

# Antitrust Chronicle

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# Agriculture

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# LETTER FROM THE EDITOR

Dear Readers,

Happy New Year!

We are what we eat. Farmers produce what we eat. But times are hard today for many farmers throughout the world. In the United States, for example, some farmers are going bankrupt at shocking record rates. In such an economic environment, a CPI Chronicle dedicated to agriculture and antitrust could not be more timely or relevant.

This Chronicle examines current competition and antitrust enforcement in agricultural markets both internationally and in the U.S. International discussions include China's evolving reviews, under its Anti-Monopoly Law, of agricultural sector mergers; Poland's recent efforts to enforce fair trading laws within its agricultural and feed supply markets; Colombia's aggressive enforcement of its antitrust laws in the agricultural sector, and the tensions these enforcement actions have generated.

In the U.S., our topics include the competitive impacts of ongoing consolidation in the agricultural biotechnology market; how information exchanges between agricultural sector companies can negatively impact competition; the anticompetitive impacts of John Deere's "Right to Repair" rules, especially in the digital agricultural information sector; and how reduced antitrust enforcement has negatively impacted farming communities.

We hope you enjoy this diverse collection of essays.

As always, thank you to our terrific panel of authors.

Sincerely,

CPI Team

Thomas J. Horton

Professor of Law, University of South Dakota

CPI Guest Editor

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## Consolidation and Concentration in Agricultural Biotechnology: Next Generation Competition Issues

By Diana L. Moss

The most recent wave of consolidation in agricultural biotechnology has sharply reduced the number of rivals from the “Big 6” to the “Big 3.” This level of consolidation, and resulting high concentration, in markets for genetic traits, genetically modified crop seed, and crop protection raises novel and significant issues for growers and consumers. These revolve around the effects of high concentration on innovation and the shift in the competition paradigm from rivalry at individual levels to competition between highly integrated, proprietary cropping systems that are fueled by ongoing acquisitions of digital farming assets. As the competitive effects of the latest round of mega-mergers unfold for growers and consumers, a key question is how antitrust enforcers will respond in addressing higher prices, less innovation, and risks to the security and diversity of the food supply system.

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## Information Exchange – An Underappreciated Anticompetitive Strategy

By Peter C. Carstensen

Information exchanges among competitors can seriously harm competition. Because such exchanges evidence an agreement, the appropriate legal question is whether the exchange involves a restraint on competition, i.e. a mutual forbearance. Exchanges among price takers in competitive markets do not imply any restraint on individual freedom of action, but when the parties are rivals for business, the risk is substantial. If the information exchanged is not consistent with what true competitors would share, it evidences an understanding to restrain competition. The leading cases, despite confusing references to the “rule of reason,” are consistent with that analysis. Central focus should rest on the kind of information being exchanged rather than an effort to identify a specific associated restraint.

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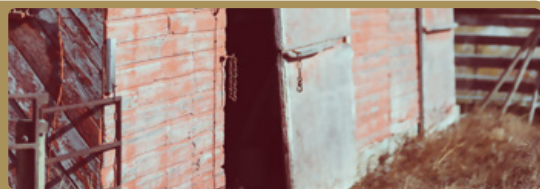


## Monopolizing the Digital Agricultural Information Market: John Deere’s Nefarious “Right to Repair” Scheme

By Thomas J. Horton & Dylan Kirchmeier

John Deere is the leading manufacturer of agricultural equipment in the American and North American markets, with market shares of approximately 53 percent of large farm tractors in North America, and 60 percent of the combine segment. Recently, John Deere sent shock waves through the American farming community when it announced a new policy of locking farmers out of the John Deere software on their equipment, so that farmers cannot repair or maintain their own machines, as they have done for decades. This article briefly discusses how John Deere’s repair tie-in may violate antitrust and consumer protection laws before turning to a different and more nefarious antitrust issue. John Deere now asserts that it solely owns the vast array of data gathered within the software in each of Deere’s machines. We discuss how collecting, controlling, and amalgamating this stupendous array of individual farm data is allowing Deere to attempt to monopolize the exploding market for digital agricultural information. We further discuss how John Deere may further be conspiring to monopolize that market through its digital agricultural information partnerships with such agricultural behemoths as Bayer/Monsanto, DowDupont, and BASF.

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## America Needs Farmers and Farmers Need Better Antitrust Law

By Max M. Miller

America’s farmers were instrumental in the passage of the nation’s first antitrust laws. The weakening of the United States’ antitrust enforcement, however, has contributed to the decline of the American farmer, who is squeezed by oligopolies on the input and output side of the farm. This has led to a lower share of the food dollar, diminished profits, and alarming rates of farm failures. The goals of the farmers pushing for the first antitrust laws were not simply to lower prices for consumers, but to balance power in agricultural markets to provide for their economic liberty and security. Antitrust practitioners should be listening to the challenges faced by farmers today and push for reforms to return competition to agricultural markets.

# SUMMARIES

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## Chinese Merger Control in the Agriculture Sector

*By Adrian Emch & Xie Lin*

In the 11 years of enforcement of the Anti-Monopoly Law, the Chinese merger control authorities have cleared over 40 transactions subject to remedies. In the agriculture sector, remedies were imposed in two “crop protection” cases (*Bayer/Monsanto* and *Dow Chemical/DuPont*), two potash cases (*Uralkali/Silvinit* and *Potash/Agrium*), and *Marubeni/Gavilon*. This paper analyses these cases, in particular to check how the various analytical steps in the merger review process have played out. Then, the paper examines if agriculture sectoral policies have surfaced in these cases, and how their influence has changed over time.

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## Carrot or Stick – Enforcing Fair Trading in Poland’s Food Supply Markets

*By Wojciech Dorabalski, Jacek Marczak & Paweł Wazniewski*

Despite relatively low concentration of food processing and retail, Poland’s agricultural sector is characterized by large imbalances in bargaining power. Early enforcement of unfair trade practices regulation unveiled a plethora of questionable practices on all levels of the supply chain. Placing the new powers with the Competition Authority shortened the learning period and generated significant case law in a short time span. This allowed for a fine-tuning of the regulation after only 2 years since its adoption. The paper describes the structure of Poland’s agricultural and food supply sectors and discusses the origins of UTP regulation. It also provides insights on the interplay of UTP rules with competition law.

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## Antitrust Enforcement and Government Interventions in Agricultural Markets – Case Study of Colombia

*By Juan David Gutiérrez & Andrés Felipe Suárez*

During the last 25 years, the Colombian competition agency has actively enforced antitrust laws in the agricultural sector. It is the antitrust authority in Latin America that has prosecuted the highest number of cases in agricultural markets. However, in Colombia, the enforcement of competition law has also collided with governmental mechanisms used to intervene these markets. This article traces the tensions between antitrust law and agricultural policies in Colombia, discusses how government agencies addressed these tensions, and explains the most common competition concerns of agricultural value chains that emerged in the competition authority’s decisions.

# WHAT'S NEXT?

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For February 2020, we will feature Chronicles focused on issues related to (1) **Data**; and (2) **Disruptive Innovation**.

## ANNOUNCEMENTS

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CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: [antitrustchronicle@competitionpolicyinternational.com](mailto:antitrustchronicle@competitionpolicyinternational.com).

### CPI ANTITRUST CHRONICLES MARCH 2020

For March 2020, we will feature Chronicles focused on issues related to (1) **Leadership EU**; and (2) **The China Edition**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden ([ssadden@competitionpolicyinternational.com](mailto:ssadden@competitionpolicyinternational.com)) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.





# CONSOLIDATION AND CONCENTRATION IN AGRICULTURAL BIOTECHNOLOGY: NEXT GENERATION COMPETITION ISSUES

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BY DIANA L. MOSS<sup>1</sup>



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# I. INTRODUCTION

As this article is written, the most recent wave of consolidation among large incumbent firms in the agricultural biotechnology sector will be essentially complete. Three major mergers – Bayer-Monsanto, Dow-DuPont, and ChemChina-Syngenta – have reduced the number of rivals from six players in the last few years to a tight oligopoly of three mega-firms, with BASF trailing in last place. The mergers, and the fundamental restructuring of U.S. agricultural biotechnology they have wrought, raise seminal issues for competition in the sector and adverse effects on growers and consumers, who potentially face even higher input and food prices, lower quality, less innovation, and higher risks to food security.

Similar to healthcare and communications, consolidation in the agricultural biotechnology sector has largely flown “under the radar” as enforcers, Congress, and the media focus on the high-profile digital technology markets. This disproportionate focus is unfortunate, as the agricultural biotechnology sector is poised to launch yet another phase of consolidation. These are acquisitions of smaller, innovative digital farming rivals that are also likely to fly under the radar as enforcers struggle to evaluate and challenge similar types of deals in the digital technology sector.

This article focuses on key competition issues that flow from sweeping consolidation that has produced the “Big 3.” It begins with a brief review of the startling pace of consolidation in the sector and high levels of concentration in the markets that comprise it. It then moves on to raise key questions about the effects of consolidation and high concentration on innovation. This is followed by the implications of the shift in the competition paradigm from rivalry at individual levels of genetic traits (“traits”), genetically modified (“GM”) crop seed, and crop protection (i.e. chemicals), to highly integrated, exclusive proprietary cropping systems that are now fueled by acquisitions of digital farming assets.

## II. A BRIEF TOUR OF CONSOLIDATION IN AGRICULTURAL BIOTECHNOLOGY

### A. *The Rise of GM Crop Seed*

The percentage of acreage planted with GM crop seed has increased dramatically since its introduction in the 1990s. In 2019, almost all corn (92 percent), cotton (98 percent) and soybean (94 percent) acreage was planted with GM varieties.<sup>2</sup> The traits that are incorporated into GM crop seed confer on plants a variety of characteristics such as herbicide tolerance, insect resistance, and other functional attributes (e.g. high oleic soybeans). These attributes are made possible by combining patented genetic events that often result from collaborations between agricultural biotechnology developers and embodied in cross-licensing agreements. Combinations of genetic events enable different plant traits, which often appear in multiples or “stacks” in GM crop seed.

Trait profiles have increased in complexity over time. This complexity is designed to combat growing resistance of weeds and insects to an aging mode of action, generates higher profit margins from higher value products, and purportedly generates higher yields for growers. The average number of traits in commercialized corn and cotton trait profiles increased from two to six and two to four, respectively, between 1995 and 2013. For example, Syngenta’s Agrisure Duracade 5222 corn trait profile contains five separate GM events developed by Syngenta, Monsanto, and Dow.<sup>3</sup> Those five events confer six different traits for herbicide tolerance, insect resistance, and metabolic characteristics. The percentage of U.S. acreage planted with stacked varieties has also increased. Only 1 percent of corn acres and 24 percent of cotton acres were planted with stacked varieties in 2000. By 2019, 80 percent of corn acres and 89 percent of cotton acres were planted with stacked varieties.<sup>4</sup>

<sup>2</sup> U.S. Dep’t. of Agric., Nat’l Agric. Stat. Serv., Acreage (June 30, 2001 and June 30, 2019) <https://downloads.usda.library.cornell.edu/usda-esmis/files/j098zb09z/0k225n39n/jw827p632/acrg0619.pdf>. In 2001, only 26 percent of corn acres, 69 percent of cotton acres, and 68 percent of soybean acres were planted with GM varieties.

<sup>3</sup> Event Name: 5307 x Mir604 x Bt11 x TC1507 x GA21 x MIR162, ISAAA, <http://www.isaaa.org/gmapprovaldatabase/event/default.asp?EventID=331> (last visited Nov. 26, 2019)).

<sup>4</sup> USDA, *supra* note 2.



## B. From the “Big 6” to the “Big 3” in Only a Few Years

The Big 3 agricultural biotechnology firms are the product of a spate of mergers between large incumbents over the last few years. The then Big 6 were the result of two previous waves of consolidation, one in the mid-1980s through the late 1990s and a second from the late 1990s through the mid-to-late 2000s.<sup>5</sup> Between 1985 and 2000, about 75 percent of the small to medium-size enterprises engaged in biotechnology research were acquired by larger firms.<sup>6</sup> In the second wave, Monsanto alone acquired almost 40 agricultural biotechnology firms and independent seed companies.<sup>7</sup> The most recent wave of consolidation is distinguished by the sharp reduction in the number of very large rivals in crop traits, GM crop seed, and crop protection, and a parallel spate of acquisitions of small digital farming startups.

Relative to other agricultural input sectors, the level of concentration and increases in concentration over time are the highest in crop seed. The market share of the four largest firms more than doubled to 54 percent between 1994 and 2009.<sup>8</sup> After completion of the Syngenta-ChemChina, (2018), Dow-DuPont (2017) and Bayer-Monsanto (2018) mergers, the Big 3 now account for the majority of output in the seed and traits markets for cotton, corn, and soybeans and.<sup>9</sup>

The significantly enhanced market power held by the Big 3, if exercised either unilaterally or in coordination with rivals, will be borne directly by growers and ultimately by consumers. Growers already pay persistently high prices for GM crop seed, even for earlier generation technologies. They also see little price transparency due to the practice of rolling technology prices into the total price of seed. This makes it harder for growers to compare seed costs over time.

Growers also see less or lower quality innovation. For example, the herbicide Roundup is, as a result of weed resistance, no longer as effective as it once was. The industry’s response to declining effectiveness of genetic technologies has been to develop more expensive, complex traits that combat resistance but do not improve yields. Growers have also seen the elimination of independent conventional and hybrid seed breeders. Industry sources reported in 2009, for example, that “[s]eed companies have either cut back on non-biotech offerings or have dropped them.”<sup>10</sup>

## III. COMPETITION AND INNOVATION IN AGRICULTURAL BIOTECHNOLOGY

### A. The “Concentration Drives Innovation” Fallacy

Contrary to long-standing claims that higher concentration is needed to spur investments in research and development (“R&D”), empirical analysis of the agricultural biotechnology sector supports the notion that concentration can actually stifle incentives to innovate. The U.S. Department of Agriculture Economic Research Service (“ERS”) observed in 2012, for example, that spending on R&D in GM crop seed and biotechnology between 1994 and 2010 grew 138 percent, the highest rate across agricultural input sectors.<sup>11</sup> The ERS reported that the four-firm concentration ratio in crop seed and traits increased from about 21 percent in 1994 to 54 percent in 2009.<sup>12</sup> At the same time, R&D intensity, as measured by

<sup>5</sup> See Diana L. Moss, *Competition, Intellectual Property Rights, and Transgenic Seed*, 58 S.D. L. Rev. 543, 551-52 (2013). See also Gregory D. Graff, Gordon C. Rausser & Arthur A. Small, *Agricultural Biotechnology’s Complementary Intellectual Assets*, 85 Rev. Econ. & Stat. 360-61 (2006).

<sup>6</sup> Keith Fuglie, John King, Paul Heisey & David Schimmelpfennig, *Rising Concentration in Agricultural Input Industries Influences New Farm Technologies*, AMBER WAVES (Dec. 3, 2012), <https://www.ers.usda.gov/amber-waves/2012/december/rising-concentration-in-agricultural-input-industries-influences-new-technologies/>.

<sup>7</sup> See Carl Pray, James F. Oehmke & Anwar Naseem, *Innovation and Dynamic Efficiency in Plant Biotechnology: An Introduction to the Researchable Issues*, 8 AgBioForum 52, 60 (2005); U.N. CONF. ON TRADE AND DEV., TRACKING THE TREND TOWARDS MARKET CONCENTRATION: THE CASE OF THE AGRICULTURAL INPUT INDUSTRY 5, 9-10 (Apr. 2006).

<sup>8</sup> Keith O. Fuglie, et al., *Research Investments and Market Structure in the Food, Processing, Agricultural Input and BioFuels Industries Worldwide*, U.S. Dep’t of Agric., Econ. Res. Serv. Rep. No. 130 (Dec. 2011), vi, [https://www.ers.usda.gov/webdocs/publications/44951/11777\\_err130\\_1\\_.pdf?v=0](https://www.ers.usda.gov/webdocs/publications/44951/11777_err130_1_.pdf?v=0).

<sup>9</sup> Letter from AAI, FWW, and NFU to Principal Deputy Assistant Attorney General Renata Hesse (May 21, 2016), [https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI-FWW-NFU\\_Dow-Dupont\\_5.31.16\\_0.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI-FWW-NFU_Dow-Dupont_5.31.16_0.pdf); Letter from AAI, FWW, and NFU to Acting Assistant Attorney General Andrew Finch (Jul. 17, 2017), [https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper\\_Monsanto-Bayer\\_7.26.17\\_0.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper_Monsanto-Bayer_7.26.17_0.pdf).

<sup>10</sup> Lynn Grooms, *Non-Biotech Soybean Seed: Is There Enough?*, CORN & SOYBEAN DIGEST (Apr. 1, 2009), <http://www.cornandsoybeandigest.com/non-biotech-soybean-seed-there-enough>.

<sup>11</sup> Fuglie, et al, *supra* note 8, at 16.

<sup>12</sup> *Id.*

the ratio of R&D investment to net sales, was 11 percent in 1994, increased to 15 percent in 2000, but declined to 10.0 percent in 2009.<sup>13</sup> Given consolidation over the last decade and the elimination of three of six rivals, the four-firm ratio in traits and GM crop seed is even higher and the decline in R&D intensity potentially commensurately greater.

As noted by the ERS, increases in concentration do not persistently lead to greater incentives to innovate. Moreover, “beyond some high level of concentration, further increases could actually reduce the incentive to innovate.”<sup>14</sup> A number of factors support this proposition. First, firms can appropriate returns from innovation more easily with less competition. Rather than stealing sales from rivals in more competitive markets, new product development with fewer rivals increases the risk that an innovator cannibalizes its own sales of existing products. This deters innovation.

