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Antitrust Economic Analysis in Food Marketing Channels

by

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By Ronald W. Cotterill

Antitrust laws, or alternatively competition laws, are now in place in over 100 nations. (UNCTAD, 2004, p. 12). Many countries have enacted such since 1990 with China's coming on line in 1994 (Brumfield 2005) and formally codified as an anti-monopoly law in 2007 (Blumenthal, *et. al.*, 2007). Globally there has been considerable convergence in content and enforcement. This has been especially true over the past ten years. Virtually every country has antitrust statutes regarding monopoly, mergers, and cartels. The economics underpinning these laws are common across all countries. Enforcement procedures, however, vary with significant implications for antitrust economic analysis.

In this paper I will compare enforcement procedures in the U.S. and the E.U., paying special attention to the move towards more private enforcement in the E.U. This shift towards the U.S. model, to the extent that it occurs in Europe and elsewhere, offers a growing opportunity for antitrust economic analysis in all industries including food. I will also provide a selective review of recent investigations in food industries that illustrate how economics is employed in different enforcement regimes.

In the United States, enforcement has decentralized over the past thirty years. In the 1980s the Reagan administration attempted to reduce antitrust enforcement by reducing activities at the federal level. This, however, created a vacuum that the state attorneys general entered. The U. S. Supreme Court unanimously ruled in 1990 (*California v. American Stores Co.*, 495 U.S. 271) that the states had the right to act on

behalf of their citizens to enforce the federal antitrust laws. That case was in the supermarket industry and relied upon quantitative analysis of concentration profit and concentration price relationships (Marion, *et. al.*, 1979) and entry conduct into local food markets (Cotterill and Haller, 1992). Similarly, private attorneys moved to enforce the federal antitrust laws by filing class action lawsuits on behalf of damaged parties. This is in addition to individual private antitrust suits by competitors, suppliers, or buyers that suffer antitrust injury and damages.

State level enforcement, often via a coalition of states, and private attorney class action enforcement has brought additional financial and intellectual resources to the bar against large corporate defendants. In the United States we have gone from two government agencies, (the Department of Justice and the Federal Trade Commission), that have limited financial and human resources to a decentralized market for antitrust enforcement with several hundred significant suppliers of enforcement activity. This shift from government enforcement agencies to a broad enforcement market is the public sector analogue of Stigler's private sector spin-off theory on economic development (Stigler 1951). Indeed Becker and Stigler (1974) first argued that private plaintiffs seeking damages for antitrust injury could achieve deterrence as efficiently as public enforcement agencies. Subsequently a large legal economic literature has analyzed the optimal balance between public and private antitrust enforcement (Bourjade, Rey, and Seabright, 2009). That work focuses on rational design of antitrust enforcement. Here I will add a more general observation to that technical literature. As the U.S. economy grew and private corporations became global and very powerful politically as well as economically, effective enforcement of antitrust law required the development of a

market structured so that financial and human resources commensurate to those of such large corporations would come forth and litigate when the facts merit judicial review. Private individual lawsuits by other large corporations and class actions on behalf of numerous plaintiffs such as consumers or farmers now play particularly important roles in this market for antitrust enforcement.

In Europe antitrust enforcement has recently evolved into a federal system. European Union competition law is analogous to federal antitrust law in the U.S. and member state competition laws are analogous to state antitrust laws in the U.S. In the E.U., however, government commissions in Brussels and in the various member state governments have very broad discovery powers and are staffed by lawyers and economists. Commissions also have the authority to determine when violations occur and decide remedies that include fines. Such fines, however, are not based on economic measurement of actual damages.

The law and factual content of EU Commission decisions and fines can be appealed to the Court of First Instance and ultimately questions of law can go to the European Court of Justice (Elhauge and Geradin, 2007, p. 45, 47). The appeal process is similar in the U.S.; however, the initial judicial finding of fact and law is different. In the E.U. and member states it now occurs within a commission. In the U.S. it occurs in a court of law.

