DEPARTMENT OF JUSTICE

ANTITRUST ENFORCEMENT IN THE MEAT PACKING INDUSTRY

Address by
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I am pleased to be here this afternoon to say a few words about the role of the federal antitrust laws and the Justice Department's Antitrust Division in ensuring that the meat packing industry is subject to healthy competitive market forces. As many have noted, concentration in this industry has increased significantly over the last 15 years, and we have been monitoring this industry on an ongoing basis for a number of years. We have designated a special monitoring group of attorneys and economists to spearhead this task.

Recent Department Activities

In recent years, the Antitrust Division has conducted several antitrust investigations in the meat packing industry. Although confidentiality requirements under the antitrust laws limit my ability to discuss in detail the Division's investigative activities or the rationales for our determinations in specific cases, I want to mention a few that are already public knowledge. In the early 1990's, we conducted an investigation into complaints about possible anticompetitive collusion by packers and breakers (wholesalers) causing low slaughter prices in the lamb industry. We ultimately decided there was not sufficient evidence to prosecute. Our investigation indicated that the drop in lamb slaughter prices during that period was consistent with normal fluctuations in supply and demand, a determination that seems to have been substantiated by the recovery in lamb slaughter price levels more recently.

We have also conducted investigations in the merger area. In 1993 and 1994 we received reports that Cargill's large meat-packing subsidiary Excel might be interested in acquiring Beef America, a significant Nebraska beef packer. We opened an investigation, and Excel never put forth a public proposal. Last winter, we investigated the acquisition by Smithfield, a major pork packing firm centered in the Southeast, of John Morrell, a smaller but still significant pork packer centered in the Midwest. And this spring, we investigated IBP’s acquisition of Calhoun. As part of that investigation, we deposed the Chairman and CEO of IBP, and the vice president of IBP’s cow division -- that is, we questioned them under oath. That’s already a matter of public record, which is why I can mention it.

We have an investigation open now relating to merger reporting issues, which I am not at liberty to discuss in more detail at this time.

This brief summary gives you some idea about how carefully we are looking at mergers, acquisitions, and other practices affecting the price of livestock.

In addition to numerous meetings held in connection with these and other investigations, Antitrust Division officials have conducted a number of what I would call "outreach" meetings during the last two years, here in Washington and around the country, with concerned livestock producers and other people in various segments of the industry. For example, in June of 1994, a Division attorney spoke at the annual meeting of the National Cattleman's Association in Omaha. In October of that year, a Division attorney spoke at the Center for Rural Affairs conference in Kansas City, and in Rapid City at a "livestock summit" put on by the Western Organization of Resource Councils. In May of 1995, Assistant Attorney General Anne Bingaman herself traveled to Omaha to speak with cattle producers and packers. In late August and early September, I and other Division officials traveled to Huron, South Dakota for a congressional field hearing and a meeting with cattle producers. In February of this year, a Division attorney spoke at the National Meat Association's convention in San Francisco. In March, we had three outreach meetings with groups in Washington, and another barely a month ago. And here I am today. We have had other meetings, and many telephone conversations, that I am not at liberty to describe specifically.

The point I want to get across is that the Antitrust Division is actively monitoring this industry, as we do other highly concentrated industries where pricing issues are present. And I am sure we will continue to do so in the months ahead.

The Antitrust Division takes very seriously its responsibility to protect the marketplace -- including the livestock marketplace -- against anticompetitive conduct and mergers that substantially lessen competition. Of course, simply because cattle slaughter prices drop to a record low does not necessarily mean that there is an antitrust violation behind it. But we are looking carefully, and talking with a lot of people, and if we uncover conduct in violation of the antitrust laws, we will take prompt and appropriate enforcement action to remedy it.

<u>What the Antitrust Laws Prohibit</u>

Let me be a little more specific about what our role is and the kind of conduct that is prohibited under the antitrust laws. We are a law enforcement agency, and our particular mission is to enforce the antitrust laws. That is a very important mission, but it is also a very focused one. We do not have wide-ranging regulatory authority to take action to address any concern we choose. What we do have is full authority to investigate potential antitrust violations and take law enforcement action when we find them.

When the Antitrust Division brings an enforcement action, a court makes the ultimate decision as to whether the antitrust laws are being violated in the particular instance. The court's decision depends on the particular facts in evidence. Therefore, we bring an enforcement action in court only when we are in the possession of factual evidence that gives us good reason to believe that the antitrust laws have been violated.

I think that by describing some of the principal types of antitrust violations, I can give you a reasonably clear picture of the kinds of factual evidence we look for, in this or any industry, to support enforcement action.

1. <u>Collusion</u>

The first type of antitrust violation I will describe is collusion, which means that firms that are holding themselves out to the public as competing against each other instead agree with each other to unreasonably restrain competition among themselves. These kinds of agreements are serious violations of section 1 of the Sherman Act, because they willfully subvert the normal operation of free markets, and can result in serious harm to consumers, suppliers, and the economy. The most common of these agreements are agreements to fix prices, agreements to allocate markets, and agreements to boycott.