With less competition, there is also less fear of losing to an innovative rival's new product with less competition, which dampens incentives to stay ahead of the innovation curve and enhances incentives to use intellectual property to shape or control competition. For example, well in advance of Roundup Ready 1 soybeans coming off patent in 2014, Monsanto attempted to switch farmers to the newly patented, marginally different, and more expensive Roundup Ready 2 soybeans.<sup>15</sup> This “hard switch” strategy met with some resistance, but apparently was successful, since only one generic soybean using the RR1 trait was introduced in 2015.<sup>16</sup>

## **B. Consolidation Eliminates “Parallel Path” R&D and Pro-Competitive Collaborations**

The U.S. Department of Justice (“DOJ”) and Federal Trade Commission Horizontal Merger Guidelines articulate concerns over the effects of mergers on R&D competition.<sup>17</sup> They explain that a merger may diminish innovation competition through curtailment of “innovative efforts below the level that would prevail in the absence of the merger.”<sup>18</sup> In the proposed merger of Applied Materials and Tokyo Electron, for example, the parties abandoned the deal after pushback from DOJ. The agency stated that the deal “...combined the two largest competitors with the necessary know-how, resources and ability to develop and supply high-volume non-lithography semiconductor manufacturing equipment.”<sup>19</sup> The DOJ also challenged the merger of Halliburton and Baker-Hughes, explaining that the merger would harm innovation by combining companies that “compete to...develop next generation technologies that will allow them to drill deeper and operate in ever-more challenging conditions.”<sup>20</sup>

The Guidelines explain that adverse effects on innovation are particularly likely when the merging parties are “two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction” and that “...[e]xplicit or implicit evidence that the merging parties intend to...curtail research and development efforts after the merger[...] can be highly informative in evaluating the likely effects of a merger.”<sup>21</sup> The “parallel path” R&D that is implicitly identified by the Guidelines is vitally important. Two leading economists explain, for example, that in pharmaceutical R&D “[t]echnological progress is best achieved in a field like pharmaceuticals when there is widespread dispersion of R&D initiatives both across companies and within them through the exploration of multiple technical paths.”<sup>22</sup>

Rivalry in agricultural biotechnology innovation is essential for maintaining incentives to continue existing and prospective product development programs. This is particularly true when the time required to perform R&D, field-test, obtain regulatory approvals, and market new technology to growers collectively create a long pipeline to commercialization and market penetration. Before the mergers of Dow-DuPont and

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<sup>13</sup> *Id.* at 15.

<sup>14</sup> James. M. MacDonald, *Mergers and Competition in Seed and Agricultural Chemical Markets*, AMBER WAVES (Apr. 3, 2017), <https://www.ers.usda.gov/amber-waves/2017/april/mergers-and-competition-in-seed-and-agricultural-chemical-markets/>.

<sup>15</sup> See Diana L. Moss, *Generic Competition in Transgenic Soybeans*, AM. ANTITRUST INST. (Aug. 16, 2011), <http://www.antitrustinstitute.org/sites/default/files/AAI%20Paper%20generic%20comp%20TG%20seed8.16.11.pdf>; see also Daryl Lim, *Living with Monsanto*, 2015 MICH. ST. L. REV. 559, 584 n.134 (2015).

<sup>16</sup> The University of Arkansas released UA 5414RR. See Seedworld.com (June 2015), 15, [http://www.seedworld.com/flipbook\\_june2015/files/inc/c409c86a78.pdf](http://www.seedworld.com/flipbook_june2015/files/inc/c409c86a78.pdf).

<sup>17</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter GUIDELINES], § 6.4.

<sup>18</sup> *Id.*

<sup>19</sup> Press Release, U.S. Dep't of Justice, Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy (Apr. 27, 2015), <https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department>.

<sup>20</sup> Complaint at 2, *United States v. Halliburton Co.*, 1:16-cv-00233-UNA (D. Del. Apr. 6, 2016), <https://www.justice.gov/atr/file/838661/download>.

<sup>21</sup> GUIDELINES, *supra* note 17, at 2.2.1.

<sup>22</sup> William S. Comanor & F.M. Scherer, *Mergers and innovation in the pharmaceutical industry*, 32 J. HEALTH ECON. 106, 107 (2013).

Bayer-Monsanto, each standalone company had strong capabilities to successfully innovate. For example, the Monsanto and Bayer R&D pipelines were associated with specific assets and features in genetics, plant breeding, and germplasm programs.<sup>23</sup> R&D “synergies,” which can translate directly to cuts in R&D, were identified as major categories of cost savings in both mergers, highlighting the Guidelines’ admonition that the loss of R&D competition and evidence of curtailing R&D efforts factor prominently into evaluating the likely effects of mergers.<sup>24</sup>

Consolidation also eliminates opportunities for independent rivals to engage in pro-competitive R&D collaborations to develop new stacked trait profiles. The effects of these more limited collaboration opportunities among a tight oligopoly of rivals could have a number of effects. These include refusals to license technology or to license it on discriminatory terms. With a tight oligopoly, there are also stronger incentives to tacitly agree, for example, on which firms specialize in certain crops and traits. This could lead to trait profiles that do not meet the growing region or climate-appropriate needs of growers, such as resistance to insects that are not regionally common or tolerance to herbicides that they do not intend to use.

The significant loss of R&D competition from the recent spate of agricultural biotechnology mega-mergers undercuts arguments that combining R&D pipelines can produce significant countervailing efficiencies. This very concern was at the center of the court’s decision to uphold the DOJ’s challenge of the merger of health insurers Anthem and Cigna: “[T]he district court reasonably determined that Anthem failed to show the kind of ‘extraordinary efficiencies’ that would be needed to constrain price increases in this highly concentrated market, and to mitigate the threatened loss of innovation.”<sup>25</sup>

## IV. EFFECTS OF INTEGRATED, PROPRIETARY CROPPING SYSTEMS THAT NOW DOMINATE THE INDUSTRY

### A. The Shift in Competition Paradigm

The most recent series of agricultural biotechnology mergers have created large, integrated, proprietary cropping systems of traits, GM crop seed, and crop protection. Such systems were evident as early as first-generation technologies, such as Monsanto’s early generation glyphosate herbicide Roundup and Roundup Ready 1 soybeans. Even then, the exclusive nature of systems was evident, as one farmer aptly noted: “[I] can’t mix chemicals with other companies’ products to remedy Roundup resistance.” More recently, Monsanto extended its newer generation RR2 soybean platform to encompass more complex traits and herbicides with its Roundup Ready 2 Xtend dicamba-tolerant integrated cropping system. Dow-DuPont made a similar move with its Enlist 2,4-D tolerant system.

Recent merger proposals are motivated, among other reasons, by the drive to build out integrated, proprietary systems that do not interoperate with rivals’ products. This goal was apparently behind Monsanto’s failed bid for Syngenta which “...would [have] enable[d] the combined company to deliver integrated and sustainable solutions across all the major technology-driven platforms of breeding, biotechnology, crop protection, microbials and precision agriculture.”<sup>26</sup> Monsanto and Bayer also touted integrated solutions as a major strategic benefit of their proposed merger.<sup>27</sup>

Integrated, proprietary systems raise a number of troubling issues. First, economic evidence from soybeans and cotton indicates that seed prices under vertical integration tend to be higher than under licensing arrangements across firms. This suggests that vertical integration may increase the exercise of market power and firms’ ability to extract economic benefits from seed dealers and farmers.<sup>28</sup> Second, integration

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23 Annual R&D Pipeline Review, Monsanto (Jan. 2017), 13-15, [https://monsanto.com/app/uploads/2017/05/2017.01.05\\_q1f17\\_mon\\_pipeline\\_update.pdf](https://monsanto.com/app/uploads/2017/05/2017.01.05_q1f17_mon_pipeline_update.pdf).

24 DuPont and Dow to Combine in Merger of Equals, (Dec. 15, 2015), 7, <http://www.dow.com/en-us/investor-relations/investor-presentations>; Creating a Global Leader in Agriculture (Sept. 14, 2016), 20, <https://www.investor.bayer.de/en/handouts/archive-investor-handouts/>.

25 *United States v. Anthem, Inc.*, 855 F.3d 345, 364 (D.C. Cir. 2017).

26 Letter from Hugh Grant, CEO, Monsanto (Jun. 6, 2015), <https://www.syngenta.com/global/corporate/SiteCollectionDocuments/pdf/media-releases/en/monsantoletters-2015.pdf>. Note that this presentation is no longer accessible.

27 Creating a Global Leader in Agriculture, *supra* note 24, at 10.

28 Kyle W. Stiegert, Guanming Shi & Jean Paul Chavas, *Innovation, Integration and the Biotechnology Revolution in U.S. Seed Markets*, CHOICES MAGAZINE (2nd Q. 2010), <http://farmdoc.illinois.edu/policy/choices/20102/2010202/2010202.pdf>.



enhances both the ability and incentive to bundle proprietary products in proprietary systems that do not interoperate with rival technologies.<sup>29</sup> This is likely to raise entry barriers for unintegrated rivals competing at standalone levels such as seeds or crop protection and that cannot enter at multiple levels. Such smaller rivals may be victims of exclusionary conduct, for example, if the Big 3 induce distributors to accept bundled products.

A third problem is that proprietary systems of integrated, proprietary technologies shifts the competitive paradigm from competition at the individual levels of traits, GM crop seed, and crop protection to competition between systems. Arguably, a sector dominated by only three large firms will not provide sufficient head-to-head competition between systems to facilitate beneficial market outcomes. This poses significant risks for growers, who could be locked into single proprietary cropping systems at higher prices, with limited flexibility and choice. It would also harm consumers, who could pay higher prices and lose choice in how their food is grown and sourced.

## ***B. The Role of Digital Farming Acquisitions in Fostering Integrated, Proprietary Systems***

Digital farming is one of the most innovative areas at the intersection of agriculture and big data. The field of companies that specialize in agricultural data analytics and intelligence has expanded over the last decade. Digital farming is defined as the use of “[e]xtensive data collection and computation” and “[p]redictive analytics” . . . to provide data-based insights to optimize field-specific decision-making.”<sup>30</sup> It encompasses data collection through satellite or other aerial monitoring, on-the-ground sensors, historical crop yield data, weather data, and soil databases; and data capture and analysis. Collectively, these functions facilitate decision-making on what varieties growers should plant, appropriate nutrients, plant protection, and when and how to optimize a harvest.<sup>31</sup>

Digital farming features centrally in the mergers that have produced the Big 3. Bayer and Monsanto explained that their merger would enable the buildout and strengthening of a digital farming platform that would generate numerous benefits, including “convenience, improved sourcing, improved yields, optimized inputs, and sustainable farming.”<sup>32</sup> While touted as innovation, these claims are in reality a response to a need to combat flagging yields and resistance with more complex and expensive products.

Farming data is quickly becoming a critical input for the Big 3. As one scholar wrote: “By amassing huge quantities of previously proprietary, private, or untapped farming data, companies are gaining a privileged position with unique insights into what farmers are doing around the clock, on a field-by-field, crop-by-crop basis[,] into what is currently a third or more of the U.S. farmland.”<sup>33</sup> The integration of traits, GM crop seed, and crop protection are inextricably linked to digital farming. For example, digital farming will likely enhance incentives to amass and appropriate valuable farm data for potential use as a strategic competitive asset. Leveraging data across integrated, proprietary cropping systems is likely to strengthen them and increase the lock-in effect for growers.

With a tight oligopoly, the Big 3 have stronger incentives to appropriate data from farmers through terms and conditions of licensing and technology agreements. It comes as no surprise that the Big 3 have begun to sweep up digital farming startups. One industry commentator noted that “[f]ollowing the recent purchase of Climate Corp. [in 2013], Monsanto is currently the most prominent biotech agribusiness to buy into big data.”<sup>34</sup> Other large biotechs have joined the acquisition spree. In 2017, BASF made a bid to acquire U.S. based ZedX, a leader in digital agriculture intelligence. Also in 2017, DuPont agreed to acquire U.S.-based Granular, a “leading provider of software and analytics tools that help farms improve efficiency, profitability and sustainability.”<sup>35</sup> Such acquisitions could well follow in the path of the largely uninterrupted string of acquisitions of startups by the largest digital technology rivals. Had enforcers more carefully scrutinized and potentially challenged some of those transactions, such startups could potentially have grown into significant rivals.

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<sup>29</sup> Letter to Andrew Finch, *supra* note 9.

<sup>30</sup> Creating a Global Leader in Agriculture, *supra* note 24, at 11.

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *Id.* at 10-12.

<sup>33</sup> Isabelle M. Carbonell, *The Ethics of Big Data in Big Agriculture* 5 INTERNET POLICY REVIEW 2 (Mar. 31, 2016), <https://policyreview.info/articles/analysis/ethics-big-data-big-agriculture>.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> DuPont Acquires Ag Software Company Granular to Accelerate Digital Ag Strategy and Help Farmers Operate More Profitable Businesses, DUPONT (Aug. 8, 2017), <http://www.dupont.com/corporate-functions/media-center/press-releases/dupont-acquires-ag-software-company-granular-to-accelerate-digital-ag-strategy.html>.

## V. CONCLUSIONS

The rapid pace of early innovation in the agricultural biotechnology sector was driven by competition. Much of that is gone, with the collapse of the industry into the Big 6, and now the Big 3. Consolidation has largely been allowed to proceed by antitrust enforcers, either outright or with potentially ineffective remedies.<sup>36</sup> This has created entities with the ability and incentive to exercise significant market power, to the detriment of growers, consumers, and the safety, security, and diversity of the food supply system. The loss of R&D competition, coupled with the fundamental shift to integrated, proprietary cropping systems limits choice for growers, raises input prices for traits, GM crop seed, and crop protection, and will likely harm consumers.

As these effects become apparent, the key question is how antitrust enforcement will respond. With merger control all but exhausted in controlling consolidation, the avenues available to enforcers include bringing claims regarding alleged exclusionary conduct or anticompetitive coordination against any or all of the Big 3. As with other sectors that are undergoing the same types of sea-change, we wait to see how aggressive enforcers will be in promoting competition and how legislators choose to address competitive problems through new proposals to strengthen the antitrust laws to support competition and protect growers and consumers.

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36 AAI Says Government Remedy in Monsanto-Bayer Merger Raises Significant "Execution Risk" (May 29, 2018), <https://www.antitrustinstitute.org/work-product/aai-says-government-remedy-in-monsanto-bayer-merger-raises-significant-execution-risk/>.



# INFORMATION EXCHANGE – AN UNDERAPPRECIATED ANTICOMPETITIVE STRATEGY

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# I. INTRODUCTION

Information exchanges require an understanding among the parties to exchange information. As a result, the first element of a Sherman Act conspiracy exists. But does such an exchange constitute a “restraint of trade,” the second element of a violation of the Sherman Act? The case law governing such exchanges has wobbled between “*per se*” condemnation and various forms of a “rule of reason” review. The resulting muddle results from the lack of clear differentiation between elements of a Section 1 offense and the standard for judging the legality of a “contract, combination. . . or conspiracy in restraint of trade...” Properly analyzed, the question in these cases is whether the agreement includes a “restraint” on the competitive freedom of the parties to the exchange. If it does, then it should be *per se* illegal. But not all exchanges justify such an inference. Consequently, the underlying question is whether it is “reasonable” to conclude that an exchange includes a restraint.

Recently, information exchange has emerged as a highly visible issue in antitrust law. The advances in computing technology have vastly increased the capacity for data collection and processing. The current litigation involving poultry and pork is the most immediate example, but the competitive concerns run across a wide range of markets. Generally, information exchange agreements are an increasing source of potential competitive harm. Hence, competition law should focus more on their merits and not look for some specifically defined additional anticompetitive agreement.

Part II illustrates the contrasting competitive implications of information exchanges. Part III explains the potential competitive effects of information exchanges in different market contexts. Part IV argues that the substantive outcomes in the leading cases are consistent with a focus on whether the facts reasonably supported an inference of restraint. Finally, Part V briefly identifies the evidence needed to prove that an exchange includes a restraint on competition as well as discussing the standards for reasonable information exchange.

## II. THREE TYPES OF INFORMATION EXCHANGE

Three examples of information exchange provide context for this discussion.

First, in 1921, the Supreme Court condemned the information exchange among the members of the American Hardwood Manufacturers’ Association.<sup>2</sup> The members agreed to provide daily reports of sales made and goods shipped with much detail, and provide monthly reports on inventory and production based on classifications “prescribed in the plan.”<sup>3</sup> Price lists were filed monthly and members had to submit to periodic inspections to ensure the comparability of the reports.<sup>4</sup> The secretary, F. R. Gadd, collated and analyzed the data providing members with weekly and monthly reports showing inventory, prices, shipments, and sales along with an evaluation of the market.<sup>5</sup> The Court observed that guided by Mr. Gadd, the members restricted production with the result that prices for flooring increased despite a significant decline in demand.<sup>6</sup> The Court found that this agreement contained a restraint of trade:

Genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals . . . ; they do not contract. . . to submit their books to the discretionary audit, and their stocks to the discretionary inspection, . . . for the purpose of successfully competing . . . , and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a “harmonized” estimate of the market as it is, and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors, but is . . . a combination to restrict production and increase prices in interstate commerce, and . . . therefore a direct restraint upon that commerce . . . <sup>7</sup>

Second, in the late 1960s, as a young attorney at the Antitrust Division, I attended family reunions in rural Iowa. The family were mostly farmers. After a big meal, my farming cousins would stand around exchanging detailed information about their livestock and discussing future prices for cattle and hogs. The information exchanged included their current “inventory,” when they expected to bring it to market, and what

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<sup>2</sup> *American Column & Lumber v. United States*, 275 U.S. 377 (1921).

