determination of whether issuance of the "lease would create or maintain a situation inconsistent with the antitrust laws."[33] The DOJ announced in 1978 a policy of finding prima facie inconsistency with the antitrust laws whenever the lessee would have more than 15% of the uncommitted non-federal reserves in the relevant market.[34] Application of this standard has gone a long way toward maintaining a competitive market structure in the western U.S. coal markets.

15. In some industries, market supply may be constrained by state government regulatory practices. The FTC often comments to state legislatures on how proposed state laws or regulations could buttress oligopoly market structures by restricting entry. For example, FTC staff has focused on

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Operations at LaGuardia Airport and Solicitation of Comments on Grant of Petition with Conditions, Docket No. FAA-2010-0109 (Mar. 24, 2010), *available at* http://www.justice.gov/atr/public/comments/257463.pdf; Comments of the United States Department of Justice, Congestion and Delay Reduction at Chicago O'Hare International Airport, Docket No. FAA-2005-20704 (May 24, 2005), *available at* http://www.justice.gov/atr/public/comments/11398.pdf; Comments of the United States Department of Justice, Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of Lottery Allocation, Docket No. FAA-2001-9854 (June 20, 2002), *available at* http://www.justice.gov/atr/public/comments/11398.pdf. *See also* W. Tom Whalen et al., A Solution to Airport Delays, *Regulation*, Spring 2008, at 30 (arguing that market-based slot allocation would reduce passenger delays as well as promote competition).

29 47 U.S.C. § 309(j)(3)(B).

30 *See* Letter from William J. Baer to Marlene H. Dorth, Secretary, Federal Communications Commission, Re: Policies Regarding Mobil Spectrum Holdings, WT Docket No. 12-269 (May 14, 2014), *available at* http://www.justice.gov/atr/public/comments/305961.pdf; *Ex Parte* Submission of the United States department of Justice, In the Matter of Policies Regarding Mobil Spectrum Holdings, WT Docket No. 12-269 (April 11, 2013), *available at* http://www.justice.gov/atr/public/comments/295780.pdf.

31 *See generally* Bureau of Ocean Energy Management, Oil and Gas Leasing on the Outer Continental Shelf, http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf.

32 43 U.S.C. § 1337(c).

33 30 U.S.C. § 184(*l*)(2).

34 *See Competition in the Coal Industry*, Report of the U.S. Department of Justice Pursuant to Section 8 of the Federal Coal Leasing Amendments Act of 1975, at 86-92 (May 1978).

certain laws and regulations, called scope-of-practice laws, that restrict the set of providers who can supply particular services. Many states have considered regulations that distinguish between the services that can only be performed by physicians and services that can also be provided by other trained medical professionals, such as advanced practice registered nurses, who are nurses with advanced degrees. While recognizing that service provision by unqualified individuals would raise valid safety concerns, the FTC has repeatedly emphasized that regulations preventing qualified professionals from providing healthcare services can unnecessarily restrict access to healthcare by restricting supply and increase costs due to diminished competition.[35]

16. The Agencies have been especially active in real estate. New competition can significantly reduce costs incurred by home buyers and sellers, but state regulatory practices often block this competition. The Agencies have brought a few enforcement actions[36] and provided comments to many state governments.[37]

3. Enforcement against Conduct Facilitating the Exercise of Market Power

17. While enforcement examples above focus on the Agencies' use of merger enforcement to maintain competitive markets, civil non-merger enforcement may be used to stop activities that make tacit or explicit collusion easier and more likely to occur. In appropriate circumstances, the Agencies will challenge conduct facilitating the exercise of market power.