Private lawsuits, including class actions, are almost nonexistent in Europe for four reasons. Private plaintiffs have very limited discovery powers compared to the U.S. Damages are not trebled. Unlike in the U.S. the loser pays all court fees (Elhauge and Geradin, 2007, p. 40). Finally defining a class in most European countries is quite

circumscribed and in some only existing consumer associations can sue on behalf of their members.¹

Recently, however, many European countries and the E.U. have moved to strengthen antitrust enforcement by strengthening private and class action venues in the courts. The market for antitrust enforcement is expanding beyond government agency enforcement. Harbour and Shelley (2006) write,

Relatively few antitrust cases have been filed in the courts of the E.U. Member States – only 60 since 1962 according to a recent survey, compared with 752 U.S. antitrust suits in 2004 alone. Siobhan Morrissey, *Vive Les Class Actions*, 91 A.B.A. J. 48, 49. On December 19, 2005, the Commission published its Green Paper, which considered whether the conditions for bringing a damages claim for infringement of EC competition law should be changed. Commission of the European Communities, *Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 (“2005 Green Paper”); ... Emphasizing the importance of “private as well as public enforcement of antitrust law...[to a] competitive economy,” the Commission expressed concern that the current EU system for private enforcement was inadequate. 2005 Green Paper; *supra*, at 3-4. In the Green Paper, the Commission proposed the use of class actions to improve the enforcement of antitrust rules.”

The 2005 Green Paper builds on procedures adopted by the EU in 2004 encouraging parties to pursue lawsuits for breach of antitrust rules in courts, as opposed to regulatory agencies. More than 700 judges throughout the Member States are currently being trained in antitrust. The first case under the new EU procedure was filed in Slovenia against the state-owned Mobitel by Western Wireless Corp., which is based in Bellevue, Washington.

In an article titled, “US Firms Prepare for European Class Actions” Garamfalvi (2007) reports that a leading U.S. class action law firm is moving into Europe.

Competition law is likely to prove to be the most fertile terrain for the firm’s initial work. In recent years, both the European Commission and some national regulators, such as the Office of Fair Trading, have

¹ See http://en.wikipedia.org/wiki/Class_action for information on class actions in Austria, France, Germany, Italy, India, Netherlands, Spain, Switzerland, and Canada (Accessed June 25, 2009).

acknowledged the limitations of public enforcement of competition law and have initiated discussions on the need to foster a litigation climate conducive to more private enforcement.

Robert Murray, a member of the U.K. Competition Commission, stated in 2007:

There is much less of a culture in Europe of people suing in the courts and much more of a culture of reliance on public enforcement. But now, in the last few years, there has been a big change. There are moves to make it easier for business to sue for compensation, for example, for damages from cartels (Garamfalvi, 2007).

Elhauge and Geradin, however, wrote in 2007,

Many in Europe indeed believe that, while playing a considerable role in ensuring effective enforcement of antitrust rules, the U.S. private litigation system has led to some abuses (Elhauge and Geradin, 2007, p.40).

Indeed, progress on class action law has not been as rapid as the 2005 study suggested. Mattil and Desoutter writing in October 2008 mention a new European Commission study is in progress.

At present the European Commission is working on a study to introduce European class action. The project is currently at the stage of obtaining expert reports and opinions (p. 484).

Bourjade, Rey, and Seabright in May 2009 write:

The United States has long been home to a culture of private antitrust litigation, encouraged in part by the availability of treble damages, while such litigation has been comparatively rare in Europe. This may be about to change: the European Commission has opened a debate on whether and how to increase the frequency of private antitrust litigation in the EU. In 2005, it issued a Green Paper entitled “Damages actions for breach of the EC antitrust rules”. After a first public consultation and discussion by the European Parliament, the Commission published in April 2008 a White Paper that proposed a first set of measures.

