LEAGUE OF WOMEN VOTERS®

Antitrust Enforcement Agencies and Legislation

When antitrust legislation surfaced in the 1890s, the agricultural sector was not on the radar screen. During the 20th century, however, public perceptions of diminished competition in agricultural input supply, commodity marketing, food processing, and, to a lesser extent, the retail grocery sector led antitrust enforcement agencies to pay more attention to these agricultural subsectors.

Government Agencies and Antitrust Benchmarks

The Antitrust Division of the U.S. Department of Justice (AT-DOJ) and the Federal Trade Commission (FTC) both carry responsibility for antitrust enforcement. The primary mandate of AT-DOJ and FTC is to enforce laws and rules established by legislation. The AT-DOJ has jurisdiction over the producing and processing sectors of agriculture, while the FTC oversees the retail sector, primarily groceries, although specifics about jurisdiction in areas like meat-packing or grain prices is complex, due to *vertical consolidation* throughout the food industry.[1]

Important benchmarks in antitrust legislation and enforcement efforts are listed below:

Benchmark date/title	Description
1890 Sherman Anti Trust Act	First antitrust legislation passed by Congress in response to concern about the growing influence of trusts in the railroad, mining, and other early industrial sectors.
1914 Clayton Act	Added restrictions to the Sherman Act to cover mergers and gave the states authority to enforce federal antitrust laws.
1914 Federal Trade Commission Act	Created the FTC and gave it authority to prosecute violators.
1922 Capper-Volstead Act	Provides a limited antitrust exemption for agricultural marketing associations. Producers, through qualifying associations, can agree on prices and other terms of sale, select the extent of their joint marketing activity, agree on common marketing practices with other cooperatives, and achieve substantial market share and influence.
1976 Hart-Scott-Rodin Act	Expanded the merger provisions by requiring notification of the intent to merge so enforcement agencies could review the competitive effects of the merger before it took place (e.g., the recent Smithfield/Shuanghui merger).
1995 Antitrust Guidelines for Licensing of Intellectual Property	DOJ/FTC issued Guidelines acknowledging the inherent tension between intellectual property licensing (which can, in effect, be anti-competitive), and formation of healthy, competitive markets.

Benchmark date/title	Description
2010 DOJ & USDA address competition in agriculture	A series of joint workshops on competition in the agriculture industry was followed by the formation of an Agricultural Competition Joint Task Force, which oversees enforcement of intellectual property rights and patent infringement in agriculture.

Antitrust Enforcement Mandate

The three types of violations of the law that antitrust enforcement agencies can pursue include:

- Collusion: When separate firms agree among themselves not to compete with each other, but instead to join forces against consumers or suppliers such as the Archer Daniel Midlands lysine price fixing case in 1996[2]
- Monopolization: When a firm monopolizes or attempts to monopolize a market
- Anti-competitive mergers: When a firm is likely to lessen competition in a market substantially by merging with or acquiring the assets of another firm

Limitations on Antitrust Enforcement and the Role of the Courts

The DOJ does not

> *… have the power to restructure any industry, any market, or any company, or to stop any practice, except in a precise and focused fashion as necessary to prevent or remedy specific violations of the antitrust laws that we can prove in court. Our authority rests ultimately on our ability to bring enforcement actions in court, and when we bring an action, it is the court that decides whether the antitrust laws are being violated in the particular instance, and whether the remedy we are seeking fits the violation. And the court's decision depends on the particular facts in evidence[3].*

DOJ also notes that monopoly charges are difficult to prove:

> *Attempted monopolization means the firm must stand a "dangerous probability" of acquiring a monopoly as a result of restrictive conduct. For "dangerous probability," the courts generally require that the firm already have a large market share (60-to-70 percent may be enough, depending on the circumstances). But even a larger market share might not be enough, if other factors indicate that the restrictive conduct is unlikely to create a monopoly. Also under our antitrust laws, a firm may lawfully have a monopoly, as long as the firm has not acquired it or maintained it illegally. So very high market share, plus restrictive conduct must be present. One or the other is not enough.[4]*

Another important point is that in merger inquiries, when the potential for reduced competition is found, the resolution is often through repositioning and/or sales of particular assets by the merging parties to reduce the anti-competitive effects rather than a blanket ban on the merger (e.g., the 1998 Monsanto/DeKalb case and the 1999 Cargill/Continental case)[5].