Let me explain each of these a bit more fully. First, price fixing. Price fixing includes not only agreeing on the specific price, but also agreeing to increase or depress price levels, or agreeing to follow a formula that has the intended effect of raising or depressing prices or price levels. Allocation of markets includes not only agreeing to divide up geographic areas to avoid competition, but also agreeing to divide up customers or suppliers within an area, or agreeing to divide up a sequence of bids, for the same purpose. Group boycotts include any agreement among competitors that they will deal with their customers or their suppliers only on particular terms. All of these activities are flatly illegal, and all U.S. businesses and individuals must refrain from engaging in them. If we find evidence in any industry, including the livestock industry, that leads us to believe these laws have been violated, we will prosecute.

It is important to remember that with any of these forms of collusion, proving a case requires evidence of an agreement. It is not enough to show merely that two meat packers bid a similar price, or that some packers go to some auction barns and other packers go to other barns. What would concern us is if there are other facts, such as patterns of change in bids over time, or patterns of attendance at various auction barns, that don't make sense as part of normal competitive behavior. Needless to say, if we ever heard about two or more packers discussing with each other what price they intend to bid, or which auction barns they intend to buy from, we would definitely be concerned and find cause to investigate.

3. <u>Monopolization or Attempt to Monopolize</u>

A second type of antitrust violation, less common than collusion but also a serious willful subversion of the free marketplace, is monopolization or attempt to monopolize, which violates section 2 of the Sherman Act. This would occur if one firm -- a meat packer, for example -- attempted to drive other packers out of business by interfering with their ability to engage in the business, such as by refusing to buy from producers who sell to the other packers, refusing to ship with transportation companies who ship for the other packers, or refusing to sell to distributors or retailers who handle the products of the other packers. Under section 2, it is not necessary to prove an agreement. One firm can illegally monopolize by itself.

But section 2 monopolization cannot be proved just by showing that a firm has engaged in the restrictive conduct. The law also requires proof that the firm had a monopoly already --

and that means an extremely high market share all to itself -- and engaged in the restrictive conduct in order to acquire or maintain the monopoly. Or, in the case of attempted monopolization, it must be proved that the firm stood a "dangerous probability" of obtaining a monopoly as a result of the restrictive conduct. And to prove "dangerous probability," the courts generally require, for starters, that the firm involved in the restrictive conduct already have a quite large market share. And even a large market share might not be enough, if other facts indicate that the scheme is unlikely to succeed in creating a monopoly.

Just as important, section 2 monopolization cannot be proved just by showing that the market is highly concentrated. It is legal under our antitrust laws for a firm to have a monopoly, as long as the firm has not acquired the monopoly or maintained it through the kind of restrictive conduct I described a minute ago. So both things -- very high market share, plus restrictive conduct -- must be proved. One or the other by itself is not enough.

3. <u>Mergers</u>

In addition to bringing action against anticompetitive collusion and monopolization, we also investigate mergers and acquisitions. A merger or acquisition that would substantially lessen competition in a particular product market and geographic market would violate section 7 of the Clayton Act.

The Clayton Act legal standard for evaluating mergers is different from the Sherman Act standards for collusion and monopolization, and for an important reason. The Sherman Act requires proof of anticompetitive conduct -- as it should, because Sherman Act violations can subject violators to stiff criminal fines and jail sentences. In contrast, under Clayton Act merger review, the principal focus is not on the conduct of the merging parties, but on whether the merger would change the market to such a degree that competition would be substantially lessened. And the remedy for a merger that violates the Clayton Act is typically to stop the merger, or to insist that it be modified to remove the cause for antitrust concern.

The Division analyzes mergers pursuant to Horizontal Merger Guidelines developed jointly by the Department of Justice and the Federal Trade Commission. The analysis is aimed at determining whether the merger is likely to create or enhance market power, or to facilitate the exercise of market power, in any relevant market. Market power is the ability of a firm or group of firms to raise the price they charge to customers -- or to lower the price they pay to suppliers, such as livestock producers -- a small but significant amount without being defeated by counteractive competitive responses by other competing firms.

The starting point in evaluating any merger is determining the scope of the product markets and geographic markets that would be affected by it. The scope of a market is largely defined by the smallest area in which a hypothetical firm, assuming it faced no competition in that area, could make a small but significant change in price stick -- that is, could change the price without customers or suppliers, as the case may be, being able to thwart the firm's effort by going outside the market for their buying or selling needs. In other words, in investigating a meat packing merger for possible creation of undue buying power, we draw a circle in the area we are investigating, and see how small we can make that circle and still have a group of livestock producers who as a practical matter have to sell to someone located within that circle. A judgment as to the dimensions of this area is usually reached by examining recent buying and selling patterns in the marketplace -- in the case of meat packing, how wide a range the meat packers travel to acquire livestock. But the judgment can also depend on a variety of other, more subtle factors, because the ultimate question is not how far they do travel, but how far they could or would travel.

Past analyses of mergers in the meat packing industry suggest that steer/heifer and cow/bull are usually distinct product markets for antitrust purposes, for example. This is because the kind of livestock used in each of these two markets is not considered readily suitable for use in the other. Past analyses have also shown that geographic markets may not be isolated local markets, and may in some circumstances be multi-state.