<sup>3</sup> *Id.* at 394-395.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 405-407, 409.

<sup>7</sup> *Id.* at 410.

options might increase the amount they would receive, or how many steers or hogs to raise. While less formal than the Hardwood Association, this exchange of forward-looking information was the result of an understanding among these farmers to exchange detailed business information. Neither I nor, I am confident, any other observer of this information exchange would have regarded it as creating a restraint on competition.

Third, currently, Agri Stats is collecting detailed, often plant specific, information based on standardized criteria from most poultry integrators and pork packers. It then does an extensive analysis of this data and provides frequent detailed reports to the participants. The information allegedly includes details of “inventory,” i.e. the number of chickens or hogs being raised, as well as details of costs of production, current production, and sales data. This allows each participant to compare its performance with that of other producers. Further, the participants allegedly can identify specific other firms despite the nominal anonymity of the data. This allows each producer to verify what other participating producers are doing and will be capable of doing in the near to intermediate future. The firms agree to provide information, and only those firms get to see the reports.

A series of pending antitrust cases in poultry have contended that the integrators have colluded to limit production, exploit the farmers who raise the poultry, and the workers whom these firms employ.<sup>8</sup> These cases allege an explicit restraint beyond the exchange of information itself. In the pork packing market, there are also a group of complaints that similarly assert that the pork packers had agreed to some specific reduction in output.<sup>9</sup> Thus, the cases so far have focused on assertions of specific conspiracy to control output, wages, or growers, and characterize the exchange of information as a “facilitating device” that advances the underlying conspiracy. The court hearing the initial poultry output control case has upheld the complaint, finding that the allegation of a conspiracy to restrict output was “plausible.”<sup>10</sup> In contrast, the district court overseeing the pork case, concluded that the allegations of a specific agreement to restrict output were not sufficiently plausible.<sup>11</sup> The Court reached that decision despite overall industry data showing a decline in the number of hogs being processed and an increase in price of pork products.

### III. THE COMPETITIVE IMPLICATIONS OF INFORMATION EXCHANGES

Standard micro-economic price theory assumes that all market participants have full and complete knowledge of supply and demand. Hence, a simplistic view of the model would suggest that any agreement to improve information would be “procompetitive” and so unobjectionable. Of course, this is not in fact the case. Some information exchange is anticompetitive while other is consistent with improving market efficiency. The key distinction is the nature of the relationship of market participants to each other.

#### A. Purely Competitive Markets

A purely competitive market in which many buyers and sellers deal in homogeneous goods means that no individual can affect market prices by strategic behavior. Each is a “price taker.” Improved information makes everyone better able to anticipate changes in supply and demand. Thus, when my cousins discussed future cattle and hog prices, they were collectively assessing the available information about demand and supply, short and longer term, as bases for their individual decisions about when to sell livestock and how much to invest in new animals. Sharing information did not imply any commitment about what anyone would do with respect to buying or selling livestock because no individual’s decision would have any effect on the price obtained by another.

Thus, economic theory and business reality combine to demonstrate that in markets with large numbers of participants the market process is improved with extensive sharing of information. Such information serves only to enhance the capacity of market participants. There is no implicit or explicit objective to control competition.

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<sup>8</sup> See, e.g. *In re Broiler Chicken Antitrust Litigation*, 290 F.Supp.3d 772 (N.D. Ill, 2017) (upholding complaint charging restraint of trade in the broiler industry).

<sup>9</sup> *In re Pork Antitrust Litigation*, 2019 WL 3752497 (D. Minn. 2019) (dismissing complaints charging restraint of trade in the pork industry with leave to amend). One difference between the pork and poultry cases is that the primary pork complaint named Agri Stats as a defendant while the primary poultry complaint did not.

<sup>10</sup> *In re Broiler Chicken Antitrust Litigation*, 290 F. Supp. 3d at 802.

<sup>11</sup> *In re Pork Antitrust Litigation*, 2019 WL 3752497 at \*9; the court did permit the plaintiffs to file an amended complaint if they wished.

## B. Rivalrous Markets

A rivalrous market is one in which competitors are rivals in the sales or purchases of goods or services.<sup>12</sup> The price and output decisions of each participant directly affect other market participants. Information about market conditions is still essential to such firms, but the fact that they are rivals means that it can serve anticompetitive as well as competitive functions. Knowing exactly what one's rival is doing can facilitate increased competition when used to take away customers. But no rival would intentionally disclose that kind of information if it were to be used that way. On the other hand, if the rival is expected (trusted) to use such knowledge to restrain its competition in ways that reduce or eliminate the risks of rivalry, then the shared information will produce anticompetitive outcomes.

An illustration comes from the *Container Corporation* case.<sup>13</sup> There, competing box makers would disclose to each other the current price they were charging to a customer when a rival, seeking to solicit that business, requested the information. This information allowed the competing rival to know what price it could beat. There were overall a significant number of competing box makers and entry barriers were relatively low, but with respect to any one buyer only a limited set of producers were plausible competitors.<sup>14</sup> Although prices were gradually declining and there was excess capacity, there was new entry.<sup>15</sup> These facts are consistent with prevailing prices being sufficiently above cost that it was rational for new entry into the market while existing competitors held back capacity to accommodate, in part, the expansion of potential supply resulting from the entry. The price disclosure made sense only if the rival would use it to restrain its incentive to cut prices. This did not require a buyer specific price agreement; it only required a tacit understanding that the pricing information would not be used to ratchet up price competition. While the decision is not well explicated, it is evident that the exchange was unlawful because the economic facts demonstrated competitive harms and the implausibility of the specific exchange having any goal other than facilitating some kind of tacit understanding about how rival box makers would compete for new business.

In contrast, the *Cement Manufacturers' Association* provided information to its members about outstanding future delivery contracts for the purchase of cement.<sup>16</sup> Such contracts were options to buy cement at a fixed price in the quantity necessary to handle some identified project. Because a buyer could obtain several such options for the same job, it could obtain cement for various uses in significant quantity at a lower price if the market price increased. By sharing information about such contracts, a member of the association could refuse to deliver cement if it appeared that the buyer was not providing the cement to the job which the contract specified. Manifestly, this reduced the ability of buyers to avoid price increases; but the logic of the situation was that each manufacturer had to decide whether or not to sell regardless of what others did. Hence, these were unilateral, but often similar, decisions. Indeed, analogous information is what credit bureaus produce on which sellers rely in making credit decisions.

Thus, for information exchange among rivals, the crucial question is whether it facilitates the efficient operations of the market or whether it operates to create a tacit (or express) understanding that the parties will modify or restrain their competition in reliance on rivals doing the same thing. The question is whether it is "reasonable" for genuine competitors to exchange specific types of information. If it is not, then the inference is that the exchange is to implement a restraint on the competitive freedom of the participants in the exchange. Indeed, the specific restraint itself can remain unarticulated and tacit.

## IV. LEGAL ANALYSIS – NOT RULE OF REASON, BUT REASONABLE INFERENCE OF RESTRAINT

### A. General Principles

Courts and commentators have failed to distinguish between the question of whether a restraint on competition exists and whether such a restraint is lawful if it exists. The second issue is the one normally addressed under the "rule of reason", which includes a "*per se*" condemnation of naked restraints of competition such as cartels. An information exchange that results in a restraint on competition is a naked restraint of cartelistic character since it operates to eliminate competition among firms having no other economic relationship with each other.

<sup>12</sup> Rivalry can result when there are few competitors producing homogenous goods for sale to a distinct set of buyers, or when the goods are differentiated but substitutes exist such that each firm has a distinct demand but one that other producers can affect just as it can affect their demand curves.

<sup>13</sup> *United States v. Container Corp.*, 393 U.S. 333 (1969).

<sup>14</sup> *Id.* at 336.

<sup>15</sup> *Id.*

<sup>16</sup> *Cement Manufacturers' Assn. v. United States*, 268 U.S. 588 (1925).



In the case of information exchange, there is no question of the existence of an agreement. A brief review of the leading cases shows that in fact the resolution of the question of the existence of a restraint is what explains the outcomes in the cases. Such decisions are often nuanced and fact dependent and so easily described as applications of a “reasonableness” test, i.e. whether the inference of restraint is reasonable under the facts.

As previously described, the *American Column* case involved the kind of exchange of information combined with a set of activities including meetings that was consistent with an understanding that the rivals would restrain their competition among themselves. In contrast the early *Cement Manufacturers’* case involved the exchange of information that allowed each participant to determine whether it would continue to supply particular buyers. Certainly, in retrospect given the facts in the *Cement Manufacturers* case that showed a high level of coordination among the cement makers to enforce a uniform fixed price, the decision to allow the exchange of information may seem questionable.<sup>17</sup>

The *Maple Flooring* case, decided at the same time as *Cement Manufacturers*, similarly upholds the collection and distribution of information, here railroad rate tables based on a single base point and average cost and past price information.<sup>18</sup> The Court appears to have assumed that the association included only a modest share of industry production.<sup>19</sup> Of course, with some knowledge of the prices for the flooring and shipping, each manufacturer could estimate the prices of its competitors. Moreover, there seem to have been a great many competitors outside the association which moves the overall market away from the rivalrous end of the spectrum.

In condemning the information exchanged on current prices, the *Container Corporation* majority looked at the kind of information exchanged. Agreeing to tell your rival for specific business the price it needed to take the business would be irrational without some implicit or explicit understanding about how that information would be used. The overall economic facts of the industry, as discussed earlier, are consistent with the conclusion that the agreed exchange of pricing information made it possible for incumbent firms to retain higher prices by inhibiting price competition.

In *U.S. Gypsum*, a criminal conspiracy case, the Court rejected the effort by wall board manufacturers to justify their agreement to exchange specific price information.<sup>20</sup> These manufacturers claimed that they needed to do this to avoid claims of price discrimination under the Robinson-Patman Act which allowed selective discounts only if made in response to a rival’s offer of a lower price. This exchange meant that discounts were disclosed between competitors with the inevitable effect to making it irrational to offer a discount. It followed that the information agreement included an understanding that the participants would not engage in discounting.

Because *Gypsum* involved a balancing of factors, the Court declared that the “*per se*” rule did not govern the legality of exchange of information.<sup>21</sup> While the Court was indeed correct to recognize that the determination of whether an exchange of information incorporated a restraint on the parties’ freedom of competitive action required a “reasonable” assessment of conflicting facts and inferences, it is unfortunate that it rejected the *per se* standard for legality. This misdirects the inquiry because it implies that an exchange which has a purpose of restricting competition may somehow remain lawful. This is an illustration of the poverty of antitrust’s doctrinal language.

The problem most recently surfaced in the *Exxon* case in the Second Circuit where the exchange involved detailed current salary information and discussions of salary budgets using job descriptions for one participant as benchmarks.<sup>22</sup> The court explicitly concluded that such an exchange in itself was subject to a “rule of reason.”<sup>23</sup> The opinion then focused on market definition, existence of market power, and whether demand for workers was inelastic.<sup>24</sup> Only then did the court consider the nature of the information exchanged and found: “The characteristics of the data exchange in this case are precisely those that arouse suspicion of anticompetitive activity under the rule of reason.”<sup>25</sup> Unfortunately, the

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<sup>17</sup> *FTC v. Cement Institute*, 333 U.S. 683 (1948) (industry by agreement used basepoint pricing system to maintain uniform prices).

<sup>18</sup> *Maple Flooring Mfrs. v. United States*, 268 U.S. 563 (1925).

<sup>19</sup> *Id.* at 565.

<sup>20</sup> *United States v. U.S. Gypsum*, 438 U.S. 422 (1978).

<sup>21</sup> *Id.* at 441, n. 16.

<sup>22</sup> *Todd v. Exxon*, 275 F.3d 191, 196-198 (2<sup>nd</sup> Cir. 2001).

<sup>23</sup> *Id.* at 198.

<sup>24</sup> *Id.* at 199 -211.

<sup>25</sup> *Id.* at 213.

use of the reasonableness label led the trial court, on remand, to focus on market definition rather than the potential function of the exchange and so dismiss the case on summary judgement.<sup>26</sup> Had the case focused on the question of whether the information exchange agreement reasonably implied an understanding that the parties would standardize their wages and so reduce competition for workers, the outcome might well have been different.

### ***B. The Current Poultry and Pork Cases***

Assuming the correctness of the allegations in the poultry and pork cases, the information collected and analyzed by Agri Stats goes well beyond what any rational rival would disclose to its competitors absent an understanding that it would be used to restrict competition. This understanding might be explicit and so constitute a distinct element of the overall agreement as the trial court found plausible in *Poultry*, or it might be simply a matter of mutual, tacit recognition that exchanging this kind of information among rivals assumes each would restrain its competitive conduct to increase the profitability of all participants. In *Pork*, the court did not find the allegations of a second agreement “plausible” and so dismissed the complaint even though the exchange of information allegedly correlated with a reduction in production and higher prices to consumer. Exactly the effects that one would predict if the exchange included a restraint on competition.

What is missing in these two decisions, and presumably from the complaints themselves, is a focus on the legality of the information exchange itself. Such exchanges necessarily require an agreement among the parties to share data. It seems “plausible” that if these agreements require parties to exchange the kind of detailed information that no true competitor in a rivalrous market context would reveal, then the parties are “united in an agreement, express or implied, to act together and pursue a common purpose under a common guide. . . to restrict production and increase prices in interstate commerce.”<sup>27</sup>

Despite the logic of focusing on the inferences of restraint inherent in the agreement to exchange information, the plaintiffs in both the poultry and pork cases apparently felt it necessary to assert that there is a second agreement to restrict output. Exactly why this compulsion exists is not clear. One likely explanation is that the case law seems to impose a “rule of reason” standard that would require as in *Todd* on remand an assessment of market definitions and proof of some high level of market power even though that was not a feature of *American Column* or *Container Corporation*.

## **V. PROVING RESTRAINT INHERENT IN AN INFORMATION EXCHANGE AND REMEDY**

To violate the Sherman Act, the agreement must involve a restriction on the economic freedom of the parties to pursue their own rational economic self-interest. Proof of such a restraint involves two kinds of evidence.

The first is the nature of the information exchanged itself. Sharing detailed firm specific data, especially forward looking, is unnecessary to enhance general market knowledge. Rather, the likelihood is that it is part of a project to restrain competition in some way even if that restraint remains largely unarticulated. The information itself makes competitive actions by the participant unlikely because their rivals can anticipate the conduct. Such information also provides confirmation of adherence to the restraints on competitive freedom. The basic test is whether this is the kind of information that true competitors would reveal to their rivals.

The second element is the external assessment of the market including both its structure and specific data about prices and volumes. When there is ambiguity as to the legitimacy of the information exchange, evidence of effects on output and price provide important insights as illustrated in *Container Corporation*, but not in the misleading way that *Todd* seems to require. For example, if the parties do not use existing capacity to expand output as prices raise and are exchanging detailed information about the use of capacity, then the inference that the agreement incorporates at least a tacit understanding to restrain competition is compelling.

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<sup>26</sup> *In re Compensation of MPT Employees Antitrust Litigation*, 2008 WL 38876619 (D. N. J. 2008).

<sup>27</sup> *American Column* at 275 U.S. 310.

In defining reasonable exchanges the challenge is again to differentiate between that information which is relevant to gaining a better sense of the overall market conditions and that which primarily serves the interest of the rivals in modifying their competition. The Health Guidelines issued by the DOJ and FTC provide benchmarks.<sup>28</sup> The EU has very similar standards.<sup>29</sup> Both require sharing only of past information that reflects averages and does not provide individual firm data however masked. These standards can provide guidance both in establishing information exchange programs and in evaluating the legality of existing programs. Moreover, they also provide a standard for injunctive relief where some of the information exchanged may be justifiable.

## VI. CONCLUSION

Better antitrust doctrinal terminology would provide a clearer basis to evaluate the lawfulness of information exchanges. The pending poultry and pork cases illustrate the ways in which current doctrine governing information exchange misdirect the focus of inquiry away from the merits of the exchange itself. The increasing significance of information exchanges as a means of achieving restraints on competition create a compelling need to define more exactly the issues that need resolution in evaluating the merits of such conduct. The central question is whether an exchange of information entails at least an implicit commitment by the parties to restrain their competition with each other. If it does, the exchange is itself unlawful. There should be no need to show a second, related express agreement to restrict competition.

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28 U.S. DEPT. OF JUSTICE, AND F.T.C., STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, 50-52(1996) available at [https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements\\_of\\_antitrust\\_enforcement\\_policy\\_in\\_health\\_care\\_august\\_1996.pdf](https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf).

29 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, ¶¶55 -110 (2011) available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.



# JOHN DEERE'S ATTEMPTED MONOPOLIZATION OF EQUIPMENT REPAIR, AND THE DIGITAL AGRICULTURAL DATA MARKET – WHO WILL STAND UP FOR AMERICAN FARMERS?

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# I. INTRODUCTION

Deere & Company (“Deere”), better known as “John Deere,” is the leading manufacturer in the North American agricultural equipment market, with market shares of approximately 53 percent of large farm tractors in North America, and 60 percent in the combine segment.<sup>2</sup> Recently, Deere sent shock waves through the American farming community when it announced a new policy with the effect of locking farmers out of the software used in Deere equipment. Deere’s lockout policy prevents farmers from repairing and maintaining their own machines, as they have done for decades.

This article briefly discusses how Deere’s repair policy may violate antitrust and consumer protection laws, before turning to a discussion of the potential impact of Deere’s policy on digital farming. Deere asserts that it owns data gathered from its machines’ software. We discuss how Deere may be attempting to monopolize the growing digital agriculture market by collecting, controlling and amalgamating farm data from its equipment’s software. We further discuss how Deere may be conspiring to monopolize digital farming markets through its partnerships with companies such as Bayer/Monsanto, DowDupont, and BASF.

