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Global Forum on Competition

COMPETITION AND COMMODITY PRICE VOLATILITY

Contribution from the United States

-- Session I --

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COMPETITION AND COMMODITY PRICE VOLATILITY

-- United States --

1. Background

1.1 In recent years has there been significant volatility in the prices of commodities that are important to the general population in your country? Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down).

1. Pursuant to the call for contributions, this submission focuses on price volatility of agricultural and mineral commodities and the role of the U.S. antitrust agencies (Department of Justice "DOJ" and the Federal Trade Commission "FTC," collectively the "Agencies") in evaluating price volatility and addressing competitive concerns in these commodities markets. Given agency expertise, the DOJ activities described center on the agricultural sector, whereas the FTC activities described focus on the gasoline sector. The Agencies generally do not evaluate price volatility outside of specific investigations in which price volatility appears to arise from anticompetitive behavior. However, as we explain below, the FTC has entered into an ongoing price evaluation exercise concerning the gasoline market.

2. In particular instances, such as in certain agricultural commodities sectors, the DOJ has heard from market participants and from some academics that price volatility has been a concern in recent years. For example, in 2010, the DOJ and the U.S. Department of Agriculture held a series of public outreach hearings on issues in agricultural markets, including the seed, livestock, poultry, hog, and dairy sectors.[1] The DOJ's role in these hearings was to listen to and learn from market participants and academics about the issues market participants face in these industries and to promote the value of competition in these sectors. Common complaints that arose in these hearings included high input (*e.g.*, food and fuel) prices, low commodity prices, and price volatility.

1.2 Are the price volatility in these commodities, and the causes of that volatility, global, regional, or domestic?

3. The causes of price volatility for commodities can be global, domestic, or regional, depending on the commodity. For example, factors that determine gasoline prices are complex, involving international crude oil inventories, national wholesale product price discounting, and domestic retail competition. Among the factors driving prices, the most important is the world price of crude oil—FTC staff has concluded that changes in crude oil prices account for approximately 85 percent of the variations in gasoline prices in the United States.[2] Crude oil prices are determined by global supply and demand

1 For more information about the hearings, *see* http://www.justice.gov/atr/public/workshops/ag2010/.

2 *See* Federal Trade Commission, Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition (2005), at p. 7, *available at* http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf. *See also* Federal Trade Commission, Gasoline Price Changes and the Petroleum Industry: An Update (2011), at p. 7, *available at* http://www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf.

conditions, most notably by production levels set by OPEC countries. In regional gasoline markets, price changes can also occur due to a unique combination of local supply and demand conditions. The amount of gasoline that can be supplied to a particular region can be inflexible due to various factors, including limitations of refining, transportation and storage capabilities or product requirements unique to that region. Therefore, sudden supply shortages, perhaps due to a refinery fire or pipeline rupture, can cause a sharp increase in price.

1.3 Does your agency have any ongoing/pre-emptive monitoring activities in relation to these sensitive commodities? For example, do you routinely monitor prices, quantities or behaviors in these markets (both domestic and foreign markets)?

4. In 2002, the FTC began a project to monitor wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities.[3] Today, this project tracks retail gasoline and diesel prices in some 360 cities across the U.S. and wholesale prices in 20 major U.S. urban areas. The FTC's Bureau of Economics staff regularly receives and reviews data from a private oil price data collection company, as well as from the U.S. Department of Energy and other sources. An econometric model is used to determine weekly whether current retail and wholesale prices are anomalous compared to historical data.

5. The Monitoring Project alerts FTC staff to unusual changes in gasoline and diesel prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to result from market-driven causes, staff consults with the Energy Information Administration of the Department of Energy. FTC staff also contacts the offices of the appropriate state Attorneys General to discuss the anomaly and appropriate potential actions, including opening an investigation.

6. While the DOJ typically does not undertake preemptive monitoring activities with regard to price volatility, it participates with the FTC and other federal agencies in the Presidentially-mandated Oil and Gas Price Fraud Working Group that monitors oil and gas prices for illegal activity.[4]

7. Both the FTC and DOJ investigate anticompetitive behavior that, in some circumstances, may lead to price volatility.

2. Competition law enforcement and formal investigations

2.1 Please provide a brief overview of significant competition law enforcement matters that your agency has undertaken in relation to commodities including: (i) Merger assessments; (ii) Cartels and horizontal agreements;(iii) Vertical restrictions; (iv) Abuse of dominance actions; (v) Any price control or other actions to regulate prices. Please explain how the matter came to the attention of the agency, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).