Bourjade, *et. al.* (2009) “contrasts the situation in the EU, where very few private actions take place, with that in the US, where approximately ten private actions are undertaken

for each action by the public authorities.“ They study the optimal design for a private antitrust enforcement regime.

Farrell and Ince (2008) provide an excellent detailed review of recent changes in the U.K. competition regime that facilitate private enforcement of competition law. The United Kingdom is the most advanced of the EU countries concerning movement to private litigation in the courts. Since 2002 designated associations such as the Consumer Association, and presumably a farmers’ association, can bring “follow on” lawsuits for damages when the UK Competition Commission, or the UK Office of Fair Trade, has found an antitrust violation that has impact on private parties. By November 2008 eight “follow on” actions had been brought. Note however “follow on” actions are not independent private antitrust enforcement in a court of law.

This brief review of the U.S. and European enforcement procedures provides several insights. First, although the underlying purposes of the laws and the economics for analysis of antitrust violations are the same, enforcement practices and the use of economic analysis are quite different. Commissions such as the British Competition Commission and the EU Competition Directorate in Brussels have very broad investigative powers and the staff to conduct comprehensive investigations to determine antitrust liability and issue enforcement directives including injunctions and fines. In the E.U. and member countries fines are administratively determined without reference to the amount of actual antitrust economic damages (Elhauge and Geradin, 2007, p. 47, 48). Therefore, in Europe, an economists’ primary task is to provide economic evidence that addresses liability under the antitrust laws. Economists can focus more on economic theory (game theory that “fits” the industry) without regard to actual empirical analysis,

however recently analysis of antitrust liability has become more empirically oriented. For example, for merger analysis see Ivaldi, *et. al.* (2003a) and Ivaldi *et. al.* (2003b). In the United States economists must, in a more direct fashion, present a theory of liability that leads to an empirical model for damage estimation. This is especially true in price fixing cases, other restraint of trade cases, and monopolization cases because both public and private plaintiffs seek treble damages. In fact the measurement of antitrust damages must be based upon the economic model of liability (Blair and Page, 1995 and Marshall, 2008). Moreover discovery in the U.S district courts must provide information including data from the defendants for the estimation of such models because public information on conduct and data are, by the very nature of the alleged conduct, insufficient.

Turning now to examples of antitrust economic analysis to illustrate the scope of enforcement in food industries globally, first consider the recent United Kingdom Competition Commission's grocery industry investigation (<http://www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm>). It is an excellent example of the strengths of the European approach. The U.K. Commission investigated all aspects of the industries conduct, obtaining detailed data and business records from all major grocery firms for their own analysis as well as major economic studies by consultants for the major grocery firms. Often there were successive rounds of studies, critique, and revised studies. Alternative methods and data were used to answer critical questions. For example, the U.K. Commission approached product (store type) and geographic market definition from several perspectives. The operational concept is application of a SSNIP test which measures how consumers switch between store types (large supermarkets, smaller supermarkets, convenience stores, and limited assortment stores) and geographic

location when presented with a “Small but Significant Nontransitory Increase in Price” (USDOJ Merger Guidelines, EU Merger Guidelines).

In its final report the U.K. Commission explained its multi-dimensional approach as follows:

- 4.12 As in any other investigation, we consider a range of evidence to assess the outcome of a SSNIP test. Our assessment of the likely behaviour of consumers when faced with a price increase might be informed by, for example, evidence of past consumer behaviour, or by elasticities of demand.² Observations on how grocery retailers react to one another’s efforts to gain new customers, for example through local promotional activity following entry by a rival, can provide useful information on which stores are substitutes for consumers.
- 4.13 We undertook a substantial amount of complex econometric and other quantitative analysis to inform our market definition. This included: (a) econometric modelling of consumer demand for groceries (see paragraphs 4.104 to 4.105), (b) an analysis of the relationship between store profit margins and local concentration (see paragraphs 4.106 to 4.113), (c) an analysis of the impact of new stores on the revenues of existing stores (see paragraphs 4.114 to 4.116), and (d) a review of a simulation model of the SSNIP test submitted by Tesco (see paragraphs 4.117 to 4.131). [Competition Commission, 2008]