## II. DEERE’S REPAIR POLICY

For centuries, American farmers, like their counterparts throughout the world, have frequently repaired their own agricultural equipment and machinery, or taken it to local shops for repair.<sup>3</sup> Unfortunately, Deere is seeking to change this. Deere is the leading supplier of agricultural machinery in the United States, with an approximate North American market share of 53 percent for large tractors and 60 percent for combines.<sup>4</sup> Deere has begun installing software in its equipment (the “Service Advisor” system) that prevents farmers from running equipment unless and until they have the equipment repaired by a licensed Deere service representative.<sup>5</sup> This policy effectively prevents farmers from performing repairs or maintenance on Deere equipment themselves, or from having a local third-party service provider repair that equipment for them.<sup>6</sup>

By way of background, Deere’s products have computerized controllers that are wired into their “can bus” systems.<sup>7</sup> Problems with Deere products are diagnosed through software error codes. Many of these error codes are purely software-based. Often, it is safe to operate the equipment even with an error code. Now, however, an error code turns on an alarm in the cab, along with a prominent “STOP” symbol.<sup>8</sup> The software shuts down the machine, and keeps it from operating until the error code is addressed.<sup>9</sup> This system effectively prevents farmers from fixing their own Deere equipment or performing maintenance themselves. It also effectively prevents them from having a local third-party repair

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<sup>2</sup> Jennifer Reibel, *Manufacturer Consolidation Reshaping the Farm Equipment Marketplace*, DATA & FORECASTS, MANUFACTURING NEWS 5, 11 (Aug. 29, 2018). The industry is largely a duopoly with CNH Industrial controlling 35 percent of the large farm tractors’ share, and 30 percent of the share of combines. The third player, AGCO, controls 7 percent of both the large tractor and combine markets. This is clearly a highly concentrated industry with HHIs in excess of 4100 for the North American large tractor market, and approximately 4600 for the combine market.

<sup>3</sup> See, e.g. Kyle Wiens & Elizabeth Chamberlain, *John Deere Just Swindled Farmers Out of Their Right to Repair*, WIRED (Dec. 11, 2019) (observing that “[t]he ability to maintain their own equipment is a big deal to farmers. When it’s harvest time and the combine goes kaput, they can’t wait for several days for John Deere to send out a repair technician. Plus, farmers are a pretty handy group. They’ve been fixing their own equipment forever”).

<sup>4</sup> Reibel, *supra* note 2, at 11.

<sup>5</sup> See, e.g. Olivia Solon, *A Right to Repair: Why Nebraska Farmers Are Taking on John Deere and Apple*, THE GUARDIAN (Mar. 6, 2017) (discussing how “[f]armers like fixing their own equipment, but rules imposed by big corporations [like John Deere] are making it impossible.”); and Wiens & Chamberlain, *supra* note 3 (observing that John Deere customers have no “right to purchase repair parts without going through a dealer. Farmers can’t change engine settings, can’t retrofit old equipment with new features, and can’t modify tractors to meet new environmental standards on their own”).

<sup>6</sup> See Solon, *supra* note 5. Solon observes: “Because farm machinery is so high-tech, the only way to silence the error message is by plugging in a special diagnostic tool — essentially a computer loaded with troubleshooting software that connects to a port inside the tractor -- to identify and resolve the problem. Only [John Deere] and authorized dealers are allowed that tool, and they charge hundreds of dollars to use it. For a fifth-generation farmer in an increasingly squeezed market, whose family has spent decades fixing the equipment they paid for, it’s a tough pill to swallow”). *Id.*

<sup>7</sup> Starting around the year 2000, all Deere equipment began using “can bus” systems in their machinery. A can bus is essentially a central electrical system that allows communications between different parts of the machinery. This allows repair technicians to plug in diagnostic tools to diagnose an issue with the machinery, which further cuts down on the amount of wiring necessary inside the machine. See John Deere & Co Sales Manual, Electrical, CAN bus electrical system (2011), available at [http://salesmanual.deere.com/sales/salesmanual/en\\_NA/tractors/2011/feature/electrical\\_and\\_lights/6030p\\_7030p/6030\\_7030\\_can\\_bus\\_story.html](http://salesmanual.deere.com/sales/salesmanual/en_NA/tractors/2011/feature/electrical_and_lights/6030p_7030p/6030_7030_can_bus_story.html).

<sup>8</sup> As Nebraska farmer Kyle Schwarting recently observed: “I can’t turn the alarm off. If I had the literature and capability to diagnose and fix it, it would already be done. I changed the mechanical switch and wire, but now I’m down to the programming.” Solon, *supra* note 5.

<sup>9</sup> *Id.*

shop or technician repair the Deere equipment for them without Deere's assistance.<sup>10</sup>

Deere likely will argue that its repair policy follows a growing trend in the agriculture industry to offer integrated solutions that are efficiency-enhancing and pro-consumer. Deere's new restrictions ostensibly parallel the recent efforts by Bayer/Monsanto to prevent farmers from replanting last year's seeds and from using different companies' crop protection systems.<sup>11</sup> American Antitrust Institute President Dr. Diana Moss notes: "Economic evidence from soybeans and cotton indicates that seed prices under vertical integration tend to be higher than under licensing arrangements across firms."<sup>12</sup> Dr. Moss adds that "[i]ntegration enhances both the ability and incentive to bundle proprietary systems that do not interoperate with rival technologies."<sup>13</sup> Deere's repair policy creates similar vertical integration in the agricultural equipment industry that will possibly generate higher repair prices, greater waiting times, and reduced choices for farmers.

Deere likely will also argue that it is protecting farmers' agricultural equipment by ensuring that only trained, qualified, and licensed repair providers work on the equipment. Something less benign, however, may be occurring.

Deere's requirement that farmers solely use Deere's repair services appears to be a tying arrangement that may violate Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act<sup>14</sup> and Section 5 of the FTC Act, as well as various state consumer protections statutes. On its face, Deere's tying arrangement may implicate antitrust scrutiny because "[r]epair is a huge business. And repair monopolies are profitable."<sup>15</sup> Deere now effectively prevents farmers from repairing their own equipment, or from going to a local repair shop, as farmers have been doing since Deere was founded in 1837.

This paper's focus, however, is not Deere's repair tie-in and Deere's potential attempted monopolization of its repair services, which are generating tremendous economic harm and frustration throughout the farming world. Instead, this article focuses on a less highlighted, but also heavily concerning aspect of Deere's Service Advisor software system: Deere's potential attempt to utilize its equipment software to monopolize the exploding market of digital farming.<sup>16</sup>

The integrated software and computers in Deere's agricultural equipment allow Deere to track farmers' activities while they use Deere equipment. The amount of digital information that can be tracked via a Deere tractor, combine, or any other piece of Deere farm equipment is expansive. For key agricultural equipment such as tractors and combines, Deere is in a perfect position to gather, control, amalgamate, and monopolize large swaths of detailed farm-by-farm digital agricultural data that it can then sell or license to other agricultural giants. Indeed, "[s]eed and chemical companies like Bayer[Monsanto], DowDupont, and BASF" already have entered into partnerships with Deere 'to gather farm level data from their tractors and host their software on Deere's farm equipment.'<sup>17</sup> Such partnerships among the large agricultural companies may seriously jeopardize future entry, innovation, and competition in this crucial burgeoning market. Perhaps that is why "Big Ag has been so reluctant to make any concessions in the growing right to repair business."<sup>18</sup>

10 See, e.g. Note, *Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs*, 52 U.C. Davis L. Rev. 1701, 1717 (2019), citing *Limited Warranty for New John Deere Turf & Utility Equipment* (Oct. 1, 2018), available at <https://www.deere.com/assets/pdfs/common/parts-and-service/warranty-protection-plans/warrantyus.pdf>.

11 See, e.g. Diana Moss, *Consolidation and Concentration in Agricultural biotechnology: Next Generation Competition Issues*, CPI AGRICULTURE AND ANTITRUST CHRONICLE (Dec. 2019). As one farmer noted: "I can't mix chemicals with other companies' products to remedy Roundup resistance" *Id.* See also Daniel Oliver, *Farming is Going Digital. Can Antitrust Law Keep Up?* <https://www.washingtonexaminer.com/farming-is-going-digital-can-antitrust-law-keep-up> at 1. "Seeds today are engineered to grow in particular soils and climates, and increasingly to perform in conjunction with specific crop protection products." (emphasis in original). *Id.*

12 Moss, *supra* note 11. Dr. Moss adds: "This suggests that vertical integration may increase the exercise of market power and firms' ability to extract economic benefits from seed dealers and farmers." *Id.*

13 *Id.* Dr. Moss explains how this can raise entry barriers by effectively blocking potential new entrants from coming into the market. *Id.*

14 Although Section 3 of the Clayton Act does not apply to services, Deere's tying arrangement effectively means that farmers will have to use Deere's repair parts, since Deere's licensed technicians are likely (and most likely required) to use Deere parts in repairing Deere equipment.

15 Although Section 3 of the Clayton Act does not apply to services.

16 Deere's tying arrangement effectively means that farmers will have to use Deere's repair parts, since Deere's licensed technicians are likely (and most likely required) to use Deere parts in repairing Deere equipment. Analyzing data to maximize their yields and reduce the need for agricultural inputs and natural resources."); *EU Antitrust Chief says "Beware" of Bayer-Monsanto Control of Farm Data*, FOOD & POWER NEWSLETTER (Oct. 14, 2019) (observing that "digitalization is radically changing farming"); *Creating a Global Leader in Agriculture* (Sept. 14, 2016), at 20, available at <https://www.investor.bayer.de/en/handouts/archive-investor-handouts/> (describing digital farming as the use of "[e]xtensive data collection and computation" and "[p]redictive analytics" to provide digital insights to optimize farmers' decision-making"); and Moss, *supra* note 11 at ("Digital farming is one of the most innovative areas at the intersection of agriculture and big data. The field of companies that specialize in agricultural data analytics and intelligence has expanded over the last decade.").

17 Claire Kelloway, *Data consolidation Threatens Sustainable Agriculture Says International Panel*, FOOD & POWER [OPEN MARKETS INSTITUTE] (February 15, 2019).

18 Solon, *supra* note 5.

### III. DEERE'S POTENTIAL ATTEMPTED MONOPOLIZATION AND RESTRAINT OF TRADE

A farmer purchasing a Deere tractor or combine reasonably expects that he or she becomes the owner of their equipment and any digital farming data their machinery generates. Deere customer Jeff Buckingham of San Luis Obispo, California noted: "At the end of the day, I bought this equipment, and I want everything I need to keep it running without relying on the manufacturer or dealer."<sup>19</sup> Unfortunately, Deere disagrees. Deere recently has gone so far as to argue that when a farmer "purchases" a Deere tractor or combine, the farmer is merely receiving a "license to operate the vehicle."<sup>20</sup>

Deere's position would seem to be *per se* illegal under the 1976 Copyright Act, which allows individuals to copy software in order to repair an item, so long as they destroy the copy when their repairs are finished.<sup>21</sup>

Deere, however, has joined with companies such as Apple in taking the position that the 1998 Digital Millennium Copyright Act ("DMCA") overrides the 1976 Copyright Act. Deere believes that the DMCA allows it to legally place software locks on their equipment, and that 17 U.S.C. §1201(a) makes circumventing such software protections illegal under federal law.<sup>22</sup>

Apart from attempting to monopolize the repair and maintenance of its equipment, why might Deere institute such scheme? The potential answer is that Deere is playing for higher stakes. Deere could have its eyes set on a monopoly beyond the repair of its agricultural equipment. Could it be that Deere is attempting to monopolize the digital farming information market? And conspiring with companies such as Bayer/Monsanto, DowDupont, and BASF in leveraging a shared monopoly?

### IV. INFORMATION TRACKING

In Deere agricultural equipment, different components have distinct "controllers" that are wired to the internal "can bus" system. Each controller stores information specific to the function that that controller manages.

For example, in a Deere tractor, there are multiple pieces of data that are tracked and logged, and this occurs simply through the act of driving the tractor. For example, the location of the tractor is tracked using a GPS system.<sup>23</sup> The number of hours that the machine has been

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* Solon adds that Deere "lock[s] users into license agreements that forbid them from even looking at the software running the tractor or the signals it generates." *Id.* See also Darin Bartholomew's Long Comment Regarding a Proposed Exemption, 17 U.S.C. §1201, U.S. Copyright Office (2014). In this comment, a John Deere attorney argues:

In the absence of an express written license in conjunction with purchase of the vehicle, the vehicle owner receives an implied license for the life of the vehicle to operate the vehicle, subject to any warranty limitations, disclaimers or other contractual limitations in the sales contract or documentation.

*Id.* Interestingly, Deere's position is similar to Tesla's position concerning its automobiles. As observed by Tesla's founder Elon Musk: "Tesla is a software company, as much as it is a hardware company ... We view this the same as updating your laptop." Jerry Hirsch, *Elon Musk: Model S not a car but a 'sophisticated computer on wheels'*, L.A. TIMES (Mar. 19, 2015) (quoting Elon Musk).

<sup>21</sup> See 17 U.S.C. §101, et seq (2019). Section 117 of the Act reads in relevant part: (c) Machine maintenance or repair. Notwithstanding the provisions of section 106 [17 USC § 106], it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if –

- (1) Such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and
- (2) With respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

See also Daniel Moore, *You Gotta Fight for Your Right to Repair: The Digital Millenium Copyright Act's Effect on Right-to-Repair Legislation*, 6 TEX. A&M L. REV. 509, 511-512 (2019).

<sup>22</sup> See 17 U.S.C. §1201, et seq; and Note, *Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs*, U.C. DAVIS L. REV. 1701, 1710 (2019). To hear the story of one Nebraska farmer who has openly admitted that he downloaded eastern European software onto his personal computer to override Deere's software lock, see <https://www.youtube.com/watch?v=F8VCOowT4w>.

<sup>23</sup> *Privacy & Data*, JOHN DEERE (May 15, 2018), <https://www.deere.com/en/privacy-and-data/>.



operated is also tracked.<sup>24</sup> In addition, the controllers can sense what other implements or attachments are connected to the tractor.<sup>25</sup> The computer can also track and log machine-by-machine information such as its ground speed. The tractor's entire error code history is logged by the software in the machine, as well as the history of the machine's software and firmware.<sup>26</sup>

In and of itself, the data collected from a single tractor may not be all that valuable. However, when combined with data received by controllers about the attachments that are used in conjunction with the tractor, the information can become very valuable. For example, controllers can log the rate of use for sprayers and fertilizer applicators, which shows how much of each chemical or liquid fertilizer the farmer is using on any given field. Seeding rates on planters and air seeders can also be tracked and logged via the controllers. This information, paired with the tracked location of the tractor, could be incredibly valuable to a seed or chemical company that is trying to market their products to farmers.

Furthermore, tractors are not the only Deere machines being tracked. There are just as many, if not more, controllers located on Deere combines. For example, Deere combines have sensors that track and log the moisture levels of the harvested product and the yield that any particular field produces.<sup>27</sup> This information is extremely valuable to seed companies.<sup>28</sup> Indeed, it does not take much<sup>29</sup> imagination to see how valuable such individual and amalgamated digital data is to the "Big 3" agricultural oligopolists.<sup>30</sup> As noted by Claire Kelloway:

The problem is not that a growing number of farmers rely on data-analytics to guide their planting decisions. It's that large swaths of valuable data are increasingly being locked away inside the servers of private for-profit corporations, rather than made public by open and disinterested sources that historically informed farmers, like the U.S. Department of Agriculture and university extension services.<sup>31</sup>

Executive Director of the Organization for Competitive Markets Joe Maxwell adds: "If they own the data, then they can dictate what [farmers] plant, where they plant it, and how they're harvested."<sup>32</sup>

While farmers assert their right to repair their Deere agricultural equipment, Deere, in the meantime, is influencing the current movement by agribusinesses "to corner access to all types of agricultural data and create their own ag-tech platforms."<sup>33</sup> Indeed, "[s]eed and chemical companies like Bayer, DowDupont, and BASF have [already entered into] partnerships with Deere to gather farm-level data from their tractors and host their software on Deere's farm equipment"<sup>34</sup> Farmers today, it seems, are becoming uncompensated data gatherers for Deere and its partners.

Attempts to monopolize under Section 2 of the Sherman Act generally require proof of: (1) anticompetitive or predatory acts by the defendant; (2) a specific intent to monopolize; and (3) a dangerous probability of success.<sup>35</sup> Deere's assertion that it owns the sole right to all of the digital agricultural information and data generated by farmers using equipment that farmers have purchased would appear to constitute a potentially anticompetitive act. What possible increase in "consumer welfare" could arise from Deere's assertion that farmers do not have the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Moss, *supra* note 11 ("Farming data is quickly becoming a critical input for the Big 3"). See also Isabelle M. Carbonell, *The Ethics of Big Data in Big Agriculture*, 5 *INTERNET POLICY REVIEW* 2 (Mar. 31, 2016); and *Dupont Acquires Ag Software Company Granular to Accelerate Digital Ag Strategy and Help Farmers Operate More Profitable Businesses*, DuPont (Aug. 8, 2017).