8. In recent years, the Agencies have investigated several matters involving agricultural and mineral commodities.

2.1.1 Grain

9. In 1999, the DOJ challenged the proposed merger between the second and third largest grain traders in North America, Cargill, Incorporated and Continental Grain Company. The DOJ was concerned that the proposed acquisition might result in farmers and other suppliers receiving lower prices for their grain and oilseed crops, including corn, soybeans, and wheat. The area of particular concern was the grain terminals ("elevators") owned by the merging firms. The DOJ's complaint alleged that wheat, corn, and

3 *See* http://www.ftc.gov/ftc/oilgas/gas_price.htm.

4 *See* http://www.justice.gov/opa/pr/2011/April/11-ag-500.html.

soybeans each constituted a relevant product market and that many farmers and other suppliers located within overlapping Cargill/Continental draw areas depended solely on competition among Cargill, Continental, and perhaps a small number of other nearby grain companies to obtain a competitive price for their products. The merger, the DOJ alleged, would significantly lessen that competition. In July 1999, the case was settled with a judicial consent decree that required the merging companies to divest a number of port terminals to third parties in several regions, including the Pacific Northwest, California, and Texas.[5]

2.1.2 Cattle

10. In October 2008, the DOJ filed suit to block the proposed acquisition by JBS S.A., at that time the third-largest U.S. beef packer, of National Beef Packing Company LLC, the fourth-largest U.S. beef packer.[6] The DOJ alleged that the proposed merger, combining two of the top four U.S. beef packers, would lessen competition among packers in the production and sale of USDA-graded boxed beef throughout the United States and would lessen competition among packers for the purchase of fed cattle (cattle ready for slaughter) in certain regions of the United States. As a result of this lessened competition, the merger would have resulted in lower prices paid to cattle suppliers and higher beef prices for consumers. In February 2009, the parties abandoned their merger.

2.1.3 Chickens

11. In May 2011, the DOJ filed a complaint challenging chicken processor George's Family Farms' consummated acquisition of a competing Tyson Food's processing plant.[7] The acquisition reduced from three to two the number of local processing plants in the Shenandoah Valley area of Virginia and West Virginia. The complaint alleged that George's acquisition of the Tyson plant had the potential to lessen competition between the remaining processors and might allow George's to exercise monopsony power by limiting the amount or types of compensation offered to local farmers. In June 2011, the DOJ entered into a settlement with George's pursuant to which the company agreed to make certain capital investments in the former Tyson plant, which would enhance George's ability and financial incentive to operate the acquired plant at a greater scale than Tyson had done.[8] The DOJ reasoned that the increase in output at the plant resulting from the required improvements would minimize the risk that farmers would be harmed.

12. In 2011, the DOJ investigated, but declined to challenge, another proposed acquisition in the chicken processing industry.[9] In that matter, Perdue Farms Inc.'s parent company, FPP Family Investments, acquired Coleman Natural Foods. The DOJ's investigation focused on the potential effects of the transaction on competition among chicken processors for the purchase of services from chicken growers. The DOJ determined that the merger would not enhance market power on the buying side of the

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5 Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Cargill's Acquisition of Continental Grain (Jul. 8, 1999), *available at* http://www.justice.gov/atr/public/press_releases/1999/2554.htm.

6 Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit to Stop JBS S.A. from Acquiring National Beef Packing Co. (Oct. 20, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/238382.htm.

7 Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Challenging George's Inc.'s Acquisition of Tyson Foods Inc.'s Harrisonburg, Va., Poultry Processing Complex (May 10, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-at-593.html.

8 Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with George's Inc. (Jun. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/June/11-at-829.html.

9 Press Release, U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Perdue's Acquisition of Coleman Natural Foods (May 2, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-at-555.html.

market because Perdue's and Coleman's facilities did not overlap in any local regions. The DOJ also considered whether the transaction might increase the possibility of coordination under several theories, including a "multi-market contact" theory, which suggests that firms may find it more feasible to coordinate on terms, such as payment for grower services, as they interact in more numerous regions. The DOJ determined, however, that adding an additional point of contact was not likely to increase the risk of coordination in this case. In a closing statement, the DOJ indicated that, while the multi-market contact theory did not apply given the specific facts of this matter, the DOJ will continue to consider its application in future transactions, especially those involving agricultural markets where processors interact in numerous local markets for the purchase of goods or services from producers.