The U.K. Commission was equally comprehensive and thorough in its investigation of potential market power exercised against consumers in local markets and buying power exercised by large supermarket chains (multiples) against food manufacturers and ultimately farmers. For example, the Competition Commission corroborated an Office of Fair Trade study that found dairy farmers are receiving lower premiums over commodity milk prices for fluid milk because fluid processors have passed supermarket buyer discounts back to raw milk suppliers (Competition Commission, 2008, Appendix 9.3).

By comparison in the United States we have not seen such a comprehensive investigation of any food industry since the National Commission on Food Marketing

Report on Food Retailing (National Commission on Food Marketing, 1966). Over the past 30 years the U.S. Department of Justice and the Federal Trade Commission have not done public industry studies. In the U.S. system each antitrust investigation focuses on very specific charges and economic analysis is confidential, used only in court and only available if presented at public trial and not struck from the public record at the request of the firms.

Clearly the strength of the Commission approach is its comprehensive engagement of the industry, varied analysis of many different issues, and the issuance of guidance for future firm conduct that seeks to promote competition. The process is more transparent than U.S. antitrust enforcement. On the other hand a weakness of the Commission approach is that it does not use the deterrent effect of measuring antitrust damages and trebling them for payment to the public treasury. Also private parties such as dairy farmers until recently have had no recourse via the courts to sue for economic damages due to antitrust injury (Farrell and Ince, 2008).

In the United States there are several examples of private antitrust actions in food industries where economic analysis has supported and in some instances proven antitrust liability as well as estimated the nature and scope of antitrust injuries, and estimated the actual amount of economic damage suffered by private parties.

Consider first, the exercise of market power against farmers. Howrey LLP, lead counsel, and several other law firms brought a class action lawsuit on behalf of 170,000 tobacco farmers and proved in court that Philip Morris, RJ Reynolds, Brown and Williamson, and Lorillard, and their leaf dealers conspired to fix and depress tobacco auction prices paid to farmers for at least 1996-2001. The settlement was for \$329

million in cash and a 10 year tobacco purchase commitment. The distribution of claims was completed in 2006 and undistributed money was donated to a number of land grant universities for scholarships for the children and grandchildren of tobacco farmers.²

Another class action case that depressed farm prices is Nate Pease, et al. v. Jasper Wyman & Son, Inc., et al., Civil Action No. 00-015 (Knox Cty, Maine).

A Maine state court jury found three blueberry processing companies liable for participating in a four-year price-fixing conspiracy to fix the base price which the defendants paid to approximately 800 growers for wild blueberries. In addition to the price-fixing claim, the plaintiffs alleged that the defendants agreed not to solicit each other's growers, a type of market allocation claim that also is a per se violation of the antitrust laws.³

Economic analysis in the wild blueberry case placed damages at \$18.6 million, trebled to \$56 million dollars.⁴

Currently Howrey LLP and other law firms are pursuing a class action lawsuit that alleges that the leading U.S. fluid milk processor, Dean Foods, and the nation's largest dairy cooperative, Dairy Farmers of America with its subsidiary National Dairy Holdings the number 2 fluid milk processor in the U.S. have with others monopsonized the raw milk market in the Southeastern United States, excluding Florida, depressing the price premium paid for bottled as opposed to commodity (manufacturing) milk to farmers from 2002 to present (In Re Southeastern Milk Antitrust Litigation).

