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## *Merger and Antitrust Issues in Agriculture: Statutes and Agencies*

Jerry Heykoop, Resources, Science, and Industry Division

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**Abstract.** A sustained period of low farm prices has generated legislative interest in concentration and consolidation within agriculture. This has raised questions about the federal government's role in pursuing cases of unfair competition or violations of antitrust laws. This report describes the federal statutes and agencies involved in antitrust regulation.

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# Merger and Antitrust Issues in Agriculture: Statutes and Agencies

Jerry Heykoop
Policy Analyst
Resources, Science, and Industry Division

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## Summary

A continuing trend toward consolidation within agriculture has generated legislative interest in the effect of concentration and consolidation on U.S. agriculture. The changing structure of the agriculture sector, particularly with respect to mergers between major grain companies and concentration in the livestock sector, has brought up questions about the federal government's role in pursuing cases of unfair competition or violations of antitrust laws. Although various regulations target business practices in the agriculture industry, important social issues associated with concentration and consolidation may not be fully addressed by existing antitrust laws. This report briefly sets out the philosophy underlying antitrust enforcement, the federal statutes and agencies currently involved in antitrust regulation affecting agriculture, and Congressional activity on the matter. This report will be updated as events warrant.[1]

## Antitrust Issues in Agriculture[2]

Many issues associated with concentration and consolidation, such as job loss, change in ownership structure, and other quality-of-life issues, are not addressed by antitrust laws, but it is these quality-of-life issues that often are the driving force behind calls for stronger regulations and law enforcement in agriculture. Within agriculture, issues involve the loss of rural lifestyles, the disruption of farming families, and the continuing trend of fewer and larger farms coupled with the loss of smaller farms. Nevertheless, antitrust enforcement does not encompass the broader range of possible economic and social effects that may be associated with mergers. Such effects result not only from mergers, but from many other forces as well, including technological change,

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[1] Minor revisions by Jean Yavis Jones, January 29, 2003.

[2] For a further discussion on legal issues dealing with antitrust, please see CRS Reports 95-116A: *General Overview of United States Antitrust Law*, and RS20241: *Monopoly and Monopolization – Fundamental But Separate Concepts in U.S. Antitrust Law*.

deregulation, and international competition. Some have argued that mergers may be more a symptom of broad change in the economy than a cause. Others similarly argue that concentration/consolidation is occurring in response to external factors, including international competition. They suggest that policies that are best for dealing with these changes include promoting full employment and macroeconomic stability, developing a skilled and well-trained work force, providing adequate unemployment insurance and other safety net programs, and helping rural communities adapt to economic change.

## Basis of Antitrust Enforcement

The goal of antitrust regulation is to protect competition for the benefit of consumers. Regulations are not intended to keep existing competitors (producers) in the market, but, rather, to protect the market from unlawful anti-competitive behavior. Thus, agencies involved might approve a large merger if competition is not reduced, and they may challenge a small merger if it is likely to reduce competition: "When the antitrust agencies —Federal Trade Commission and the Antitrust Division of the Department of Justice— review mergers, they do so with an eye to protecting competition for the benefit of consumers. They pay considerable attention to market definition —over how large a market the merged firm might exert market power, and what competitors it faces in that market— so that the effects of a merger are evaluated in the proper context."[3] Mergers or acquisitions that are likely to substantially lessen competition in a market are a violation of Section 7 of the Clayton Act. The purpose of merger review by the Department of Justice (**DOJ**) or the Federal Trade Commission (**FTC**) is to prevent anti-competitive conduct before it occurs. The principal focus during merger review is not on the conduct of the merging parties, but on whether the merger would change the market structure to such a degree that competition likely would be substantially lessened. The premerger remedies DOJ/FTC seek for a merger that would violate the Clayton Act is a suit to stop the merger, or to insist that approval depends on whether it can be modified to remove the cause for antitrust concern (*e.g.*, through divestiture). In addition to potentially anticompetitive mergers, there are two other classes of anticompetitive behavior that may be subject to findings of antitrust unlawfulness:

***Collusion*** - a violation of Section 1 of the Sherman Act. Occurs when separate firms agree among themselves not to compete with each other, but instead join forces against their consumers or their suppliers.