<sup>28</sup> Moss, *supra* note 11.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Kelloway, *supra* note 17, at 2. University of Wisconsin Law Professor Peter Carstensen similarly observes that "[t]he fundamental problem is having these guys [the Big Ag companies], as the source of all kinds of planting and other information." *Id.* (quoting Prof. Carstensen). Professor Carstensen adds that the corporations could use their data control to steer farmers toward their particular seeds, crops, and pesticides. *Id.*

<sup>32</sup> *Id.* (quoting Joe Maxwell).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 324 (8<sup>th</sup> ed. 2017).

right to the agricultural data farmers generate on their own farms using their own farming machinery? In effect, by nature of Deere equipment comprising approximately 53 percent of the large North American tractor market and 60 percent of the North American combine market, Deere has asserted that it is entitled to sole ownership and the right to use or sell a substantial majority of all of the information American farmers generate using their own equipment on their own farms.<sup>36</sup>

Deere's assertion of its sole proprietary rights to farmers' highly detailed and confidential agricultural data shows a potential intent to monopolize. In effect, Deere is asserting that it has the right to control, amalgamate, and exclusively sell the majority of key digital agricultural data from individual farms throughout the United States. What could be more anticompetitive or exclusionary than excluding the buyers and owners of equipment access to the information their own machines generate?<sup>37</sup> Furthermore, farmers are being doubly harmed, since, as discussed above, they also are denied the right to repair and maintain their own equipment.

Finally, Deere's dangerous probability of success is apparent through its majority ownership of the North American market, including a 53 percent market share of heavy tractors and a 60 percent market share of combines.<sup>38</sup> Furthermore, it is critical to understand just how strong of a history and hold Deere's name has on farmers.<sup>39</sup> For example, author Kirchmeier remembers playing with green toy Deere tractors as a boy while his family, like so many other farming families, loyally purchased Deere machinery. In addition, the high barriers of entry for other companies to enter the agricultural equipment industry are extraordinary. Without access to a substantial amount of the raw, hard data stored in Deere's software, how can other agricultural companies compete without brokering with Deere to purchase some or all of the data?

Deere's growing success in potentially monopolizing the growing digital agricultural information market is also shown through its partnerships with other companies like Bayer/Monsanto, DowDupont, and BASF. These players already have negotiated with Deere to gain access to the information and farm equipment Deere effectively controls through its proprietary software.<sup>40</sup> Indeed, it does not seem a far stretch to believe that Deere and its partners may also be conspiring to monopolize the digital agricultural information market.<sup>41</sup> Given Deere's 53 percent control of the North American tractor market and its 60 percent control of the combine market, Deere may be at the center of such a possible conspiracy.

## V. CONCLUSION

Deere's assertion that it solely owns the digital information collected by the software it has implanted in its agricultural machinery, and the digital agricultural farming data Deere equipment generates, is doubly troubling under America's antitrust and consumer protection laws. First, by making it impossible for farmers to access the software in their own equipment, farmers are being denied their historic rights to repair and maintain their own equipment. As a result, farmers are forced to pay higher prices to Deere's licensed dealers, often while having to endure greater delays in getting their Deere equipment repaired and maintained.

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36 Deere's stunning agricultural data grab hardly evidences competition on the merits or procompetitive competition. Indeed, Deere's blunderbuss proprietary assertions represent the height of exclusionary and anticompetitive conduct. See, e.g. *Morris Commc'ns Corp. v. PGA Tour*, 364 F.3d 1288, 1295 (11<sup>th</sup> Cir. 2004) ("[A]nticompetitive conduct ... is conduct without a legitimate business purpose that makes sense only because it eliminates competition."). Deere's anticompetitive intent is further shown through its use of a repair tie-in that prevents Deere equipment owners from accessing the agricultural data they themselves have generated using their own equipment. See, e.g. *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns* 311 F. Supp. 2d 1048, 1108 (D.Colo. 2004) (holding that tying arrangement conditioning air play of artists' songs on their use of defendants' concert promotional services was evidence of an anticompetitive intent).

37 See, e.g. *Broadcomm Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318 (3d Cir. 2007) (holding that defendant acted with a specific intent monopolize a chipset market through anticompetitive practices lacking "a legitimate business justification").

38 See, e.g. *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (66 percent market share); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1443 (6<sup>th</sup> Cir. 1990) (58 percent share of pricing contracts); and *Kelco Disposal v. Browning-Ferris Indus.*, 845 F.2d 404, 409 (2d Cir. 1988) (55 percent market share, along with other market characteristics). As previously noted, this industry is a tight duopoly controlled by Deere and CNH Industrial, with combined North American market shares of approximately 88 percent for large tractors and 90 percent for combines. Such joint shares further magnify Deere's control of the market.

39 See, e.g. *Orrin Miller & John Froelich, The Story of a man and a Tractor*, 45 THE JOHN DEERE LEGACY (Don McMillan ed., 2003); and *The History of John Deere*, <https://www.deere.com/en/our-company/about-john-deere/>.

40 See Kelloway, *supra* note 17.

41 See, e.g. ABA ANTITRUST DEVELS., *supra* note 35, at 342-46; and Moss, *supra* note 11, at 7; (discussing "Big Ag's" growing control of crucial digital agricultural data); and Carbonell, *supra* note 27, at 2 ("By amassing huge quantities of previously proprietary data, companies are gaining a privileged position with unique insights into what farmers are doing around the clock, on a field-by-field, crop-by-crop basis.") By controlling and amalgamating such digital information, Big Ag companies are building massive competitive advantages in creating integrated, proprietary ag product systems.

Second, with majority ownership of the North American large tractor and combine market, Deere is uniquely positioned to monopolize the exploding digital agricultural information market. Deere already has begun potentially leveraging its data collection monopoly by partnering with other large agricultural companies, including Bayer/Monsanto, DowDupont, and BASF.

It is time for the United States Congress, the Department of Justice's Antitrust Division, and the Federal Trade Commission, as well as state attorneys general and legislatures, to put an immediate end to Deere's anticompetitive and economically devastating practices to farmers. The idea that farmers own neither the equipment they purchase, nor the information they generate in their own fields, is outrageous. Both the economic welfare of America's farmers and the consumers they serve are at risk. The only question left is, who will truly stand up for America's farmers and consumers?<sup>42</sup>

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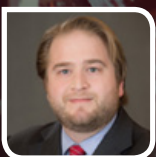
<sup>42</sup> With Midwestern Farmers filing for Chapter 12 bankruptcy protection at levels not seen for at least a decade, and suicides among farmers exploding, can we realistically hope for our antitrust laws to protect our farmers' consumer welfare? See, e.g. *Suicide Among Rural South Dakotans is a Serious Issue*, SOUTH DAKOTA FARMERS' UNION NEWS (Jan. 2, 2019), available at [www.sdfn.org](http://www.sdfn.org).



# AMERICA NEEDS FARMERS AND FARMERS NEED BETTER ANTITRUST LAW

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J.D. Scholten is running for Iowa's 4<sup>th</sup> Congressional District, an area of the country defined by its rolling fields of corn and soybean. On the trail, you may find him wearing a campaign shirt that reads: "America Needs Farmers; Farmers Need Antitrust." The first part of the slogan is certainly familiar to Iowans as legendary Hawkeye football coach Hayden Fry coined it during the last farm crisis. It also inspired lines of black and gold "ANF" clothing, as well as stickers and hitch covers that occupy the back of Iowa vehicles. The second part of the slogan, however, reflects the growing role that antitrust is playing in American politics. How has competition law become a central campaign issue in this predominantly rural and agricultural part of the country? It could have something to do with the fact that agriculture and antitrust have been intertwined since before the passage of the Sherman Antitrust Act in 1890 and that Scholten is campaigning in a state responsible for the world's first antitrust statute.

Following the Civil War, farmers across the western frontier of the United States suffered through droughts, declining incomes, and the predatory practices of monopolistic railroads, lenders, and grain elevators. In response to these troubles, farmers organized in the second half of the 19<sup>th</sup> century, calling for regulation of industries and demanding that their legislatures address the problem of monopoly power in agricultural markets. Known as the "Granger Movement," these farmers took aim at limiting the market power of corporate middlemen in the agricultural supply chain who took economic rents from farmers' productivity. Political newspapers, like St. Paul, Minnesota's aptly-named "Anti-Monopolist," sprung up to advance the political goals of the Grangers. These efforts led to the passage of laws regulating the prices and practices of railroads and grain elevators, but it also inspired states to begin passing statutes protecting and promoting competition.

On April 16, 1888, the Iowa legislature became the first government in the world to pass a general antitrust statute. Titled *An Act for the Punishment of Pools, Trusts, and Conspiracies*, the act outlawed agreements to fix the price or reduce output of commodities.<sup>2</sup> Other midwestern states soon followed Iowa's lead.<sup>3</sup> While legislative action at the state level was foreshadowing the coming embrace of competition regulation, it was understood that state laws could only nibble at this monopoly-sized problem. As a Spirit Lake, Iowa newspaper reflected after the passage of the Iowa act: "So far as domestic trusts are concerned the Iowa act seems well calculated to prevent and punish the evil. The most rapacious trusts, however, are inside the field of inter-state commerce, and are fortified by ultra-protectionism, so that congress [sic] only can deal with them."<sup>4</sup> Two years after the Iowa act, Congress passed the Sherman Act, which would become the backbone of antitrust law in the United States and provide inspiration for competition statutes around the world.<sup>5</sup> Global competition law, therefore, owes much to America's farmers and their fight to address monopoly power.

So, how have American farmers fared under the antitrust laws they helped create? The answer, quite simply, is not well at all. One measure of the health of the farm economy is to look to farmers' share of the retail food dollar. Alongside the enactment and enforcement of state and federal antitrust laws through the first part of the 20<sup>th</sup> century, farmers' share of the food retail dollar remained relatively stable, floating around 40 cents for much of the century.<sup>6</sup> However, since the late 1970s there has been a steady decline in the farmers' share of the food dollar. As of 2017, farmers earn about 14 cents of every retail dollar spent on food.<sup>7</sup>

Several factors have contributed to the decline of the farmers' share of the retail food dollar including a notable consumer demand shift to time-saving processed foods, but probably no factor has been as important as the weakening of antitrust enforcement in America. This has permitted extreme concentration in agricultural markets to emerge on both the input and output side of the American farm. This concentration had the foreseeable effect of minimizing farmers' earnings while enriching the oligopolies on either side of the farm.

Recent mergers on the input side involved Dow and Dupont, Bayer and Monsanto, and ChemChina and Syngenta, which followed a string of earlier mergers eliminating strong competitors such as DeKalb and Pioneer. This recent string of mergers had the shocking impact of reducing the "Big Six," as they were once known (and resulting from an earlier generation of mergers), to just four (Bayer, Corteva (formerly DowDupont), Syngenta, and BASF). Based on available 2015 data, two companies, Bayer and Corteva, now effectively control over 77 percent of the corn seed

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<sup>2</sup> Act of Apr. 16, 1888, ch. 84, 1888 Iowa Acts 124.

<sup>3</sup> See Charles S. Dameron, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 Yale L.J. 1072, 1082 (2016).

<sup>4</sup> *The Law Passed by the Iowa Legislature Forbidding Trusts, Pools, Etc.*, The Spirit Lake Beacon, Apr. 20, 1888, [http://dickinson.advantage-preservation.com/viewer/?k=%22anti%20trust%22&i=f&d=01011870-12311889&m=between&ord=k1&fn=spirit\\_lake\\_beacon\\_usa\\_iowa\\_spirit\\_lake\\_18880420\\_english\\_1&df=1&dt=3#zoom=page-width](http://dickinson.advantage-preservation.com/viewer/?k=%22anti%20trust%22&i=f&d=01011870-12311889&m=between&ord=k1&fn=spirit_lake_beacon_usa_iowa_spirit_lake_18880420_english_1&df=1&dt=3#zoom=page-width), (last visited Dec. 6, 2019) (Reprint of an article from the Chi. Trib., Apr. 12, 1888, 4).

<sup>5</sup> While Iowa was first to pass a modern general antitrust statute, competition-related common law and statutes date back more than a millennium.

<sup>6</sup> *Agribusiness during the 1950s and 60s*, <https://livinghistoryfarm.org/farminginthe50s/making-money/agribusiness/> (last visited Dec. 6, 2019), citing Bruce L. Gardner, *American Agriculture in the Twentieth Century*, Harvard University Press (2002).

<sup>7</sup> USDA Economic Research Service, *Food Dollar Application* (Aug. 20, 2019), <https://data.ers.usda.gov/reports.aspx?ID=17885>, (last visited Dec. 6, 2019)

market, and 66 percent of the soybean seed market.<sup>8</sup> For comparison, as recently as 1997, the top seven seed companies competed for only a 68 percent share of all seed markets.<sup>9</sup> Similar concentration trends can be seen in the fertilizer industry as the 2017 merger of Potash Corp and Agrium, Inc. created Nutrien Ltd., the “world’s largest producer of crop inputs,” further consolidating an already concentrated fertilizer market.

On the production side, the situation is looking similarly dire. Just four companies, Archer Daniels Midland, Bunge, Cargill, and Dreyfus, control approximately 90 percent of the global grain trade.<sup>10</sup> Only four companies control 79 percent of beef, 65 percent of the pork, and 57 percent of the chicken processing markets in the United States.<sup>11</sup> Approximately half of all chicken producers are located in regions with only one or two processing plants.<sup>12</sup> Just two companies, Dean Foods and Dairy Farmers of America, control almost 60 percent of the milk supply in the United States and in some states, their control can exceed 80 percent.<sup>13</sup> As a sign of how weak antitrust law in the United States has become, agricultural firms are pushing the boundaries of what constitutes a legal merger. In 2018, Archer Daniel Midland engaged in talks to acquire Bunge (which later failed) and recent reports indicate that Dairy Farmers of America has entered negotiations to purchase Dean Foods after it filed for bankruptcy. The concentrated markets and moves toward further consolidation represent a clear trend toward monopoly in agriculture, a trend that is certain to have devastating consequences for farmers.

As these production-side markets become more concentrated, the possibility of both tacit and active price collusion also increases. Peter Carstensen, antitrust professor emeritus at the University of Wisconsin School of Law, spoke about the potential Dairy Farmers of America purchase of Dean Foods and noted that the buyout “could give it monopoly-like power over the milk market. . . . What you’re going to see is increased risk of tacit collusion on the consumer side, raising the price of milk for consumers.”<sup>14</sup> In recent years, private lawsuits have been filed against the beef, pork, chicken, and dairy processors alleging price and output manipulation, the clearest harms articulated by the antitrust laws. In 2012 and 2013, Dean Foods and DFA settled allegations that they colluded together to fix prices paid to farmers, conduct that ironically, becomes legal should the two be allowed to merge. With the potential for collusion and durable market power in agricultural markets, farmers earn less for their products than they would in a competitive market. But consumers may not benefit either as market power allows the same processors to pocket the cost savings achieved from squeezing farmers while keeping the prices high for consumers.

This concentration and potential cooperation among competitors has a profound impact on farmers’ bottom lines. Between 2006 and 2017, average seed prices increased over 250 percent, from \$45 per acre in 2006 to \$115 per acre in 2017. Pesticides saw a 220 percent increase going from \$33 per acre in 2000 to \$73 per acre in 2017.<sup>15</sup> Fertilizer has experienced similar increases. In 2000, a ton of anhydrous ammonia averaged \$227.<sup>16</sup> This past summer, if you wanted to buy a ton of anhydrous ammonia in Iowa, it cost you, on average, \$630 per ton, a 270 percent increase over the year 2000.<sup>17</sup> Meanwhile, farmers have seen declining prices paid for their production. Since 2012, wheat, corn,

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8 Sonja Begemann, *Farm Journal: Mergers and Market Shifts*, Verdant Partners (July 2016), <https://www.verdantpartners.com/mergers-and-market-shifts/>. (last visited Dec. 6, 2019)

9 USDA Economic Research Service, *Seed Industry Structure is Characterized by Growth and Consolidation*, The Seed Industry in U.S. Agriculture, AIB-786 27, [https://www.ers.usda.gov/webdocs/publications/42517/13605\\_aib786g\\_1\\_.pdf](https://www.ers.usda.gov/webdocs/publications/42517/13605_aib786g_1_.pdf). (last visited Dec. 6, 2019).

10 Adam Putz, *The ABCDs and M&A: Putting 90% of the global grain supply in fewer hands*, Pitchbook (Feb. 21, 2018), <https://pitchbook.com/news/articles/the-abcds-and-ma-putting-90-of-the-global-food-supply-in-fewer-hands>. (last visited Dec. 6, 2019).

11 Jonathan Tepper & Denise Hearn, *The Myth of Capitalism*, 31 (2018); Luis Suarez-Villa, *Corporate Power, Oligopolies, and the Crisis of the State* 63 (2015).

12 *Chicken*, Food & Power, <http://www.foodandpower.net/chicken/> (last visited Dec. 6, 2019). U.S. Small Business Administration, *Evaluation of SBA 7(A) Loans Made to Poultry Farmers 2* <https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13.pdf> (last visited Dec. 6, 2019).

13 *Dairy*, Food & Power, <http://www.foodandpower.net/dairy/> (last visited Dec. 6, 2019).

14 Colleen Kottke, *Is Sale to DFA Best Solution in Dean Foods Financial Woes?* Wisconsin State Farmer, (Nov. 20, 2019), <https://www.wisfarmer.com/story/news/2019/11/19/sale-dfa-best-move-solving-dean-foods-financial-woes/4228744002/> (last visited Dec. 6, 2019).

15 Gary Schnitkey, *Historic Fertilizer, Seed, and Chemical Costs with 2019 Projections*, Farmdoc Daily, (June 5, 2018), <https://farmdocdaily.illinois.edu/2018/06/historic-fertilizer-seed-and-chemical-costs.html> (last visited Dec. 6, 2019).

16 USDA Economic Research Service, *Fertilizer Use and Price*, Table 7: Average U.S. Farm Prices of Selected Fertilizers. <https://www.ers.usda.gov/data-products/fertilizer-use-and-price.aspx> (last visited Dec. 6, 2019).