The points noted above also apply to the FTC, which enforces antitrust laws through its Bureau of Competition. Both the AT-DOJ and the FTC are guided by the same underlying antitrust statutes (primarily the Sherman Antitrust Act and the Clayton Act).[6] It is important to note that the antitrust laws focus on competition and the competitive process, and do not serve directly other policy goals like fairness, safety, promotion of foreign trade, and environmental welfare.[7]

Current Issues

There is ample economic evidence that when farms and other actors in the agricultural sector increase the size and scale of their operations through vertical and/or *horizontal integration* there are economies of size and scale that result in significant reductions in costs per unit of output. The realization of these economies has helped to keep food prices in the U.S. lower than in most other countries of the world. Questions have been raised as to whether the level of consolidation by some agricultural input supply, commodity marketing, processing, and retail grocery firms is not so great that it is restricting competition in the agricultural sector and injuring farmers, consumers, and small to mid-sized processors and retailers.[8]

Because the structure of agricultural industries has become so complex and intertwined, it is not only difficult to determine if there is "too much" consolidation, but it is even more difficult to evaluate the impacts that the consolidation might be having on prices, the availability of goods and services, and competition. Among those who believe that consolidation has accelerated during the recent past, many lay the blame on existing policies and the manner in which they are implemented. Among the culprits mentioned are patent law, agricultural subsidies that benefit multi-national agribusinesses more than farmers, weak antitrust laws and enforcement, and political influence.[9] Because the concentration of concern tends to be occurring either upstream from the farm (in the seed and fertilizer input sectors) or downstream (in the commodity trading, processing and retail sectors), it is difficult to view the issue as one that can be addressed through agricultural policy alone. Ultimately, some combination of reforms may be needed to fully address this issue; but the voices from the Workshop on Agriculture and Antitrust Enforcement suggest that it is an issue, which is of growing importance to farmers and other agricultural sector stakeholders.[10]

Recommended Reading

Frederick, Donald A., USDA, Cooperative Information Report 59, September 2002, "Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act," http://www.rurdev.usda.gov/rbs/pub/cir59.pdf, accessed 10/26/13.
Although this document focuses on the Capper-Volstead Act, which is of particular relevance to farmers, it provides an historical overview of the evolution of antitrust legislation in the U.S.

Ross, Douglas. Antitrust Enforcement and Agriculture, (address to the American Farm Bureau Policy Development Meeting, Kansas City, MO, August 20, 2002), http://www.justice.gov/atr/public/speeches/200417.htm, accessed 10/26/13.
This is probably the best single document on the issue of antitrust enforcement in agriculture as it reviews the powers of DOJ to enforce, clarifies some of the terminology, and also provides short illustrations of a number of cases pursued by DOJ.

[1] Ronald B. Rowe, Prepared Statement before the Commerce, Science, and Transportation Committee, United States Senate, Huron, South Dakota, 8/31/1995, http://www.ftc.gov/speeches/other/graintes.shtm, accessed 7/24/2013, **server not found 12/20/13.**

[2] Department of Justice, "Archer Daniels Midland Co. To Plead Guilty and Pay $100 Million for Role in Two International Price-Fixing Conspiracies," News Release October 15, 1996, http://www.justice.gov/opa/pr/1996/Oct96/508at.htm, accessed 10/26/2013.

[3] Douglas Ross, Antitrust Enforcement and Agriculture (address to the American Farm Bureau Policy Development Meeting, Kansas City, MO. August 20, 2002), http://www.justice.gov/atr/public/speeches/200417.htm, accessed 10/26/2013.

[4] Douglas Ross, op. cit.

[5] Douglas Ross, op. cit.

[6] Federal Trade Commission, "A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority," revised July 2008, http://www.ftc.gov/ogc/brfovrvw.shtm, accessed 10/26/2013.

[7] Point made in U. S. Department of Justice, "Competition and Agriculture," op. cit.

[8] See Department of Justice, "Competition and Agriculture: Voices from the Workshops…" op. cit. and Food & Water Watch, Farm Bill 101, January 2012, http://www.foodandwaterwatch.org/tools-and-resources/farm-bill-101/, accessed 10/26/2013.

[9] Food & Water Watch. Farm Bill 101, January 2012, op. cit.

[10] Department of Justice, "Competition and Agriculture: Voices from the Workshops…" op. cit.