18. One example is the *Airline Tariff Publishing Co.* case. ATP was a central repository for airline fares. But the airlines did not post only fares actually available to travelers. One carrier would propose a fare increase for a particular route, and another would match or propose an alternative increase, all without offering to sell tickets at the proposed fares. Footnotes attached to proposed fares sometimes were used to link fares between routes. Through this system, one carrier would threaten to cut its fare on a particular route in retaliation for another's fare cut on a different route. A carrier also would offer to raise its fare on a particular route as an inducement to a rival for going along with a fare increase on a linked route. In 1992, the Department of Justice filed a complaint under Section 1 of the Sherman Act.[38] The Department alleged both that the airlines unlawfully agreed to operate ATP in a manner facilitating fare coordination, and that the airlines unlawfully agreed on fares. The case was settled by a consent decree barring, among other things, posting fares not actually available to travelers.[39]

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35 For a summary of these FTC staff recommendations, see FTC, Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses, *available at* http://www.ftc.gov/system/files/documents/reports/policyperspectives-competition-regulation-advanced-practicenurses/140307aprnpolicypaper.pdf.

36 For details on the DOJ's enforcement actions, see http://www.justice.gov/atr/public/real_estate/enforce.html. For information on FTC enforcement actions, see https://www.ftc.gov/news-events/media-resources/mergers-and-competition/real-estate-competition.

37 *See,* e.g., Joint DOJ/FTC comments to Rhode Island House of Representatives on proposed legislation requiring lawyers to represent buyers in real estate closings (March 29, 2002), *available at* http://www.justice.gov/atr/public/comments/10905.htm.

38 United States v. Airline Tariff Publ'g Co., No. 92-2852 (D.D.C., filed Dec. 21, 1992), *available at* http://www.justice.gov/atr/cases/f4700/4796.pdf.

39 United States v. Airline Tariff Publ'g Co., 1994-2 Trade Cases (CCH) ¶ 70,687 (D.D.C. 1994) (final judgment), *available at* http://www.justice.gov/atr/cases/f4800/4801.pdf; United States v. Airline Tariff Publishing Co., Competitive Impact Statement, 59 *Federal Register* 15,225 (Mar. 31, 1994), *available at* http://www.justice.gov/atr/cases/f4800/4800.pdf.

19. An example of anticompetitive information-sharing among competitors is the FTC's case against the National Association of Music Merchants (NAMM).[40] In this matter, the FTC challenged the trade association's rules, which enabled and encouraged its members to exchange competitively sensitive price information, thereby enhancing opportunities for members to coordinate price increases. A key aspect of the FTC's consent order resolving the matter involved barring NAMM from coordinating the exchange of price information and certain discussions concerning conditions of sale among musical instrument manufacturers and dealers.[41]

20. Another case arose from a Federal Communication Commission auction for licenses for broadband radio spectrum used for personal communications services. Licenses were simultaneously auctioned in 493 geographic areas, called "Basic Trading Areas" or BTAs, each assigned a three-digit code. The auction was conducted in rounds, and in each round bidders could not only place bids but also could withdraw bids. The auction continued until a round passed with no new high bids, requiring 276 rounds in all. This format allowed bids to be used to communicate and coordinate: In order to induce a rival to drop out in BTA 444, one bidder first submitted, then withdrew, new high bids in two other BTAs in which the rival had been the high bidder. Those new high bids ended in the digits 444. The rival ceased bidding in BTA 444, and the first bidder submitted bids less than those of the rival in the two other BTAs. The Department of Justice filed three civil cases charging collusion in the auction.[42] The cases were settled by consent decrees prohibiting both unlawful bidding agreements and the sort of signaling that led to the agreements.[43]

21. Firms in oligopoly industries sometimes attempt actual price fixing. An invitation to collude that is not accepted has no redeeming feature and creates a substantial risk of anticompetitive behavior. Although unaccepted invitations to collude cannot be challenged under Section 1 of the Sherman Act,[44] they can be challenged under Section 5 of the FTC Act as an "unfair method of competition." The FTC has brought a number of those cases when such an invitation has not been accepted.[45] For example, in 2014, the FTC settled cases alleging that two online UPC barcode

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40 FTC, Press Release, "National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition ," March 4, 2009, *available at* https://www.ftc.gov/news-events/press-releases/2009/03/national-association-music-merchants-settles-ftc-charges.