***Monopolization*** or ***Attempt to Monopolize*** - a violation of Section 2 of the Sherman Act. May be used with the anti-merger provisions of the Clayton Act. There are several ways to monopolize, including the use of predatory practices and/or exclusionary conduct.

## Major Antitrust Statutes (with particular emphasis on agriculture)

**Packers and Stockyards Act, 1921** (**P&S Act**) (7 USC §181 *et seq*.), administered by the U.S. Department of Agriculture's (**USDA**) Grain Inspection, Packers and Stockyards Administration (**GIPSA**). Contains financial protection measures, prohibits

[3] *Economic Report of the President*. February 1999, p. 39.

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unfair, unjustified discriminatory and deceptive practices, and prohibits activities that might adversely affect competition.

**Capper-Volstead Act** (7 USC §§291-292) administered by USDA. Confers limited exemption from antitrust liability to allow farmers to join together in collectively marketing or processing commodities they produce. USDA may, but has never utilized the power to, file complaints against cooperatives that engage in a monopoly or restriction of trade to such an extent that the price of the commodity is unduly enhanced.

**Sherman Act** (15 USC §§1-8) and **Clayton Act** (15 USC §12 *et seq.)* administered by DOJ and FTC. Prohibit certain activities, including mergers and acquisitions (15 U.S.C. § 18), that may restrict market access or suppress competition. USDA has no formal role, but may be called on by DOJ/FTC for expertise.

**Hart-Scott-Rodino Act** (**HSR**) (15 USC §18a). Requires notification to DOJ and FTC of proposed mergers or acquisitions, the results of which meet certain size and/or ownership criteria set out in the statute. The agencies determine the need for any review beyond the initial requirement.

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## Agencies Regulating and Enforcing Antitrust Statutes

**Grain Inspection, Packers and Stockyards Administration.** GIPSA, an agency within USDA, has primary regulatory authority over meat packers and grain processors. Its authority to regulate packers and stockyards is found in the P&S Act. GIPSA does not have antitrust authority directly. Rather, its role is to maintain fair competition regulations. Specifically, the P&S Act (7 USC §192) makes it unlawful for a packer or poultry dealer to:

- Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device.
- Give undue/unreasonable preference/advantage to persons or localities.
- Apportion supply among packers in restraint of commerce (creating a monopoly).
- Trade in articles to manipulate or control prices, or to create a monopoly.
- Conspire to apportion territory, or sales, or to manipulate or control prices.

GIPSA is authorized to investigate alleged violations in the livestock industry, but not in the poultry industry. Alleged violations of the P&S Act within the poultry industry must be referred to DOJ. Violators are served "cease and desist"orders and fines may be imposed. If a packer disregards an order or refuses to pay fines, GIPSA may refer the case to DOJ, which can enforce the order/fine through court action. According to GIPSA, most violations are corrected voluntarily by the individuals or firms when a violation is brought to their attention. Except for serious violations, disciplinary action tends to be the last resort, and is imposed only after substantial efforts for compliance have failed.

**Department of Justice.** DOJ has the authority to prosecute anti-competitive acts generally, including violations of the P&S Act upon referral by GIPSA. DOJ also is required, under HSR, to review certain merger proposals, and is authorized to file suit to block any that are deemed anticompetitive. Specifically, parties to proposed mergers must notify DOJ and FTC if the results of the merger will meet certain size and/or ownership conditions. DOJ/FTC then have 30 days to review the merger, during which time the agency may request further information. Such a "second request" generally triggers

negotiation between the parties and the reviewing agency, if, in fact, negotiation has not already begun. If a suit to enjoin the merger is announced or filed, the proposed merging companies may take one of three courses of action: (1) drop the merger, (2) prepare to fight the lawsuit, or (3) negotiate with the agency (if that process has not already begun) in an attempt to restructure the merger to alleviate the government's concerns (*e.g.,* via divestiture of selected assets). Negotiation often is seen as being in the interests of all parties, because going to court can be expensive, time-consuming, and risky.