2.1.4 Milk

13. In January 2010, the DOJ filed a civil antitrust lawsuit against Dean Foods Company, challenging its April 2009 acquisition of Foremost Farms USA's Consumer Products Division, alleging that the merger eliminated substantial competition between the two companies in the sale of milk to schools, grocery stores, convenience stores, and other retailers in Illinois, Michigan, and Wisconsin.[10] Dairy processors, such as Dean and Foremost, purchase raw milk from dairy farms and agricultural cooperatives to pasteurize and package. The processors then distribute and sell the milk to school districts, supermarkets, grocery stores, and other commercial customers. In the school milk market, the DOJ alleged that the merger left many districts with a monopoly provider and in others reduced the number of bidders from three to two. In the market for sale of milk to supermarkets, grocery stores, and other commercial customers, the DOJ alleged that the acquisition eliminated the substantial competition between Dean and Foremost and that it made it easier for Dean to coordinate with the remaining milk processors. In March 2011, the DOJ reached a settlement with Dean that required it to divest a significant milk processing plant and related assets that it acquired from Foremost, as well as a popular brand name.[11]

14. In April 2003, the DOJ filed a civil antitrust lawsuit challenging Dairy Farmers of America's (DFA's) significant partial investment in two rival dairies (Flav-O-Rich and Southern Belle).[12] DFA is a multi-billion dollar cooperative of thousands of dairy farmers. Its primary mission is to secure a steady sale of raw milk for its farmers at the highest price. Prior to February 2002, DFA held a 50% equity stake in the company that owned and operated the Flav-O-Rich dairy. The other 50% equity stake was held by the Allen Family Limited Partnership. In February 2002, DFA acquired 50% of the voting stock of Flav-O-Rich's biggest competitor, the Southern Belle Dairy. The DOJ alleged that DFA's partial acquisition of Southern Belle gave it both the economic incentive and the ability to reduce competition between the dairies. The complaint alleged that the dairies were the only two competitors for a significant number of customers, that entry or expansion would not prevent increased prices and a reduction in service, and that the transaction yielded no efficiencies to outweigh the likely competitive harm. Following dismissal by the district court of the DOJ's original complaint, a successful appeal by the DOJ to the court of appeals, and remand of the case to the district court, the DOJ and DFA entered into a settlement agreement requiring DFA and the Allen Family Limited Partnership to sell the Southern Belle dairy plant to another firm.[13]

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10 Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Against Dean Foods Company (Jan. 22, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/254435.htm.

11 Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Dean Foods Company (Mar. 29, 2011), *available at* http://www.justice.gov/opa/pr/2011/March/11-at-388.html.

12 Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit Against Dairy Farmers of America Inc. and Southern Belle Dairy Co. LLC to Restore Competition in School Milk Sales (Apr. 24, 2003), *available at* http://www.justice.gov/opa/pr/2003/April/03_at_253.htm.

13 Press Release, U.S. Dep't of Justice, Justice Department Obtains Dairy Processor Divestiture in Settlement with Dairy Farmers of America (Oct. 2, 2006), *available at* http://www.justice.gov/opa/pr/2006/October/06_at_672.html.

2.1.5 Gasoline

15. On June 20, 2011, in light of recent increases in crude oil and refined petroleum product prices and profit margins, the FTC disclosed an investigation to determine whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others (1) have engaged or are engaging in practices that have lessened or may lessen competition—or have engaged or are engaging in manipulation—in the production, refining, transportation, distribution, or wholesale supply of crude oil or petroleum products; or (2) have provided false or misleading information related to the wholesale price of crude oil or petroleum products to a federal department or agency.[14] This pending investigation serves as an example of how pricing behavior may trigger an investigation of whether anticompetitive practices are involved.