41 *See* Decision and Order, *available at* https://www.ftc.gov/sites/default/files/documents/cases/2009/04/090410nammdo.pdf.

42 United States v. Omnipoint Corp., No. 1:98CV02750 (D.D.C. Nov. 10, 1998); United States v. Mercury PCS II L.L.C., No. 1:98CV02751 (D.D.C. Nov. 10, 1998); United States v. 21st Century Bidding Corp., No. 1:98CV02752 (D.D.C. Nov. 10, 1998).

43 *See* Final Judgment and Competitive Impact Statement, United States v. Mercury PCS II L.L.C., 1999-2 Trade Cases (CCH) ¶ 72,707 (D.D.C. 1999), *available at* http://www.justice.gov/atr/cases/f2000/2069.pdf and http://www.justice.gov/atr/cases/f2000/2063.htm; Final Judgment and Competitive Impact Statement, United States v. 21st Century Bidding Corp., 1999-1 Trade Cases (CCH) ¶ 72,473 (D.D.C. 1999), *available at* http://www.justice.gov/atr/cases/f2000/2073.htm and http://www.justice.gov/atr/cases/f2000/2072.pdf; Final Judgment and Competitive Impact Statement, United States v. Omnipoint Corp., 1999-1 Trade Cases (CCH) ¶ 72,472 (D.D.C. 1999), *available at* http://www.justice.gov/atr/cases/f2000/2065.pdf and http://www.justice.gov/atr/cases/f2000/2066.pdf.

44 A challenge under Section 2 of the Sherman Act as an attempt to monopolize is possible when the acceptance of an invitation to collude would create "joint monopoly power." *See* United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984).

45 *See e.g.*, In re U-Haul International, Inc., FTC File No. 0810157 (July 20, 2010), *available at* https://www.ftc.gov/enforcement/cases-proceedings/081-0157/u-haul-international-inc-amerco-matter; Decision and Order, In re Valassis Communications, Inc., FTC File No. 0510008, FTC Docket No. C-4160 (Apr. 28, 2006), *available at* https://www.ftc.gov/enforcement/cases-proceedings/0510008/valassis-communications-inc-matter; In re Stone Container Corp., FTC File No.

resellers sent emails to competitors, inviting them to join a collusive scheme to raise the prices charged for barcodes sold online. The emails suggested that the companies raise prices together. The FTC charged the two companies that sent the emails with inviting an agreement to raise prices in violation of Section 5 of the FTC Act. The FTC did not allege, however, that the invitations to collude resulted in an agreement on price or other terms of competition. [46]

4. Conclusion

22. Oligopoly market structure can lead to anticompetitive results without explicit agreements among competitors. Competition enforcement agencies must appropriately apply the tools at their disposal to guard against such results.

9510006, FTC Docket No. C-3806 (June 3, 1998), *available at* https://www.ftc.gov/enforcement/cases-proceedings/9510006/stone-container-corporation; In re Precision Moulding Co., Inc., FTC File No. 9510124, FTC Docket No. C-3682 (Sept. 10, 1996), *available at* https://www.ftc.gov/enforcement/cases-proceedings/9510124/precision-moulding-co-inc; In re YKK (U.S.A.), Inc., 116 F.T.C. 628 (1993); In re A.E. Clevite, Inc., 116 F.T.C. 389 (1993); In re Quality Trailer Products Corp., 115 F.T.C. 944 (1992).

46 FTC, Press Release, "Two Barcode Resellers Settle FTC Charges That Principals Invited Competitors to Collude," July 21, 2014, *available at* https://www.ftc.gov/news-events/press-releases/2014/07/two-barcode-resellers-settle-ftc-charges-principals-invited.