**Federal Trade Commission.** FTC's role in maintaining fair competition in agriculture involves the review of mergers, similar to the DOJ role described above.

On March 5, 2002, DOJ and FTC issued a *Memorandum of Agreement* designed to both streamline and increase the transparency of their "clearance procedures," the processes under which the agencies determine which of them will handle a given merger or conduct an investigation.[4] Although clearance procedures traditionally have emphasized the agencies' experience in dealing with specific industries and sectors, they contend that rapid technological change and deregulation have created convergence issues, lengthened the clearance period, and reduced the effectiveness of experience-based allocation.[5]

Pursuant to the *Memorandum*, allocations to FTC include grocery manufacturing and operation of grocery stores; pharmaceuticals and biotechnology (other than that associated with agriculture); and, the operation of retail stores. Allocations to DOJ include agriculture and associated biotechnology; beer; financial services, insurance, and commodity markets; industrial equipment; paper, lumber, and timber; and, transportation.

Other provisions of the agreement addressed: development of a clearance manual; maintenance of a common database to track HSR filings and clearance matters; designation of a clearance officer at each agency; weekly meetings and reports to review the clearance process and ongoing matters; clearly designated levels of review for clearance disputes; and, provisions for obtaining input from a neutral evaluator in instances in which the agencies are otherwise unable to resolve a clearance dispute.

On May 20, DOJ announced it would no longer adhere to the agreement due to opposition from Senator Hollings.

## Examples of Agricultural Sector Mergers and Investigations

**Case-New Holland.** Case (Racine, WI) and New Holland (Amsterdam, The Netherlands) announced in May 1999, their plans to merge. The two companies manufacture agricultural equipment (tractors and implements), construction equipment,

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[4] *Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations,* March 5, 2002. [http://www.ftc.gov/opa/2002/04/clearanceoverview.htm]. Although the *Memorandum* is supported by several Members of Congress and several former antitrust officials, it is also strenuously opposed by at least one Senator, and by some consumer groups.

[5] For example, in a number of cases the clearance process consumed a significant share of the initial 30-day review period and the reviewing agency was forced to issue a second request simply to preserve its time to investigate effectively.

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and provide financial services. The DOJ and the European Commission cleared the merger for a November 12, 1999, closing, with divestitures of product lines in the United States and plants in Canada, Britain, Italy, and Germany. In its merger approval, DOJ ordered Case and New Holland to divest interests in specific tractor and implement manufacturers and a plant in Canada where the tractors are made. DOJ said the Case and New Holland businesses it ordered sold are interests in which both companies compete directly and would have decreased competition and led to higher prices for farm machinery.

**Cargill-Continental Grain.**[6] In most cases, merger policy focuses on monopoly power, but this case focused on monopsony power —the power to dictate purchase prices. The two companies reached an agreement in October 1998, for Cargill to acquire Continental Grain's commodity marketing operations. After DOJ review, the merger received final approval in June 30, 2000. In approving the merger, DOJ required the divestiture of 10 elevators in seven states. Divestitures were to take place within five or six months, with the acquirer subject to DOJ approval as well.

**Biotech.** When Monsanto acquired DeKalb (both are seed companies), DOJ required a spinoff of gene technology to the University of California-Berkeley. DOJ actions in this field have intensified and it continues to closely scrutinize the biotechnology sector. The most recent case in the biotech industry involves an antitrust suit against the seed companies Seminis Vegetable Seeds Inc. and LSL Biotechnologies for entering into an agreement for the production of long-shelf-life tomatoes, and which allegedly reduced competition in the development and sale of vegetable seed. Seminis is the world's largest producer, developer, and marketer of vegetable seeds.

