



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

April 4, 2007

Ms. Roxann E. Henry
Ms. Jacqueline I. Grise
Howrey LLP
1299 Pennsylvania Avenue NW
Washington, DC 20004

Dear Ms. Henry and Ms. Grise:

This letter responds to your request for an advisory opinion concerning the law enforcement intentions of the Federal Trade Commission's ("FTC" or the "Commission") Bureau of Competition ("BC") with respect to the agreement of worldwide stakeholders in the coffee industry to adopt a Common Code for the Coffee Community (the "Code" or "4C"). For the reasons discussed below, BC staff has no present intention to recommend to the FTC that it challenge any stakeholder within its jurisdiction because of the stakeholder's agreement to the principles and terms of the Code. This present intention relies entirely on a review of the materials submitted in your letter (with attachments) of March 6, 2007 and materials found on the Code's Internet site to which you directed our attention.¹ Should there be information that we are unaware of that contradicts any of this information, or should the terms of the Code change in the future, BC's law enforcement recommendations to the Commission may change.

Description of the Code

According to the materials that you have provided, the Code is a newly-formed non-profit association intended to "foster sustainability in the mainstream green coffee chain and to increase the quantities of coffee meeting basic sustainability criteria within all three dimensions."² Those dimensions are the growing, processing, and trading of green coffee. The association is located in Bonn, Germany, and was legally registered in Geneva, Switzerland in January 2007.

The Code represents "an open and voluntary initiative by coffee growers, roasters, trade and industry, trade unions, NGOs, and other stakeholders, including post-harvest processing facilities: traders, exporters, importers, and processors (e.g., mills) of 4C green coffee in the global green coffee chain to establish a sustainability system with a global code of conduct, as well as good agricultural and management practices, to improve social environmental, and

¹ Letter from Roxann E. Henry and Jacqueline I. Grise to Donald S. Clark, Secretary, Federal Trade Commission (March 6, 2007). The Internet site is: <http://www.sustainable-coffee.net/>

² Common Code for the Coffee Community (09 September 2004 Version).

economic sustainability in the production, post-harvest processing, and trading of coffee.”³ To advance its objective to “to foster and assist sustainability of coffee production, post-harvest processing and trading, [t]he Code will establish a new basis for competition in the green coffee chain by developing baseline standards in these areas, including decent and humane working conditions and improving the environment by reducing the use of certain chemicals, etc.”⁴

Participating members of the Code “acknowledge that the application of sustainability practices according to the Common Code may have an impact on the costs of production of coffee on its way towards sustainability.”⁵ Further, “[b]uyers agree that suppliers of 4C coffee need to be adequately rewarded for their efforts to comply with 4C requirements in comparison with similar coffee that is not 4C compliant, including the appropriate costs of verification. The process of negotiating between buyers and sellers of this coffee shall build on transparent market information and will incorporate the good faith of the individual buyer and seller.”⁶ It is expected that by sharing “best practices,” the long-term costs of growing, processing, and trading of green coffee may actually decrease notwithstanding possible higher short-term costs. In this way, worldwide sustainability is enhanced.

We further understand that the “Rules of Participation” (“Rules”) for stakeholders agreeing to the Code will be those Rules provided by you to us and designated as “Confirmed Version January 2006.”

Among other activities, the Rules provide for the reporting of data on purchases and sales of 4C coffee. We understand that “aggregate volume data shall be distributed through annual reports of the Management Unit. Participation in aggregate volume reporting programs shall be extended to all 4C participants.”⁷ We understand that “[i]n compiling data for reporting purposes, no report of data shall be issued in instances in which five or fewer firms are reporting. No report shall be released in which individual company figures can be identified either directly or indirectly.”⁸

Under the Rules, “[b]uyers will contribute to capacity building activities of stakeholders

³ Rules of Participation (Confirmed Version January 2006).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

associated with 4C activities, including field and farm education and training programs. Training programs will comprise capacity building to export directly, quality improvement, organizational development, managerial tools, brand development, access to market information, diversification as appropriate etc.”⁹ In so doing, “[b]uyers will contribute to capacity building in a way that is commensurate with their volume or value of coffee purchased; they decide about the nature, scale and amount of their contribution to capacity building activities on a voluntary basis.”¹⁰

We also understand that the governing of the Code shall be comprised of a General Assembly, Council, Executive Board, Mediation Board, Technical Committee, and Secretariat.¹¹ The General Assembly is the supreme authority and will include producers, trade and industry, civil society, and a group of associated members.¹² The General Assembly will meet at least once every three years.¹³ Membership in the Code requires an agreement to advance the objectives of the Code and a membership fee.¹⁴

Under Swiss law, the Council and Executive Board are established to act on behalf of the Code.¹⁵ The Executive Board guides the operational activities of the Code and approves its budget and business plan.¹⁶ It also appoints the Executive Director of the 4C Secretariat, which executes the decisions of the Executive Board.¹⁷

The Technical Committee is the “expert body of the 4C association,” and the Mediation Board “recommends a process to address issues sufficiently” should there be serious conflicts

⁹ *Id.*

¹⁰ *Id.*

¹¹ Statutes of the Common Code for the Coffee Community Association.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

within the Code.¹⁸ Within each body in the Code, the objective is to make decisions by consensus.¹⁹

Among other guiding principles, the participants in the Code agree to support such principles as freedom of association, right to childhood, humane living conditions, certain conservation and environmental practices, and energy efficiency.²⁰ The degree and nature of specific effort on the part of participants to advance these principles, however, rests with the individual participant.

