

No Sacred Cow: DOJ Turns Up the Heat on Competition Issues in the American Agriculture Industry

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During the first in a series of unprecedented joint workshops between the U.S. Department of Justice (DOJ) and the U.S. Department of Agriculture (USDA), held on March 12, Assistant Attorney General of the Antitrust Division Christine A. Varney stated that it is the Division's "hope that antitrust enforcement will not only promote diversity and competition among American farmers, but will also help to keep food plentiful and affordable for American consumers." Varney was joined by U.S. Attorney General Eric Holder, who defined the "central question" to be discussed at these joint workshops as, "Is today's agricultural industry suffering from a lack of free and fair competition in the marketplace?" It is clear that DOJ intends to answer that question, and it will put the agriculture industry under a microscope to do so.

Varney's and Holder's statements come following several pronouncements by Obama administration officials indicating that they are "committed to a careful examination of the [agriculture] marketplace." In August 2009, Deputy Assistant Attorney General of the Antitrust Division Philip J. Weiser stated that DOJ's "interest in competition issues affecting agriculture markets is longstanding," noting that one of the drivers leading to the 1890 passage of the Sherman Act was Congress's concerns relating to the Chicago beef trust's effort to control the price of livestock. More recently, DOJ's interest in the agricultural and food industry's competitive practices led to a late-1990s investigation of the snack food industry's relationship with grocers relating to shelf space and a 2008 investigation of the pricing, marketing, and sale of egg products. In October 2008, the Antitrust Division also filed an antitrust lawsuit seeking to block the proposed merger between livestock industry companies JBS and National Beef Packing Company, which the companies ultimately abandoned in early 2009.

The Antitrust Division's recent focus on the agricultural industry appears to be driven by a number of factors, including changes in technology that have produced both marketplace efficiencies as well as "concerns about concentration," as Weiser put it. During his August 2009 speech, Weiser announced the commencement of a series of workshops that will focus on the following:

(1) The state and nature of competition in a range of agricultural markets

The Antitrust Division is "keeping a close watch" on particular market segments, including the seed, dairy, and livestock markets. Weiser stated that DOJ will evaluate the seed markets, particularly corn and soybean, in light of their emerging industry structure, the ability of new entrants to introduce innovations, and any practices that may affect competition. In addition, the dairy market is of interest to the DOJ because of the "considerable consolidation" that has recently

taken place in that market and, according to Weiser, “questions about the state of competition in that market.” Finally, the livestock market took center stage following the proposed but abandoned merger between JBS and National Beef Packing Company.

(2) The impact of vertical integration

According to Weiser, agriculture markets have become more vertically integrated in recent years, with companies acquiring pieces of their supply chain, such as other companies that produce necessary raw materials or distribution channels.

(3) Concerns about “buyer power”

An increase in buyer power has piqued DOJ’s interest in the agriculture markets. As Varney stated during the March 12 workshop, “[W]e are acutely aware of the dynamic—not unique to agriculture—where a small number of large buyers are able to exert undue influence on the price of commodities.” She added, “[W]here the Division’s powers can be used to ensure fair and efficient prices on the farm, they will be.”

(4) Relevant regulatory regimes

Varney stated that the Antitrust Division has provided guidance to the USDA regarding rules the USDA promulgated under the Packers and Stockyard Act of 1921, as amended, which prohibits, *inter alia*, price discrimination, price manipulation, and weight manipulation of livestock or carcasses, and misrepresentation of carcass grades and the source, condition, or quality of livestock. The USDA has previously been criticized for its lax investigation and enforcement activities and for its failure to issue regulations establishing the criteria it will use to evaluate complaints under the Packers and Stockyard Act.

(5) Questions regarding the nature of transparency in the marketplace

The Antitrust Division has also communicated with the Commodity Futures Trading Commission regarding complaints the Division received concerning transparency in agriculture price-discovery (or “spot price”) markets.

The message from the Antitrust Division to the agriculture industry is clear—the Division is watching and ready to act.

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