Shifting now to private class action lawsuits that allege the exercise of market power against buyers in food market channels, one has a sister case against Dean, DFA, and others that alleges they have conspired to fix prices, allocate territories, and monopolize wholesale bottled milk markets in the southeast U.S. (Food Lion, LLC *et. al.*

² http://www.howrey.com/practices/practices_Detail.aspx?service=45e73399-0543-41d9-9f65-d6559b20d228&op=experience

³ http://www.cmht.com/cases_itnsettlement.php

⁴ http://www.cmht.com/cases_itnsettlement.php

v. Dean Foods, *et. al.*). The class is all retailers and distributors who directly purchased bottled milk from the defendants for resale to consumers or away from home eating establishments (hotels and restaurants).

Both of these milk cases are proceeding in spite of the fact that the U.S. Department of Justice investigated Dean/DFA conduct after a 2001 merger of the two largest dairy processors created Dean and the DFA owned NDH processing firms. US DOJ took no action and the entire investigation is confidential and unavailable for public scrutiny. Recently the Obama administration has recognized and signaled support for private enforcement in dairy as well as other industries (Williamson and Karnitschnig, 2009).

Another monopolization class action that involves both direct and indirect purchasers alleges that Del Monte Fresh Produce Inc. excluded Dole, Chiquita, and others from the fresh “Gold” pineapple market for several years and subsequently as a declining dominant slowly ceded its pricing power to the market. Economic specification and estimation of a monopoly and then declining dominant firm model was sufficient for the federal court to grant class certification for direct purchasers, however a second economists work on price pass through by direct purchasers, food retailers, to indirect purchasers, consumers, was so flawed and inadequate that the court denied class certification for indirect purchasers (*In Re Fresh Del Monte Pineapples Antitrust Litigation*).⁵ In the U.S. once one has class certification, *i.e.* the court agrees that

⁵This author is expert economist for the Del Monte direct purchasers. Professor Dennis Carlton, University of Chicago/Lexecon is expert economist for Del Monte. Dr Frank Trinari, the economist who estimated the value of lost lives for victims’ families (a class action case) at the World Trade Center Sept. 11 2001 catastrophe was expert economist for the indirect purchasers. Also see Cotterill, Egan, and Buckhold. (2001) and Cotterill (1998) for the economics of price pass through. The latter secured class certification in state courts for indirect purchasers (consumers) in Kansas and Washington, D.C., but not Michigan. After the Michigan decision, in a separate case on appeal Judge Richard Posner, 7th Circuit Chicago, certified a

common facts and issues of law make it sensible and reasonable for alleged plaintiffs to proceed as a class with common legal counsel and a common economic analysis, the lawsuit proceeds to the merits of the case.

In conclusion private antitrust enforcement and related antitrust economic analysis of damages may become more similar in different countries, effectively catching up with the convergence in the economic analysis of antitrust liability under cartel, monopoly, and merger laws. Christine Varney, the new undersecretary for antitrust in the Department of Justice at her confirmation hearing before the United States Senate Committee on the Judiciary clearly supports worldwide convergence and cooperation in antitrust matters.

I look forward to working with all the members of this committee to promote the effective enforcement of our antitrust laws and to renewing our nation's status as the international leader in antitrust policy development and convergence ... we must continue our cooperation with worldwide antitrust authorities, discussing our differences with international enforcers respectfully and engaging with emerging antitrust regimes such as China and India as they implement new antitrust laws. ... In these tough economic times, more than ever, it is important to remember that clear and consistent antitrust enforcement – protecting competition and thus consumers while being conscious of the need for economic stability – is essential to a growing and healthy free market economy. (Varney, 2009)

Convergence is not necessarily synonymous with following the American model. In one of her first acts as undersecretary Ms Varney withdrew the Bush administration's report on monopoly antitrust enforcement effectively moving U. S. policy in this area towards EU policy with its concern for the anti-competitive impacts of exclusionary acts including vertical foreclosure, bundling, and tying.

direct purchaser class action on behalf of soft drink bottlers. This contributed to the successful certification of the 3 subsequent indirect purchase cases. All three cases were settled before a trial on the merits.

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