17 USDA - AMS: *Iowa Production Cost Report (Bi-Weekly)*, Futures and Commodity Market News, (June 4, 2019), [http://tfchart.com/news/futures/USDA\\_\\_AMS\\_\\_Iowa\\_Production\\_Cost\\_Report\\_\\_Bi\\_Weekly\\_\\_2019\\_06\\_04\\_\\_usda3197xw85d.html](http://tfchart.com/news/futures/USDA__AMS__Iowa_Production_Cost_Report__Bi_Weekly__2019_06_04__usda3197xw85d.html) (last visited Dec. 6, 2019).

and soybean prices have been on a steady decline.<sup>18</sup> The stranglehold of a few companies over the processing of livestock forces producers out of competitive cash markets and into forward contracts favorable to processors. Virtually all broiler chickens are now produced on a contract basis.<sup>19</sup> Beef and pork are quickly descending to the same state. This move toward contract farming jeopardizes the economic well-being of America's livestock producers by eliminating competitive markets for their products and increasing the power of processors over producers.

Rising input costs and falling output prices has meant that farmers' profits have decreased or been eliminated entirely, creating hardships and bankruptcy. Dairy producers spend on average \$1.92 to produce a gallon of milk, but they receive just \$1.32 when they sell it to processors.<sup>20</sup> This is economically unsustainable, and it forces hundreds of dairy farms to close each year. In 1970, there were 650,000 dairy farms in the United States, fueling a middle class and sustaining rural communities across the country. Today just 40,219 remain.<sup>21</sup> The trend is consistent across the agricultural industry. Delinquencies are up on farm loans, to their highest point in 9 years.<sup>22</sup> And, for the first time since before the Louisiana Purchase, the total number of farms in the United States will drop below 2 million.<sup>23</sup> The decimation of the small family farm not only impacts the economic well-being of those individuals, it also weakens the rural communities that depend on them, and in turn, threatens the economic fabric upon which the American Republic depends.

In December of 2018, I was honored to speak on a panel at the American Antitrust Institute's Food and Agriculture Competition Roundtable in Madison, Wisconsin. The event was well attended by scholars and practitioners, but it was also attended by a fair number of farmers, many of whom were from the dairy industry. While the viewpoints of panelists were diverse, the sentiments of the farmers were not. They were irritated that the government has thus far failed to enforce antitrust law against agriculture's corporate giants. They also held the general opinion that higher prices in the grocery line should be an acceptable tradeoff to ensure that farmers could thrive. This belief, of course, caused some practitioners who were trained on price-based "consumer welfare" antitrust to bristle.

These farmers' sentiments, however, should not have been surprising as it dates back to the founding of our modern antitrust statutes. When farmers across the Midwest organized and lobbied for the passage of the first antitrust laws, they were not doing it because they were concerned about the prices paid by their neighbors at the local general store. They primarily were concerned about their economic liberty and well-being. They wanted fair markets, not ones distorted by durable market power. The radical shift of antitrust to a consumer welfare framework in the 1970s and 80s lost sight of the origin movement of antitrust. It ignored the fact that individuals in our society are not just consumers seeking the lowest prices. They are also employees, business owners, and hard-working folks expecting to receive fair compensation for their productivity. Many Americans across the country are connected to agriculture. Some are farmers, others love them, and still others make up the communities that support and depend on them. And all Americans, one way or another, rely on farmers to put food on our tables. As these farmers continue to get squeezed by the power wielded by a few large agricultural corporations, these same Americans begin to understand the fight of the Grangers from over a century ago. Antitrust has always been a movement-based area of law, and a new movement is emerging and demanding reform.

While some may be taking note of this new antitrust movement, U.S. Department of Agriculture Secretary Sonny Perdue demonstrated that he is oblivious to the shifting American attitudes toward antitrust. At a meeting with dairy farmers in Wisconsin in October, Secretary Perdue said, "It's very difficult on an economy of scale with the capital needs and all the environmental regulations and everything else today to survive

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18 *Wheat Prices – 40 Year Historical Chart*, Macrotrends, <https://www.macrotrends.net/2534/wheat-prices-historical-chart-data>; (last visited Dec. 6, 2019); *Corn Prices – 59 Year Historical Chart*, Macrotrends <https://www.macrotrends.net/2532/corn-prices-historical-chart-data> (last visited Dec. 6, 2019); *Soybean Prices – 45 Year Historical Chart*, Macrotrends <https://www.macrotrends.net/2531/soybean-prices-historical-chart-data> (last visited Dec. 6, 2019); Jesse Newman & Patrick McGroarty, "The Next American Farm Bust Is Upon Us," *The Wall Street Journal*, 8 Feb. 2017, [www.wsj.com/articles/the-next-american-farm-bust-is-upon-us-1486572488](http://www.wsj.com/articles/the-next-american-farm-bust-is-upon-us-1486572488) (last visited Dec. 6, 2019).

19 *Broiler Chicken Industry Key Facts 2019*, National Chicken Council, <https://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/> (last visited Dec. 6, 2019).

20 Phil McCausland, *Best Advice for a U.S. Dairy Farmer? 'Sell out as Fast as You Can'*, NBC News (June 29, 2018), <https://www.nbcnews.com/news/us-news/best-advice-u-s-dairy-farmers-sell-out-fast-you-n887941?ref=marketbulletin> (last visited Dec. 6, 2019).

21 *Id.*

22 Roxana Hegeman, *Farm Loan Delinquencies Reach Highest Point in 9 Years As Prices Slump*, Des Moines Register (Feb. 28, 2019), <https://www.desmoinesregister.com/story/money/agriculture/2019/02/28/farm-loan-delinquencies-highest-point-nine-years-donald-trump-tariffs-low-grain-prices-corn-soybeans/3017895002/> (last visited Dec. 6, 2019).

23 Jesse Newman & Patrick McGroarty, *The Next American Farm Bust Is Upon Us*, Wall St. J. (Feb. 8, 2017), <https://www.wsj.com/articles/the-next-american-farm-bust-is-upon-us-1486572488>. (last visited Dec. 6, 2019).

milking 40, 50, or 60 or even 100 cows ... In America, the big get bigger and the small go out.”<sup>24</sup> Needless to say, Secretary Perdue’s comments were not well received by the struggling dairy farmers in the room. Speaking with reporters after the meeting, Darin Von Ruden, president of the Wisconsin Farmers Union and a small dairy farmer himself, asked, “Do we want one corporation owning all the food in our country?”<sup>25</sup> His question is prescient, because while the obvious answer is “no,” antitrust policy in the United States has certainly put the country on a trajectory toward that outcome. With each wave of mergers in every industry, there are armies of highly-paid attorneys, economists, and consultants willing to argue that fewer market participants is a good thing for consumers. It is foreseeable that without an adjustment to antitrust policy and the legal framework, further consolidation and concentration will continue.

To keep antitrust from becoming obsolete in the United States, antitrust practitioners would be wise to start listening to the farmers. Seek out their stories of corporate abuses of power in these agricultural markets and recognize how corporate concentration has weakened and even eliminated their livelihoods. Farmers are the economic group most responsible for the creation of our modern antitrust laws, but ironically, they have suffered the most under the yoke of concentrated corporate power. They were a force in creating the original statutes, and they now can be a force in helping to reform this essential area of law. As practitioners, academics, or anyone who cares about competition policy, we should recognize that if antitrust is failing the farmers, it is simply failing. Let us rethink our understanding of the law and embrace reforms to help restore competitive markets to America’s agriculture industries.

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<sup>24</sup> *Trump Agriculture Secretary Says During Wisconsin Visit That Family-Run Dairy Farms May Not Survive*, MarketWatch (Oct. 3, 2019, 4:37 PM), <https://www.marketwatch.com/story/trump-agriculture-secretary-says-during-wisconsin-visit-that-family-run-dairy-farms-may-not-survive-2019-10-03>. (last visited Dec. 6, 2019).

<sup>25</sup> *Id.*



# CHINESE MERGER CONTROL IN THE AGRICULTURE SECTOR

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# I. INTRODUCTION

China's antitrust law enforcement has gone through a remarkable evolution over the past 11 years. In the merger control field, China's authorities are widely recognized as key antitrust regulators globally. According to the Global Competitiveness Report 2016-2017 by the World Economic Forum, China is ranked 29<sup>th</sup> in terms of "effectiveness of anti-monopoly policy" among 138 jurisdictions surveyed.<sup>2</sup>

By the end of November 2019, Chinese merger control authorities have reviewed over 2,800 merger filings. In 43 cases, clearance was made subject to remedies and two transactions were outright prohibited. In the agriculture sector, two "crop protection" cases (*Bayer/Monsanto* and *Dow Chemical/DuPont*), two potash cases (*Uralkali/Silvinit* and *Potash/Agrium*), and *Marubeni/Gavilon* were among the transactions approved subject to remedies.<sup>3</sup>

Below, in Section II, we will go through these cases and check how the various analytical steps in the merger review process have played out. In Section III, we will ask if agriculture sectoral policies have surfaced in merger control cases, including these conditional clearance cases, and how that influence has changed over time. Section IV will conclude.

## II. REMEDY DECISIONS IN THE AGRICULTURE SECTOR

The remedy decisions in the agricultural sector provide interesting analyses on a number of questions. Below, we will first look at market definition, then turn to the competitive assessment, and end up with a look at the specific remedies imposed. We will look at decisions both by the prior merger control authority – the Ministry of Commerce ("MOFCOM") – and the new antitrust authority – the State Administration for Market Regulation ("SAMR").

### A. Definition of the Relevant Market

Generally speaking, the remedy decisions in the agricultural field are quite diverse when it comes to market definition. For example, within the span of around six years, MOFCOM imposed remedies in two transactions involving the same product, potassium chloride (also called "potash"). Yet the approach towards geographic market definition was different in the two transactions.

Very briefly, concerning these two transactions – in June 2011, MOFCOM conditionally cleared the acquisition of Silvinit by Uralkali, both Russian potash producers ("*Uralkali/Silvinit*").<sup>4</sup> In November 2017, MOFCOM granted clearance for the merger between Potash Corporation of Saskatchewan and Agrium, both Canadian potash producers ("*Potash/Agrium*").<sup>5</sup> In both cases, MOFCOM defined the relevant product market as that for potassium chloride. In *Potash/Agrium*, MOFCOM's analysis was somewhat more detailed, as the authority examined whether different colors and particle sizes of potash were sufficiently substitutable to belong to the same product market. MOFCOM concluded that they were.

Potash is a type of salt, and hence not an agriculture product as such. However, potash is one of the main fertilizers used for agriculture produce in China and worldwide. In other words, potash is a key input for agricultural markets, therefore we have included these cases in our analysis here.

While MOFCOM's two decisions are consistent in terms of the relevant product market identified, their approach towards the relevant geographic market is different. In *Uralkali/Silvinit* the authority did not explicitly state what the geographic scope of the market was, while it did so in *Potash/Agrium* (finding a global market). Although the absence of clear positioning in *Uralkali/Silvinit* avoids a direct inconsistency, the angle of the analysis taken shows that MOFCOM essentially ended up focusing on a very narrow market or segment: in *Uralkali/Silvinit*, MOFCOM kicked off its analysis in a broad fashion, looking first at the global picture to stress that the merged entity would become the number 2 player

<sup>2</sup> World Economic Forum, *The Global Competitiveness Report 2016-2017*, September 28, 2016, see [http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf), p. 147.

<sup>3</sup> One of the two prohibition decisions was also closely related to agriculture: in *Coca-Cola/Huiyuan*, the affected product markets were carbonated soft drinks and fruit juices. Fruits are upstream to fruit juices, but there is not much discussion on the transaction's impact on farmers or the Chinese agricultural sector as such in the decision. We will therefore not further comment on this case. *Coca-Cola/Huiyuan*, [2009] MOFCOM Public Announcement No. 22, March 18, 2009.

<sup>4</sup> *Uralkali/Silvinit*, [2011] MOFCOM Public Announcement No. 33, June 2, 2011.

<sup>5</sup> *Potash/Agrium*, [2017] MOFCOM Public Announcement No. 75, November 6, 2017.

with a market share of around 33 percent worldwide. But the authority then quickly went on to examine the imports of potash into China, and proceeded even more narrowly to distinguish the “seaborne trade market” and the “border trade market” (i.e. overland imports). MOFCOM found that the combined market share of the merging parties was 50 percent of total imports and 100 percent of land-border imports. The authority stressed that the fact that the merged entity would become the sole supplier of land-border potash imports into China would likely have an anti-competitive effect: “As a result of China’s reliance on potassium chloride imports and the current structure of the potassium chloride market, this concentration between business operators will create a certain impact on China’s industries such as the agricultural sector.”

In contrast, in *Potash/Agrium*, MOFCOM’s analysis was mainly focused on examining the competitive dynamics at the global level, and did not specifically examine imports into China.

Even more clearly than in *Uralkali/Silvinit*, “import markets” were defined as relevant markets in *Marubeni/Gavilon*.<sup>6</sup> That case involved the acquisition of Gavilon (a U.S. company producing and supplying “staple products” such as grains) by Marubeni (a Japanese trading house, selling all kinds of products). Soybeans were the product of concern in that case. Gavilon was predominantly active in the manufacture of soybeans (mainly in the U.S.), while Marubeni mainly acted as a trader (with 99 percent of sales going to China).

However, the MOFCOM decision in *Marubeni/Gavilon* concluded that the relevant market was the “China soybeans import market,” but there was no detailed analysis in that regard. While the decision does refer to some of the factors set out in the Guidelines on the Definition of the Relevant Market, there is no clear analysis of demand-side or supply-side substitutability and no SNNIP test was used.<sup>7</sup> In other words, the *Marubeni/Gavilon* decision does not explain to what extent imported soybeans would be different (e.g. in terms of quality or price) from domestic soybeans.

## **B. Competitive Assessment**

In principle, the Anti-Monopoly Law (“AML”) sets out in its Article 27 what factors the Chinese merger control authority needs to consider in its substantive assessment: the merging parties’ market shares and market power; the degree of market concentration; the transaction’s impact on market access and technical progress, on consumers and other parties (such as competitors), and on the development of the national economy, as well as other factors as decided by the authority.

In practice, the merger control authorities, MOFCOM and now SAMR, mainly use a form of “structural analysis.” In the published agriculture-related remedy cases, not all of the factors listed in Article 27 of AML were considered in the analysis.

Market share and market power were often taken into consideration, while other factors were not always taken into account. In its *Bayer/Monsanto* decision from March 2018 – its last conditional clearance decision as merger control authority – MOFCOM covered some new ground.

The *Bayer/Monsanto* transaction brought together the German company Bayer (with operations in the pharmaceutical, consumer health-care and agriculture science areas) and Monsanto (mainly active in seeds, genetically modified traits, and crop protection) from the U.S.<sup>8</sup> MOFCOM found overlaps between the merging parties in 12 product markets.

In terms of its substantive assessment, MOFCOM looked at some traditional factors, such as how the transaction would lead to unilateral effects (in terms of price rises by the merged entity). As mentioned, MOFCOM adopted a “structural approach” focusing primarily on market shares and the degree of market concentration.

At the same time, MOFCOM pointed to the existence of high barriers to entry, as new market entry not only required capital but also technology and R&D capabilities.<sup>9</sup> The MOFCOM decision contained some specific language on the duration of the R&D cycle and the R&D investment amounts required. The decision stressed that the transaction would lead to a reduction of competing developers of traits, as Bayer

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<sup>6</sup> *Marubeni/Gavilon*, [2013] MOFCOM Public Announcement No. 22, April 22, 2013.

<sup>7</sup> See Guidelines on the Definition of the Relevant Market, [2009] Anti-Monopoly Commission of the State Council, May 24, 2009. In *Marubeni/Gavilon*, the MOFCOM decision mentions actual trading patterns, consumption habits, transportation and customs duties.

<sup>8</sup> *Bayer/Monsanto*, [2018] MOFCOM Public Announcement No. 31, March 13, 2018.

<sup>9</sup> MOFCOM also looked at the merged entity’s ability and incentive to bundle seeds, traits and agrochemical products, as well as other theories of harm.



may cut its investment into innovation and delay the launch of new products. MOFCOM's finding of anti-competitive effects in relation to “digital agriculture” went in a similar direction. Here MOFCOM looked at the merging parties’ plans to offer a digital platform allowing farmers and other market players to purchase the whole range of agriculture-related products and services.

On that point, the *Bayer/Monsanto* decision tied in with the factor in Article 27 of the AML relating to the transaction's impact on technical progress. The *Bayer/Monsanto* decision came at the heels of the *Dow Chemical/DuPont* case, where MOFCOM similarly found the transaction to bring about a negative impact on technological innovation in the relevant markets.<sup>10</sup>

The MOFCOM decisions are no outliers in terms of analyzing a transaction's negative effects on incentives to innovate. These two decisions are broadly aligned with the “competition in innovation” based theories of harm being discussed in the global antitrust community. However, our hope is that the new theories of harm do not lower the bar compared to the “traditional” analyses.

One factor that came up in several agriculture cases in China was the high degree of dependence on imports by Chinese customers. This was the case with the two potash transactions and *Marubeni/Gavilon*.

In *Marubeni/Gavilon*, this aspect seemed to gain the upper hand in the analysis, as the combined market share of the parties was quite low – below 19 percent looking at imported soybeans only, and below 15 percent looking at both imported and domestically harvested soybeans.