16. In June 2005, the FTC acted to save consumers hundreds of millions of dollars in higher gasoline prices by accepting two consent orders to resolve the Commission's administrative monopolization complaint against Union Oil Company (Unocal) and competition concerns arising from Chevron's proposed $18 billion acquisition of Unocal.[15] The settlements focused primarily on resolving allegations of monopolization through anticompetitive abuses of the regulatory process related to California reformulated gasoline in connection with certain Unocal patents. However, the merger also raised concerns that Chevron could use information obtained through patent licenses to facilitate coordinated interaction among itself and other refiners and marketers, leading to higher prices for reformulated gasoline. By the terms of the order, the combined firm agreed not to enforce its relevant patents or collect royalties on those patents.[16]

2.2 Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).

17. The Federal Trade Commission Act ("FTC Act") explicitly authorizes the FTC to "gather and compile information concerning . . . the organization, business, conduct, practices and management" of persons and of corporations.[17] As commentators have noted, "the gathering of information and its dissemination has long been one of the chief justifications for the existence of the Federal Trade Commission."[18]

18. The FTC often initiates studies at the request of the U.S. Congress, the President, and Congressional oversight committees. Although to some extent these requests determine the scope of an inquiry, the FTC refines further the focus of the study in light of the substantial cost of undertaking a study and other considerations. In response to higher gasoline prices during the spring and summer of 2006, the FTC completed an extensive, Congressionally-mandated investigation to determine whether gasoline prices were being affected by illegal "manipulation" or "cheating." The investigation "revealed no

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14 *See* http://www.ftc.gov/os/2011/06/110620petroleuminvestigation.pdf.

15 *See* FTC, Dual Consent Orders Resolve Competitive Concerns About Chevron's $18 Billion Purchase of Unocal, FTC's 2003 Complaint Against Unocal, *available at* http://www.ftc.gov/opa/2005/06/chevronunocal.shtm.

16 The FTC has investigated several mergers in the petroleum industry, including *Shell/Texaco*, *BP/Amoco*, *Exxon/Mobil*, *Chevron/Texaco*, and *Phillips/Conoco*. For a list of FTC merger enforcement actions in the petroleum industry since 1981, *see* http://www.ftc.gov/ftc/oilgas/charts/merger_enforce_actions.htm.

17 15 U.S.C. § 46(a).

18 *See* William Breit and Kenneth G. Elzinga, "Information for antitrust and business activity: line of business reporting," *in* THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 98 (Kenneth W. Clarkson & Timothy J. Muris eds. 1981).

evidence that refiners conspired to restrict supply or otherwise violated the antitrust laws"[19] and found, rather, that the "price increases were caused by a confluence of factors reflecting the normal operation of the market."[20]

19. The FTC also performs studies on its own initiative of industries, such as gasoline, that are of particular importance to consumers. These studies frequently build on experience the agency has gained in enforcement matters. For example, as noted above, the FTC published its market study on gasoline price changes in 2005,[21] which the FTC Bureau of Economics updated in 2011.[22]

20. The DOJ does not have statutory authority to conduct general market studies.

2.3 Has your agency received requests from governments or other parts of society to formally investigate commodities markets or requests for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anticompetitive behavior? What was the nature and circumstances of the request and how did your agency respond?

21. From time to time, the Agencies receive requests from government components or market participants to investigate anticompetitive behavior, such as the Congressional mandate that the FTC perform a gasoline-sector investigation in response to higher gasoline prices in 2006. When it appears that the cited behavior may raise antitrust concerns, the Agencies will open an investigation. However, input prices, commodity prices, or price volatility that result from market forces, rather than anticompetitive practices, are not the concern of the U.S. antitrust laws. The U.S. antitrust laws are not price-control statutes, and any responses to price volatility, outside of ensuring a competitive marketplace, would require legislative involvement.

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19 Federal Trade Commission, *Report on Spring/Summer 2006 Nationwide Gasoline Price Increases*, at 3, *available at* http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf.

20 *Id.* at 26.

21 *See* Federal Trade Commission, Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition (2005), at 7, *available at* http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf.

22 *See* Federal Trade Commission, Gasoline Price Changes and the Petroleum Industry: An Update (2011), at 7, *available at* http://www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf.

3. Advocacy opportunities and challenges

3.1 Has your agency had the opportunity to improve the efficiency and effectiveness in commodities markets through advocacy? For example, have you had the opportunity to recommend or advise on commodity price deregulation? Have you had the opportunity to advise on the reform of government or private sector monopolies for the purchase or sale of particular commodities for domestic consumption or export (i.e. single desks)? Have you had the opportunity to advise on the reform of regulations that fix or control prices or quantities? What was the commodity, the nature of the reform and the outcome?

Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?

Please describe any preemptive steps available to your agency to: (i) Reduce the risk of commodity price volatility becoming a problem in your country? (ii) Reduce the risk that governments or public societies seek policy responses to problematic commodity price volatility that would impede competition?

22. Advocating for competition is an important part of the Agencies' missions. This advocacy takes a number of forms, including providing testimony or comments on proposed federal and state legislation and regulations, advising Executive Branch components on competition issues, and advocating for competition principles in public fora. The Agencies aim their advocacy at a broad range of industries across the economy, including various commodities sectors. For example in 2010, the DOJ, along with the U.S. Department of Agriculture, held a series of public outreach hearings on issues in agricultural markets, including the seed, livestock, poultry, hog, and dairy sectors. As noted above, the DOJ's role in these hearings was to listen to and learn from market participants and academics about the issues participants face in these industries and to promote the value of competition in these sectors. Volatility in commodity prices, particularly in recent years, was one issue market participants and academics touched on in these hearings. Similarly, the FTC has testified before U.S. Congressional committees about the role of market forces and competitive dynamics in petroleum markets and its initiatives to protect a competitive marketplace.[23]

23. The Agencies rely on their competition advocacy efforts to reduce the risk that the federal government or state governments will seek policy responses to issues in various markets, including the commodities markets, that would impede competition. To the extent that legislative or regulatory proposals addressing the commodities sector, or other sectors, may implicate competition issues, the Agencies may, through formal channels or informal consultation, provide views to legislators or regulators. For example, in 2004, the DOJ filed a post-hearing memorandum before the U.S. Department of Agriculture opposing a proposed federal marketing agreement that would have authorized an administrative committee to control the quantity of hops, grown in certain states, that producers could market.[24] The DOJ argued that the hops industry was competitive and that the proposal to allow the committee to artificially restrict the hops

23 *See* http://www.ftc.gov/ftc/oilgas/testimony.htm. *See also* http://www.ftc.gov/ocr/testimony/index.shtml.

24 Post-Hearing Memorandum from the U.S. Dep't of Justice on Proposed Marketing Order No. 991, Hops Produced in Washington, Oregon, Idaho, and California, to the United States Dep't of Agriculture, Docket No.: AO-F&V-991-A3; FV03-991-01 (Feb. 18, 2004), *available at* http://www.justice.gov/atr/public/comments/202477.htm.

supply would lead to non-competitive pricing effects and resource misallocations. The Department of Agriculture ultimately determined not to promulgate the hops marketing agreement.[25]

24. The Agencies in certain instances also express support for proposed legislation that would benefit consumers by protecting or promoting competition. In 2010, FTC staff submitted comments to the New Jersey State Senate expressing support for a bill that would modify the law to allow gasoline retailers to set their prices below cost in certain circumstances. New Jersey law prohibited a “retail dealer” from selling motor fuel “at a price which is below the net cost of such motor fuel to the retail dealer plus all selling expenses.”[26] The proposed legislation would change New Jersey law to allow below-cost pricing to meet competition, so long as such prices are not set “with intent to injure competition or destroy or substantially lessen competition.”[27] The FTC staff explained that because below-cost pricing can benefit consumers, and because the proposed legislation would allow New Jersey gasoline retailers to compete more aggressively on price, New Jersey consumers will likely benefit from the proposed legislation.

25. By working with and advising federal and state legislators and regulators, the Agencies promote competition and, when appropriate, raise awareness of the potential competitive impact of particular proposed laws and regulations, including in the commodities sector.

25 United States Dep’t of Agriculture, News Release, USDA Terminates Proposed Hops Marketing Order Proceeding (June 20, 2005), *available at* http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateU&navID=LatestReleases&page=Newsroom&topNav=&leftNav=&rightNav1=LatestReleases&rightNav2=&resultType=Details&dDocName=STELDEV3004036&dID=42805&wf=false&description=USDA+Terminates+Proposed+Hop+Marketing+Order+Proceeding+.

26 *See* http://www.ftc.gov/os/2010/09/100928gasolineretailers.pdf.

27 *Id.*