**Others.** In the area of meatpacking, Excel attempted to acquire Beef America. However, when DOJ announced an investigation, the transaction went no further. The Excel case has been cited as an example of how DOJ stops anti-competitive behavior without much outside attention. In another case, ADM was found to be in collusion in conjunction with the international lysine (feed additive) market and received a $100 million fine, which was the largest corporate fine in history at the time.

## Railroads[7]

Mergers in the railroad industry are important to agriculture because of the potential impacts on commodity transportation. Rail mergers are handled differently from mergers in other industries in three aspects:

First, the Surface Transportation Board (**STB**) has final authority on allowing or disallowing mergers. DOJ and FTC are allowed to testify similarly to other parties at a merger hearing, but STB can (dis)allow a merger regardless of either agency's position. For example, DOJ opposed the merger in 1996, of Union Pacific and Southern Pacific

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[6] MacDonald, J. September 1999. "Cargill's Acquisition of Continental Grain: Anatomy of a Merger." *Agricultural Outlook*, p.21-24. USDA, ERS.

[7] For further discussion on railroad mergers and competition, see CRS Report 97-98 E: *Rail Mergers: Background and Selected Public Policy Issues*, and GAO Report GAO-01-689: *Freight Railroad Regulation*.

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railroads. However, STB granted permission and the railroads merged under the name Union Pacific.

Second, railroad mergers cannot proceed without STB permission. That is different from mergers in other industries, which are reviewed by DOJ/FTC. In those industries, mergers can proceed unless blocked by DOJ or FTC. For example, the recent Tyson-IBP merger proceeded since neither agency moved to block the merger within 30 days of the premerger filing.

Third, STB can oversee results of a merger in order to ameliorate adverse effects. Because STB maintains oversight over railroads, it may place additional conditions on a railroad after the merger. That is different from mergers in other industries in that DOJ/FTC do not maintain oversight after a merger. Rather, they attempt to structure a merger in a manner that would prevent any potential future anticompetitive practices/issues.

**STB Merger Guidelines.** In December 1999, Burlington Northern Santa Fe (**BNSF**) and Canadian National (**CN**) announced plans to merge under the name North American Railways, Inc. It was widely speculated within the railroad industry and among shippers that a BNSF-CN merger would spur the final round of mergers among railroads. It was believed the final result would leave the railroad industry with only two very large Class 1 railroads that span the continent. Before the merger application was filed, STB held hearings on March 8-10, 2000, to review mergers in the railroad industry and to determine if a merger moratorium was warranted. After the hearings, STB announced a 15-month moratorium in order to review and update its merger procedures. In accord with the moratorium, STB announced it would not accept merger applications between Class 1 railroads during that period, effectively blocking BNSF and CN from filing their merger application. BNSF and CN appealed STB's decision to the District of Columbia Court of Appeals. However, the court ruled STB had the authority to call a moratorium and did not have to accept the application (*Western Coal Traffic League vs Surface Transportation Board* 216F.3d1168 (D.C. Cir. 2000)). Consequently, BNSF and CN called off their proposed merger.

On June 11, 2001, STB announced its new merger review guidelines. Among other issues, railroads hoping to merge would have to prove not only that a merger would maintain competition, but, rather, that a merger would enhance competition.

## 2002 Farm Bill

The new farm law titled "Farm Security and Rural Investment Act of 2002, signed into law May 13, 2002, (P.L. 107-171; H.R. 2646) extends GIPSA authority to include swine production contracts. Previously, GIPSA protected broiler farmers who grew under contract and livestock producers who sold directly to packers; it did not have authority over livestock producers growing under contract. Persons contracting with others to raise and care for feeder pigs or other swine not intended for slaughter also were not covered.. The new law also allows contract producers to discuss the contract with advisors and enforcement agencies even if the contract contains a confidentiality clause. A Senate proposal that would have restricted packer ownership was dropped in conference. This issue may be revisited in the 108th Congress.

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