You contend that advancing these and other 4C principles will “increase competition along a number of dimensions to the benefit of consumers.”²¹ Specifically, “[p]roviding information to consumers about 4C quality and process standards may facilitate competition, increase consumer confidence, and stimulate demand. The existence of objective and verifiable standards defining decent and humane working conditions and environmental standards also will be procompetitive because they will permit competition on the basis of respect for workers [sic] rights, as well as on price, quality, and other product attributes. Consumers who ascribe importance to purchasing products that are based on 4C standards will be provided information relevant to their purchasing decisions.”²²

In addition, you believe that “[t]he 4C Association’s ‘capacity building’ efforts also may be expected to increase efficiency in the green coffee chain through training programs and the provision of managerial tools, in particular, to the smaller growers who historically have had very limited access to such resources.”²³

Finally, you have informed us that the United States Senate has produced a resolution, S. Res. 368, that expresses the sense of the Senate that the United States should adopt a global

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Draft Version of 4C Matrix Including Generic Indicators for Measurement of Compliance (09 September 2004 Version).

²¹ Letter from Roxann E. Henry and Jacqueline I. Grise to Donald S. Clark, Secretary, Federal Trade Commission (March 6, 2007).

²² *Id.*

²³ *Id.*

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strategy to respond to the coffee crisis. In so doing, the U.S. should coordinate with pertinent coffee producing countries and with private sector buyers and roasters.

Bureau of Competition Analysis

The Code is both an information exchange program designed to identify and share “best practices” among the world’s coffee enterprises and a voluntary agreement to advance the proportion of “green” coffee in the world’s output of coffee. The antitrust risks, if any, that may arise from an information exchange program are determined by considering the net market effects of the exchange.²⁴ That is, the Bureau considers the capacity of the information exchange program to facilitate anticompetitive price stabilization in a relevant U.S. market against its tendency or ability to further plausible and cognizable ends, such as reducing costs. The Bureau’s analytical framework for evaluating agreements among competitors to achieve joint goals is set out in the Federal Trade Commission/Department of Justice Guidelines for Collaborations Among Competitors.²⁵

Based on the information that you have provided us and as summarized above, it does not appear that, at this time, participation in the Code raises serious competitive concerns in any relevant U.S. market. First, the goals of the Code do not appear to be either directly or indirectly anticompetitive, or to implicate collaboration among U.S. competitors on a significant competitive parameter such as price or output rates. Absent collaboration on a significant competitive parameter, efforts by industry members to identify and share best practices are not likely to raise substantial risk of competitive harm.²⁶ Moreover, to the extent that the sharing of best practices reduces resource utilization, the program, if anything, could have procompetitive results. (However, it does not appear that such cost reductions, if any, directly accrue to U.S. participants in the Code.) The additional information provided to consumers about green coffee can also be expected to benefit those consumers for whom purchasing green coffee is of value. Our conclusion that the Code does not raise significant antitrust concerns is further buttressed by the fact that participation in the Code is voluntary as is the degree of effort any one participant must make toward advancing the Association’s goals and principles. Thus, any participant whose commercial and competitive interests do not converge with the goals of the Code can be expected to pursue those interests without penalty and would retain the ability and incentive to compete independently.

²⁴ *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

²⁵ Available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>

²⁶ *See, esp.*, section 3 of the Collaboration Guidelines.

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Second, although membership in the Code places a commitment on buyers to increase their purchases of 4C coffee over time, that commitment does not appear either to be binding, specific as to quantity or time, or otherwise of a form that is likely to result in anticompetitive effects in a relevant U.S. market. Rather, each participant retains independent decision-making respecting purchase commitments. Retention of such independent decision-making reduces the likelihood that the common goal of increasing purchases of 4C coffee could have an anticompetitive effect in the U.S.²⁷ Should, however, U.S. coffee roasters and distributors ultimately agree to purchase specific quantities of higher cost coffee beans that they individually would not purchase but for the agreement, a potential antitrust risk could arise.

Third, the information collection and reporting appears (1) to protect commercially sensitive information and (2) to be aggregated in a way that protects against identifying any one reporting party. Moreover, the aggregated data is apparently only going to be disseminated on an annual basis. Given these conditions, it appears that the information exchange programs falls within the "safety zone" set out in Statement 6 of the Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Healthcare.²⁸

Finally, other aspects of participation in the 4C (e.g., advancing humane living and working conditions) appear to us not to be factors directly related to price competition. Under these circumstances, it does not appear that adherence to the Code's objectives will have an adverse effect on the prices that U.S. consumers pay for coffee.

Based on the above, the Bureau does not intend to recommend a law enforcement action to the FTC at this time.

This letter expresses the current opinion of BC staff, and is predicated on the accuracy of the information that you have provided to us. In accordance with normal practice, BC reserves the right to reconsider the questions involved and, with notice to the requesting party, to rescind the opinion if actual conduct in compliance with the Code proves to be anticompetitive in any purpose or effect, or if facts change significantly in the future such that it would be in the public interest to bring an enforcement action.

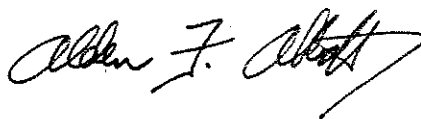
²⁷ See, esp., section 3.34 of the Collaboration Guidelines.

²⁸ Available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm>.

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The views of BC staff contained herein are provided as authorized by Rule 1.1(b) of the Commission's Rules of Practice, 16 C.F.R. § 1.1(b). Under Commission Rule 1.3(c), 16 C.F.R. § 1.3(c), the FTC is not bound by this staff opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Alden F. Abbott". The signature is written in a cursive style with a large, sweeping flourish at the end.

Alden F. Abbott
Associate Director