In the agriculture-related remedies cases, detailed economic analyses were rarely used. This contrasts with remedy cases in other sectors, where a more economic approach was followed (e.g. using HHI calculations) were more widely applied, such as in *HP/Samsung printer business*, *Advanced Semiconductor Engineering/Siliconware* or *Maersk/Hamburg Sued*.<sup>11</sup>

### C. Remedies

The AML allows the merger control authority to impose remedies to reduce the negative impact that a transaction has on competition. However, the AML does not specify what remedies can be used, although an AML implementing rule classifies remedies into three categories: structural remedies; behavioral remedies; and hybrid remedies.<sup>12</sup>

In general, we can spot a trend whereby remedies have shifted from purely behavioral remedies in the earlier agriculture cases to hybrid (i.e. “behavioral plus structural”) remedies in subsequent cases.

For example, in both *Bayer/Monsanto* and *Dow Chemical/DuPont*, the merging parties had to divest certain businesses in addition to behavioral commitments. In *Dow Chemical/DuPont*, MOFCOM also specifically highlighted the need to include the global technology units and regional R&D units for some products in the divestiture package.

In terms of behavioral remedies, a wide range of different types of remedies were included:

- “hold separate” obligations (whereby the businesses of the merging parties need to be kept structurally and operationally separate for a relatively lengthy period of time);<sup>13</sup>
- maintaining the stability of supply prices;<sup>14</sup>

<sup>10</sup> *Dow Chemical/DuPont*, [2017] MOFCOM Public Announcement No. 25, April 29, 2017.

<sup>11</sup> *HP/Samsung printer business*, [2017] MOFCOM Public Announcement No. 58, October 5, 2017; *Advanced Semiconductor Engineering/Siliconware*, [2017] MOFCOM Public Announcement No. 81, November 24, 2017; *Maersk/Hamburg Sued*, [2017] MOFCOM Public Announcement No. 77, November 7, 2017.

<sup>12</sup> Regulation on the Attachment of Restrictive Conditions for Concentrations between Business Operators (for Trial Implementation) [2014] MOFCOM Order No. 6, December 4, 2014, art. 3.

<sup>13</sup> *Marubeni/Gavilon*; and *Bayer/Monsanto*.

<sup>14</sup> *Dow Chemical/DuPont*; and *Potash/Agrium*.

- guaranteeing minimum supply volumes;<sup>15</sup>
- maintaining pre-merger transaction conditions;<sup>16</sup>
- commitment not to request exclusivity;<sup>17</sup>
- commitment not to exchange competitively sensitive information;<sup>18</sup>
- granting access to digital agricultural platforms on a fair, reasonable, and non-discriminatory basis.<sup>19</sup>

Although the *Bayer/Monsanto* and *Dow Chemical/DuPont* decisions suggest a trend towards a more structural approach, behavioral remedies are still widely used by SAMR. For example, the authority's latest remedy decision – a joint venture between Garden Biotech and DSM – also imposed a series of behavioral obligations such as preventing the flow of competitively sensitive information.<sup>20</sup>

Even though MOFCOM and now SAMR have used behavioral remedies across a wide range of sectors, we believe that their use in the agriculture sector is particularly interesting. This brings us to our next question – the importance of industrial policies in the agriculture sector.

### III. AGRICULTURE POLICIES IN THE MERGER REVIEW

In this section, we will first look at the importance of industrial policies in general before we consider agriculture sector policies more specifically. Then, we will explore whether the importance of industrial policies in Chinese merger control may be on the decline.

#### A. Industrial Policies in Merger Control

As noted above, Article 27 of the AML lists several factors that SAMR should take into consideration in the merger review process, including “the impact ... on the development of the national economy.” What should we make of this criterion?

We believe that, in practice, this criterion is often interpreted as referring to the assessment of the transaction's effect on the domestic industry.

Other jurisdictions may not have this criterion enshrined in their antitrust laws. But, in China, the legislator wrote it into the AML.

Beyond antitrust, in China, government-led industrial policies played an important role in promoting development in the early stages of China's transformation from a planned to a market economy. In the plan economy, every key decision was made by the State. Not surprisingly, the decision away from that type of economic system was also driven by the State as the key decision-maker. During that process, much of the economic and social infrastructure underpinning the market economy was invested and constructed by the State. The result of this government-led effort was that competition policies long played a secondary role in comparison with industrial policies. However, there has been a trend to reverse this situation in the recent past, with the importance of competition law and policy on the rise.

Against this background, in the early years of AML enforcement, various types of industrial policies may have emerged in the merger review procedure – including agricultural policies, which are considered key to the development of the national economy and the livelihood of the people.

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<sup>15</sup> *Uralkali/Silvinit*, and *Potash/Agrium*.

<sup>16</sup> *Uralkali/Silvinit*, and *Potash/Agrium*.

<sup>17</sup> *Dow Chemical/DuPont*.

<sup>18</sup> *Marubeni/Gavilon*; and *Potash/Agrium*.

<sup>19</sup> *Bayer/Monsanto*.

<sup>20</sup> *Garden Biotech/DSM*, [2019] SAMR Public Announcement, October 16, 2019.

## ***B. Agriculture Sector Policies***

China has a considerable density of laws, regulations and policies in the agricultural sector.

In the merger control area, some of the agricultural policy aspects considered were introduced through sectoral regulators or by organizations consulted in the review process.

In all agriculture-related transactions which were approved with remedies, the public decisions indicate that the “opinion of the relevant government departments and industry associations were solicited in the review process.”

In many cases – especially the earlier cases – MOFCOM considered the impact of the transaction on the domestic industry. In *Marubeni/Gavilon*, for example, the decision highlights that “China is highly dependent on the import of soybeans. For the domestic soybean crushing enterprises, the degree of concentration is low, the production scale is small, and the bargaining power is weak.”<sup>21</sup>

China’s soybean market was found to be highly open: apart from a 3 percent customs duty, MOFCOM did not find barriers to cross-border sales. As a result, imports played an important part in the merger review<sup>22</sup> – although this is somewhat in tension with MOFCOM’s geographic market definition (see above under Section II.A).

In short, the decisions in *Marubeni/Gavilon* and *Uralkali/Silvinit* explicitly mention that China’s reliance on imports is an issue. Against this background, it is not difficult to see that security and stability of supply played a major role in the authorities’ decision-making.

In *Marubeni/Gavilon*, as remedies, Marubeni and Gavilon had to commit to keeping their Chinese soybean sales operations as separate businesses; Marubeni can purchase soybeans from Gavilon only on arm’s length/FRAND terms; and Marubeni and Gavilon need to put in place safeguard measures to prevent the flow of competitively sensitive information).

The parties’ activities may have been impacted by these remedies – in particular the “standalone hold separate remedies”<sup>23</sup> – as the parties were not able to integrate to achieve synergies.

In *Uralkali/Silvinit*, the remedies were for the merged entity to commit to maintaining prior sales practices, including in sufficient varieties and quantities, and prior procedures, including price negotiation procedures. On the one hand, these remedies would seem to address the concern that there could be a price rise post-transaction (which can be an antitrust concern). On the other hand, they fit in with one of the main concerns showing up in agricultural policies, namely the sufficiency and stability of supply by way of imports for key agricultural or input products.

## ***C. Decreasing Importance of Industrial Policies in Merger Control***

Our analysis above appears to indicate that elements of agricultural sector policies emerged in some of the conditional clearance decisions.

That said, however, we also note that some of these decisions were adopted a while ago. It may be possible to argue that there is a trend to further “disentangle” agricultural sector policies from the merger review process.

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<sup>21</sup> *Marubeni/Gavilon*, *supra* note 6, at sec. III.1.

<sup>22</sup> Zhang Ruiping, *Analysis of the Safeguard Mechanism and Rules by the Anti-Monopoly Law for China’s Agricultural Industry Security*, July 28, 2014, see [www.competitionlaw.cn/info/1128/1674.htm](http://www.competitionlaw.cn/info/1128/1674.htm).

<sup>23</sup> See Han Wei, Yin Ranran & Zeng Xiong, *Standalone Hold Separate Orders as Remedies in Chinese Merger Control* in ADRIAN EMCH & WENDY NG (Eds.), WANG XIAOYE – THE PIONEER OF COMPETITION LAW IN CHINA – LIBER AMICORUM (2019), p. 27-41.



This would make sense from a broader perspective, as China announced the continuation of its reform process. The report of the 19th National Congress of the Chinese Communist Party pointed out that the market is to play a decisive role in the allocation of resources and the government would have a more limited say in market operations.<sup>24</sup> Premier Li Keqiang stressed that the relationship between the government and the market is to further evolve, and government functions are to be further transformed from the micro- to the macro-level.<sup>25</sup>

The implementation of these directives is visible in the antitrust field, for example in the creation of the “fair competition review system.” That system establishes a mechanism whereby government bodies of all levels in China are required to review new and existing rules and policies, and screen whether they are compatible with the principle of fair competition.

In the merger control field specifically, the relationship between competition and industrial policies will need to be handled in a way that takes into account overall societal interests in the long run, not the specific sectoral interests or interests of individual enterprises. Achieving this goal requires collective efforts and determination, as well as creative thinking.

Another important factor leading to the reduced importance of industrial policies is the increase in cooperation among antitrust authorities across borders. During the review of cases involving global markets, MOFCOM and now SAMR at times closely communicate with fellow regulators in major jurisdictions such as the EU and the U.S. China’s antitrust authorities have been actively seeking to integrate themselves within the international community. They attach increasing importance to building a good reputation in that community.

These developments limit the possibilities to take into account industrial policy considerations.

## IV. CONCLUSION

From the agricultural sector decisions, we can see that the Chinese merger review process cannot be understood from a purely legalistic perspective alone. Instead, it is necessary to follow a multi-perspective analysis, looking at the big picture (taking into account the AML’s enactment and implementation as relevant context). This context includes a series of factors relating to the domains of politics, economy, law, culture, and social reality.

The specific factors that should be considered when assessing the effectiveness of China’s merger control regime are the political environment, China’s level of economic development, the maturity of the market, the depth and detail of the legal regime, the distribution of antitrust enforcement powers, resource limitations at the antitrust authorities, industrial and other economic policies, international competition law practices and international cooperation among antitrust authorities globally.

24 Xi Jinping, *Secure a Decisive Victory in Building a Moderately prosperous Society in All Respects and Strive for the Greatest Success of Socialism with Chinese Characteristics*, speech delivered at the 19th National Congress of the Communist Party of China, October 18, 2017, see [http://www.gov.cn/zhuanti/2017-10/27/content\\_5234876.htm](http://www.gov.cn/zhuanti/2017-10/27/content_5234876.htm).

25 In that sense, Li Keqiang, *Report on the Work of the Government*, speech delivered at the first session of the 13th National People’s Congress of the People’s Republic of China, March 5, 2018, see <http://www.gov.cn/zhuanti/2018lh/2018zfgzbq/zfgzbq.htm>.

# CARROT OR STICK – ENFORCING FAIR TRADING IN POLAND’S FOOD SUPPLY MARKETS

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# I. INTRODUCTION

Interestingly, the first nation mentioned in Adam Smith's "Inquiry into the Nature and Causes of the Wealth of Nations" is not Scotland, but Poland. He characterized its 18<sup>th</sup> century economy with these words:

The corn of the rich country, therefore, will not always, in the same degree of goodness, come cheaper to market than that of the poor. The corn of Poland, in the same degree of goodness, is as cheap as that of France, notwithstanding the superior opulence and improvement of the latter country. [...] the corn-lands of France are said to be much better cultivated than those of Poland. [...] In Poland there are said to be scarce any manufactures of any kind, a few of those coarser household manufactures excepted, without which no country can well subsist.<sup>2</sup>

Today's Poland can no longer be taken as an example of a poor agrarian society. However, its agriculture still remains an important part of the economy, and the sector's problems stem to a large extent from a strange amalgam of feudal and communist legacy.

With the adoption of the EU's Unfair Trading Practices Directive ("UTP Directive"),<sup>3</sup> vertical relations in the agricultural and food supply markets will come into focus in EU countries. While most EU jurisdictions have already adopted some laws that protect the interests of suppliers of food products, other countries will continue to face the challenge of retrofitting the new regulation into the existing competition protection framework. We attempt to shed some light on problems and dilemmas that these and other jurisdictions may face when going through the same exercise. The paper begins with a description of Poland's agricultural and food supply sectors. We recall the origins of the EU and the Polish UTP regulation. In this article, the history of unfair trading practices ("UTP") enforcement is presented in the context of its interplay with the existing antitrust regime.

## II. POLAND'S FOOD SECTOR

The food sector is one of the most important and fastest growing branches of the Polish economy.<sup>4</sup> The total value of production of food processing sector in Poland accounted for 16 percent of manufacturing in 2018. As much as 41 percent of production from the Polish food sector is exported. The EU's internal market, with over 500 million consumers, became one of the main driving forces for the sector after Poland's accession to the EU. Poland is a leading EU producer of fruits (apples, raspberries, blackcurrants, blueberries), meat (poultry, pork), dairy products, and mushrooms. Despite this export success and strong domestic consumption, the profitability of Polish agricultural production is deteriorating. This stems from structural challenges: atomization of farms (of 1.4 million farmers, 1 million i.e. 76 percent own less than 10 hectares or 25 acres),<sup>5</sup> inadequate consolidation of the means of production and sluggish emergence of producer groups and organizations. The latter factor is one of the major tools of the EU policy to overcome bargaining power distortions in the food supply chain.<sup>6</sup> Despite this, no more than 20 percent of Polish farmers are involved in some form of cooperation, such as producer groups.<sup>7</sup> The exception is dairy – 70 percent of Polish milk supply is processed by cooperatives. A likely culprit is the fact that, in Poland, "Agricultural Production Cooperatives" are associated with the forced collectivization of farms during the communist era.

The Polish market is also characterized by a relatively low concentration of both food processing and retail trade. The food processing sector is represented by 1,385 large and medium-sized companies,<sup>8</sup> not counting small or micro firms. The largest domestic retail chain has a

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2 A. Smith, "Inquiry into the Nature and Causes of the Wealth of Nations," 1776, Volume I, Book I, Chapter 1, Paragraph 4.

3 The UTP Directive is: Directive (EU) 2019/633 of the European Parliament and of the Council of April 17, 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (Official Journal of the EU L 111/59 - [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2019.111.01.0059.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.111.01.0059.01.ENG)).

4 Polish Investment and Trade Agency, "Food processing," available at [https://www.paih.gov.pl/sectors/food\\_processing#](https://www.paih.gov.pl/sectors/food_processing#).

5 Statistics Poland, "Land use and sown area in 2018," March 29, 2019, available at <https://stat.gov.pl/en/topics/agriculture-forestry/agriculture/land-use-and-sown-area-in-2018,7,14.html>.

6 Taking into account the disparity in bargaining power economic theory suggests that any form of farmers' cooperation, such as cooperatives, may be potentially welfare-improving— by reducing transaction costs (institutional economics) or setting competitive yardstick (neoclassical approach) — see L.F. Schrader, "Economic Justification," [in:] D. Cobia (ed.), "Cooperatives in Agriculture," Prentice Hall, Englewood Cliffs New Jersey 1989, p. 132.).

7 This share is reaching 60-100 percent in some EU-15 countries, which in some cases raises concerns regarding compliance with competition law, see European Commission, "The application of the Union competition rules to the agricultural sector," Report from the Commission to the European Parliament and the Council, October 26, 2018; available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52018DC0706>.

8 Data for the year 2018, companies with over 49 employees, see: Polish Investment and Trade Agency, op. cit.



share of at most 20 percent, the four largest retail chains have a combined share of at most 33 percent, the eight largest 46 percent and the twelve largest 52 percent.<sup>9</sup> Polish consumers seem to prefer small-format stores. The two leading retail chains are “soft discount stores,” usually with a sales area that meets the definition of a supermarket. The largest store formats, i.e. hypermarkets, have been losing market share in recent years. In the meantime, the small-format segment is growing due to the development of franchise chains.<sup>10</sup>

Disparities in bargaining power at various levels of the food chain resulting in UTP remains a common problem. In the case of agricultural products, moreover, the sector is forced to deal with a heightened level of information asymmetry related to the underdeveloped commodity exchange market. For example, Poland is one of the world’s largest producers of apples and concentrated apple juice (and the largest in Europe). At the same time, there are no commodity exchanges that could provide farmers with reliable information on prices and trends.

### III. ORIGINS OF UTP REGULATIONS IN THE EU

The discussion on UTPs in the EU can be traced back to the year 2007 when the food price index calculated by the Food and Agriculture Organization of the United Nations (“FAO”) rose by nearly 40 percent, compared with 9 percent the year before. Nearly every agricultural commodity was part of this rising price trend.<sup>11</sup> In response, the European Commission (“EC”) issued a communication aiming to create “[a] better functioning food supply chain in Europe.”<sup>12</sup> The EC paid particular attention to the fact that the prices of many commodities have come down to levels comparable to, or lower than, those from before the start of the price surge. However, consumer food prices continued to increase and only started declining in May 2009, prompting concerns about the functioning of the food supply chain. These changes have caused considerable hardship for agricultural producers and implied that consumers are not getting a fair deal.

In the following years, the Commission continued to carry out in-depth research into the problem of unfair supply chain practices. The result was a “Green paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe.”<sup>13</sup> At this point, the need for UTP regulations seemed non-controversial. However, there were at least a few unresolved issues on the table. Is self-regulation sufficient or is hard law needed? Should regulations apply only to food or also to other products? Should the entire chain be regulated, or supplier-retail relations only? During lengthy discussions at the EU level, 20 out of 28 Member States decided to introduce various types of regulations against UTPs to their jurisdiction and started to enforce it *ex officio*.<sup>14</sup> The Czech Republic and Germany belong to the countries with the longest experience with this type of regulation. In both cases, the national competition authorities (which had received additional competence in the field of UTPs), after issuing the first decision against the big retail chain, were faced with protracted appeals procedures. Surprisingly, the main grounds for legal challenge in both countries were not supposedly dishonest business practices, but economic evidence of a bargaining power disparity.