There is no automatic threshold of market concentration that will always result in a determination that a merger would violate section 7 of the Clayton Act. Other factors also play an important role in analyzing the impact of the merger -- such as other structural features of the market that make anticompetitive effects more likely or less likely; evidence of prior anticompetitive conduct, to the extent it could indicate an anticompetitive bent among the firms in question; and the possibility or difficulty of entry into the marketplace by new competitors, which could neutralize any anticompetitive potential. We would also consider the impact of any demonstrable efficiency gains that would result in benefits to consumers.

But market concentration is the first thing we look at, because in highly concentrated markets not only are price fixing and other collusion easier to coordinate; there is also a dampening effect on competitive rivalry, even in the absence of collusion, because it is easier to monitor what your rivals are doing and to anticipate what they will do next. And there is no doubt that the meat packing industry is far more concentrated than it was 10 or 15 years ago -- and the steer & heifer sector of the market has become quite highly concentrated. We will be scrutinizing mergers among meat packers closely to determine whether they violate the Clayton Act.

<u>Division of Responsibility Between DOJ and FTC</u>

I should mention that the Antitrust Division shares antitrust enforcement responsibility with the Federal Trade Commission. To avoid duplicating each other's investigative efforts, we have developed a formal liaison process to determine cooperatively which agency will investigate a particular matter. If one agency has greater current expertise in a particular industrial sector, usually as a result of previous investigations, that agency will generally handle new matters in that sector. Pursuant to this arrangement, it has worked out that the Antitrust Division has handled investigations in the cattle, hog, and lamb sectors, while the FTC has handled investigations in the poultry sector.

<u>Coordination with GIPSA</u>

The Antitrust Division also maintains close contact with the USDA's Grain, Inspection, Packers and Stockyards Administration (GIPSA). GIPSA does not have authority to enforce the Sherman and Clayton Acts, although it does have authority to consider competition concerns as part of its authority under the Packers and Stockyards Act; that authority, by the way, extends beyond conduct that violates the antitrust laws. And if GIPSA uncovers conduct that it believes may violate the antitrust laws, it has authority to refer the matter to us for investigation and enforcement.

We and GIPSA share information with each other on a regular basis. For example, we received useful market information from GIPSA during our investigation into the lamb industry a few years ago, and during our investigation into the recent mergers. And we have been consulting with GIPSA in connection with its investigation of federal cattle procurement practices, and helped advise GIPSA in shaping and overseeing the recent economic studies on market concentration in the red meat-packing industry. We were also in contact with the USDA Advisory Committee on Agricultural Concentration, which was formed to comment and follow up on those studies.

USDA Advisory Committee Report

As some of you may have already heard, the Advisory Committee released its report just a short while ago today. The report confirms that livestock producer concern over the way the market currently functions is widespread and heartfelt. The report's central recommendation is to improve the balance of access, as between producers, feedlots, and packers, to market information on which to base their decisions.

Among the advisory committee's other recommendations is that the antitrust and fair trade laws should be vigorously enforced, including the Packers and Stockyards Act, and the merger laws as they relate both to packer mergers and railroad mergers.

Although all members of the advisory committee signed on to the report, several members also submitted their own minority views. One minority report, submitted jointly by several members, supports the majority report's principal recommendations but goes further in its recommendations regarding vertical integration and formula pricing.

We have obviously not had time to digest the new report. Many of its recommendations extend beyond the realm of antitrust. But the report is going to be of great interest to us, and we will be reviewing it closely and discussing it with the Department of Agriculture in the coming weeks.

We certainly agree with the advisory committee that the antitrust laws should be vigorously enforced. We are going to continue doing just that.

We also agree that railroad mergers should be carefully reviewed for their possible effects on competition. The Department of Justice does not make the final decision on whether to challenge a railroad merger, however. Last year, although the Clinton Administration had proposed that Congress give us the authority to review railroad mergers, under the Clayton Act, Congress decided instead to give the authority to the new Surface Transportation Board, transferring it from the now-defunct Interstate Commerce Commission.

We do have authority to submit our views to the Board. Earlier this week we filed a brief before the Board urging that it not approve the merger between the Union Pacific and Southern Pacific Railroads, on the basis that it would substantially reduce competition in hundreds of markets across the country.

Conclusion

I hope I have given you a good idea of the kinds of conduct that are prohibited under the antitrust laws -- for the livestock and meatpacking industries, just as they are for virtually every industry in this country. We in the Antitrust Division are committed to vigorous antitrust enforcement of the law in all sectors of our economy, and this sector is no exception.

If you have any questions about how the law applies in a particular fact situation, please call us. And if you have any information that you think is relevant to our enforcement activities, we want to hear about it. All conversations with us are held in strict confidence, and are not disclosed outside the Antitrust Division unless the source has made them public or, if a case is brought in court, under a properly authorized subpoena. If someone brings us facts that suggest the antitrust laws have been violated, we will investigate, and if a violation is found, we will prosecute.