### IV. EMERGENCE OF UTP REGULATION IN POLAND

Given the importance of the agricultural and food processing sector, the fact that Poland had not adopted its first UTP law until 2017 is somewhat surprising. Even though the Unfair Competition Act had been in place since 1926,<sup>15</sup> it did not seem to provide an adequate legal framework to deal with the problems stemming from the existing contractual imbalance in the food supply sector. Its largest drawback was its civil law nature – it provides a basis for private damages lawsuits but there is no public agency responsible for enforcing it. Plaintiffs cannot claim damages beyond direct financial damage suffered, so there is little deterrent effect from such lawsuits. Also, due to the very nature of the contractual imbalances at issue, those who might be interested in filing lawsuits are not launching such actions because of their economic dependence on adverse parties. As a result, only a handful of lawsuits had been filed, all of which were “divorce cases,” filed after an existing contractual relationship fell apart.

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<sup>9</sup> Estimates based on the value of turnover from the 2017 financial statements.

<sup>10</sup> Statistics Poland, “Internal market in 2017”, November 29, 2018, available at <https://stat.gov.pl/en/topics/prices-trade/trade/internal-market-in-2017,7,16.html>.

<sup>11</sup> J. von Braun, “Rising Food Prices: What Should Be Done?,” International Food Policy Research Institute IFPRI Policy Brief, April 6, 2008, available at <http://www.ifpri.org/blog/rising-food-prices-what-should-be-done>.

<sup>12</sup> European Commission, “A better functioning food supply chain in Europe,” Communication, October 28, 2009, available at [https://ec.europa.eu/economy\\_finance/publications/pages/publication16061\\_en.pdf](https://ec.europa.eu/economy_finance/publications/pages/publication16061_en.pdf).

<sup>13</sup> European Commission, “Green paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe,” January 31, 2013, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013DC0037>.

<sup>14</sup> European Commission, “Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain,” January 29, 2016, [https://ec.europa.eu/growth/content/commission-publishes-report-unfair-trading-practices-food-supply-chain-0\\_en](https://ec.europa.eu/growth/content/commission-publishes-report-unfair-trading-practices-food-supply-chain-0_en).

<sup>15</sup> The Unfair Competition Act of 1926 r. was never formally repealed, but practically unenforceable during the communist times. The new Act was adopted in 1993.

The sector's problems could not be addressed effectively under competition protection regulations either. The Office of Competition and Consumer Protection ("OCCP") – Poland's Competition Authority – was unable to intervene, as the parties with contractual advantages typically do not hold a "dominant position" as defined in Polish and EU competition rules.<sup>16</sup> While it was relatively easy to show that the undertakings that used UTPs can act "to a significant degree independently of [their] contracting parties," it was often impossible to prove that they enjoy a similar degree of market power *vis-à-vis* consumers and competitors. In addition, those who came forward with testimony of unfair business practices made it clear that they were doing so on the condition of anonymity and were reluctant to provide much detail, in fear of retaliation.

The shortcomings of the national legal framework became the topic of heated public debate in 2015. The pressure for regulation started mounting, perhaps fueled by the growing strength of supermarket chains positioned in the "discount" segment. Initially, the solution preferred by the President of the OCCP and the food retail industry was self-regulation in the form of an industry code of conduct. However, attempts to draft a compromise text failed and the Parliament put a legislative proposal in motion. The Parliamentary project was soon abandoned and a more comprehensive piece of legislation was proposed by the Ministry of Agriculture in June 2016.<sup>17</sup> The official motives for the regulation focused on the apparent widespread unfair practices of the retail chains towards their suppliers. However, the proposal did incorporate one of the main claims of the retail industry: that due to high concentration levels (and high level of market power) on the side of the food processing industry, the retailers, including the strongest supermarket chains, often fall victim to unfair practices of the suppliers. The proposal therefore allowed for public intervention at all stages of the food supply chain, against the buyers and the suppliers of agricultural and food products alike. Despite this concession to the retail industry, the proposal was criticized and opposed by this group of stakeholders.

The President of the OCCP was involved in multilateral talks on the subject, participated in drafting of the proposal, and was eventually entrusted with the role of the main enforcer of the new UTP rules. The decision to add UTP enforcement to the OCCP's portfolio of powers was based on several factors. First, the Office had experience with enforcing "competition related rules." Second, it had procedures and trained staff already in place, which would allow it to "hit the ground running" with the new regulations. Third, due to the complicated subject matter of UTP infringements, it seemed natural that the judicial review of administrative decisions should be placed with civil courts, as was the case with the existing privately enforced unfair competition law. The Court for Competition and Consumer Protection – a civil court specialized in reviewing OCCP's administrative decisions – was a natural candidate for this task. OCCP's lack of detailed expertise in agricultural markets was not viewed as a major obstacle, since the interventions were expected to affect mostly the food retail sector – which the OCCP was more or less familiar with, thanks to its merger control activities.

## V. CONTENTS OF THE FIRST UTP ACT

The Act "On counteracting the unfair use of contractual advantage in the trade in agricultural and food products" – a new law concerning UTP – came into effect on July 12, 2017. Unfair use of contractual advantage was outlawed under article 6 and defined in article 7 of the Act. According to the original wording of the latter, a "contractual advantage" was a position of a purchaser *vis-à-vis* the supplier, where the supplier did not have sufficient and opportunities to sell agricultural or food products to other purchasers and where there was a significant disparity in economic potential between the two entities, which put the purchaser at an advantage (or *vice versa*).

Holding a contractual advantage is not in itself an infringement under the Polish UTP regulations. Only an abuse of such an advantage, i.e. behavior that is contrary to good practices and infringes upon vital interests of the other party, is considered unfair and unlawful.

The Act contains an illustrative list of unfair trading practices:

- unreasonable termination or threatening with such termination;
- conferring only upon one party the right to terminate or withdraw from contract or to rescind it;
- making the conclusion of a contract contingent upon considerations having neither substantive nor customary relation with the subject of such contract (tie-in sales or purchases);
- unreasonable extension of payment periods for the agricultural or food products supplied.

<sup>16</sup> According to the legal definition contained in the Polish Act of 16 February 2007 "On competition and consumer protection," a dominant undertaking must be "capable to prevent effective competition in a relevant market by enabling it to act to a significant degree independently of its competitors, contracting parties and consumers."

<sup>17</sup> More information on the origins of the new law can be found in: M. Błachucki & S. Józwiak-Górny, "New act on contractual advantage in the trade in agricultural and food products in Poland," *European Competition Law Review*, (2018) 39, Issue 4.

Apart from the practices listed in the Act, the general prohibition clause of article 6 enables the President of the OCCP to contest practices that are not specifically named in the Act and this clause has already been applied several times.

According to the Act, the President of the OCCP is competent to investigate cases of alleged practices involving the unfair use of contractual advantage and issue administrative infringement decisions. The OCCP has powers to request information, conduct unannounced on-site inspections and impose financial penalties (up to 3 percent of an annual turnover).

## VI. THE EARLY UTP CASE LAW

In March 2018, the Office closed its first ever UTP proceedings, which focused on extended payment periods for carrot supplies. In the final decision, the investigated food processor committed to making payments no later than in 45 days for weekly deliveries (instead of the previous 60 days counted from the end of all deliveries of a supplier) and also to establishing a non-discriminatory time schedule of supplies. Under previous arrangements, a carrot producer had to maintain readiness for an order any time between August 15 and March 30. This was unfavorable for those supplying only in the later months. Those farmers who had to wait till the end of the winter risked that their product would be deemed non-compliant with quality standards (e.g. frozen or withered) and rejected.

Somewhat unexpectedly, the complaints filed with the Office in 2017 and 2018 concerned mainly the relations between farmers and processors, rather than the practices of food retailers. Following new market signals, five more proceedings were launched, four of which concerned industrial apple supplies and one regarded the conduct of a major sugar producer towards its suppliers of sugar beets.

In the infancy of the regulation, the Office led advocacy and educational activities following a lenient policy and allowing time for the food producers and traders to align to the new legal provisions.<sup>18</sup> In this spirit, three decisions concerning apple processors were issued.

In the *Dohler* case, an apple concentrate producer committed to shortening payment periods (30 day for flat-rate farmers and 60 for VAT payers, instead of a previous uniform 90 days) and refraining from payment delays. Vague price clauses were also modified. The fruit processor committed to informing its contractors in advance about minimum prices in the season and to ensuring each supplier's right to withdraw from a contract. Furthermore, to make money available to contractors sooner, Dohler committed to promoting factoring among fruit producers, organizing educational meetings and to sharing the bank fees. The last element of the processor's commitment was to order an independent audit of its transactions with fruit suppliers from past 2 years. In case of late payment, Dohler was to pay statutory interest.<sup>19</sup> In the OCCP's assessment, these remedies were sufficiently transparent to ensure fairness in fruit supply contracts, while not interfering directly in the final sale price, and redress any harmed contractors. No fine was imposed on the food processor.

Two parallel cases of fruit concentrate producers were concluded with similar commitment decisions (*Real* and *Rauch*) whereas the *T.B. Fruit* case proved to be the first one where a monetary fine was imposed for unfair use of contractual advantage.<sup>20</sup> The OCCP's "carrot" strategy, applied in the first five cases and accompanied by soft but increasing pressure on other companies, is slowly being replaced with a "stick" or – at least – a mixed approach.

To sum up, in the first six administrative decisions, but also in its reports and the so-called "soft calls,"<sup>21</sup> the OCCP challenged mostly late payments, extended payment periods, vague provisions on price determination (or lack thereof), non-transparent and discriminatory supply schemes, extended contract termination periods (e.g. 9, 12, or 15 months) combined with price reductions during a termination notice period, as well as the lack of an appeals procedure in case a certain product is rejected or its price reduced by the buyer due to inadequate quality.

<sup>18</sup> See: OCCP's reports on the dairy sector, available at [https://www.uokik.gov.pl/aktualnosci.php?news\\_id=14287&print=1](https://www.uokik.gov.pl/aktualnosci.php?news_id=14287&print=1) and the fruit market, available at [https://www.uokik.gov.pl/aktualnosci.php?news\\_id=15031](https://www.uokik.gov.pl/aktualnosci.php?news_id=15031).

<sup>19</sup> The interest was to be calculated following rules provided for in the Polish Act "On payment dates in commercial transactions" implementing Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

<sup>20</sup> For more information see the official OCCP's press release: [https://www.uokik.gov.pl/aktualnosci.php?news\\_id=15826](https://www.uokik.gov.pl/aktualnosci.php?news_id=15826).

<sup>21</sup> Letters addressed to businesses in which OCCP presents its objections and requests for explanation or discontinuation of allegedly unfair practices.



## VII. LESSONS LEARNED – THE NEW UTP ACT

When drafting the Act, it was necessary to take into account the large number of entities operating on the food market in Poland and a still greater number of annual transactions between them. In addition, according to market signals, the biggest problem was UTPs in transactions between retail chains and their suppliers. There was a great concern and uncertainty about the initial number of notifications and the risk that the OCCP would be swarmed with minor complaints. Therefore, the initial version of the Act contained certain thresholds. It applied only to contracts where: (1) the aggregate value of turnover between parties, exceeded PLN 50,000 (roughly EUR 12,000), and (2) during the year preceding the year of commencement of the proceedings, the turnover of the infringer exceeded PLN 100,000,000 (roughly EUR 24,000,000).

Moreover, the original definition of ‘contractual advantage’ contained the following provisions: “where the supplier does not have sufficient and actual opportunities to sell agricultural or food products to other purchasers” and “where there is a significant disparity in economic potential between the two entities which puts the purchaser at an advantage” (or *vice versa*). Such a complex definition of contractual advantage could make these cases difficult to deal with. Prior to the amendment it was hardly possible to prove that the supplied goods could not have been sold to another buyer (especially retail chain, given that the Polish hypermarket, supermarket and discount store (“HSD”) market is perceived to be highly competitive). In some instances, this was more cumbersome and time-consuming than defining a relevant antitrust market and proving the existence of a dominant position under competition law rules, as no guidance on markets were available. It also turned out that there were not as many notifications (complaints) as expected.

A new wave of discussions on the effectiveness of the Act prompted the Ministry of Agriculture to initiate legislative proceedings. On October 4, 2018 an amendment was enacted by the Parliament and came into force on December 12 that year. The thresholds were abandoned, as was the first part of the contractual advantage definition (i.e. the “lack of alternative buyer/supplier” condition). Some additional minor modifications were made, such as enhanced protection of complainant anonymity during the investigation, which was aimed at alleviating the problem of intimidation and retaliation.

It is worth mentioning that further modifications, related to the implementation of the UTP Directive<sup>22</sup> are currently being drafted.

These changes made it easier to handle cases of producer-to-retailer relations and lead to the first investigation into the activities of a retail chain. This on-going investigation, launched in September 2019, concerns the practices of Biedronka, the largest retailer in Poland, which allegedly forced food producers to grant additional discretionary retroactive rebates. It was preceded by an unexpected inspection at the premises of the chain’s owners, Jeronimo Martins Polska. The OCCP is now facing a challenge concerning its assessment as to whether the practice of imposing unilaterally determined *ex post* rebates deviates from good commercial conduct.

## VIII. CONCLUSIONS

Incorporating new UTP powers into an existing competition enforcement portfolio is not an easy task. There were fears that the OCCP’s competition enforcement “DNA” may be negatively affected, as the goals pursued by the two strains of law are not entirely compatible: competition law focusing on maximizing consumer welfare, while UTP law aims to get a “fair deal” for all market participants. We now know that these fears were exaggerated. Competition law strives to achieve its main goal by protecting and promoting competition on the merits, as consumers are able to reap the full benefits of the market system only if that system rewards those who can win in a fair battle and not those who rely on “dirty tricks.” If the markets themselves are not capable of punishing unfair players, a public referee must sometimes step in. This is equally true with regard to unfair behavior enabled by monopoly power, a conspiracy, or some other form of market advantage. An antitrust mindset – fixing market mechanisms across a full spectrum of markets, instead of directly protecting a narrow group of market participants – was helpful in putting the sectoral regulation on the right track.

We believe that the facts and observations provided above can be particularly useful to policymakers and enforcers in countries where sector-specific UTP rules are not yet present and in those where an adjustment of the legal framework is contemplated. Still, many important questions remain to be answered. What are the long-term effects of UTP regulations? Who are the biggest beneficiaries of improved competition culture? Will additional restrictions on vertical relations push the sector towards vertical integration? The implementation of UTP regulations is a natural experiment, which provides an opportunity for researches to identify its true effects. We hope the results of such research will soon become available and will assist in working out recommendations for future policy adjustments.

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<sup>22</sup> Directive (EU) 2019/633, *supra* note 3.



# ANTITRUST ENFORCEMENT AND GOVERNMENT INTERVENTIONS IN AGRICULTURAL MARKETS – CASE STUDY OF COLOMBIA

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# I. INTRODUCTION

In 2003, the National Milk Producers Federation of the United States developed a plan to reduce the amount of cattle and to limit the participation of its members on the milk market for a year.<sup>2</sup> As a result, half a million cattle were sacrificed and 10 thousand millions of liters of milk were not produced.<sup>3</sup> This strategy increased the price of milk and raised the revenues of the dairy producers by 9.6 billion dollars. The illegality of this conduct in the United States became clear in 2012 when a court held that the conduct had violated antitrust laws and that it could not be justified by the Capper-Volstead law.

One of the first cases decided by the Colombian antitrust authority in an agricultural market was very similar to the case mentioned above. The *Superintendencia de Industria y Comercio* (the “SIC” or the “authority”), established that between 1996 and 1997 some companies and cooperatives, with the support of a business association, had agreed to create mechanisms to help them reduce supply in the market for eggs. The authority concluded that the mechanism was illegal and compelled the companies to refrain from implementing it.<sup>4</sup>

Over the last 25 years, the SIC has actively enforced the antitrust regime in the agricultural sector. A significant proportion of the antimonopoly cases analyzed by the authority involved companies that operated in different stages of agricultural value chains. Moreover, the SIC is the antitrust authority in Latin America that has prosecuted the largest number of cases in agricultural markets.<sup>5</sup> Additionally, the SIC has used its competition advocacy tools to address competition concerns in agricultural markets. Between 2000 and 2015, the SIC conducted 11 studies (65 percent of the total studies it has undertaken) to understand the structure of and anticompetitive pressures affecting these markets.

However, just as in other Latin American countries, in Colombia the objectives of antitrust laws sometimes clash with the objectives pursued by government interventions in agricultural markets.<sup>6</sup> Indeed, the enforcement of competition law has directly collided with governmental mechanisms used to intervene these markets.<sup>7</sup> These include price stabilization funds, parafiscal funds for agricultural development, minimum guaranteed prices, value-chain agreements, safeguard systems, and price controls.

This article traces the tensions between antitrust law and agricultural policies in Colombia, discusses how government agencies addressed these tensions, and identifies the most common competition concerns in agricultural value chains discussed in SIC decisions. The cases decided by the SIC between 1994 and 2015 are classified in terms of the types of anticompetitive practices at issue, the relevant markets affected, the role played by business associations, and the (alleged) links between the investigated conduct and the policies and instruments employed by the Colombian government to intervene in agricultural markets. This research does not aim to study other factors related to the competitiveness of agricultural markets, such as the insufficient provision of public goods by the Colombian government and the lack of access to the credit market as a result of market failures.

This article is divided in five sections, including this introduction. The second section briefly explains the main government intervention mechanisms used in the Colombian agricultural markets. The third section overviews the evolution of the SIC’s position regarding the conflict between the antitrust enforcement and government interventions in agricultural markets. The fourth section analyzes the types of anticompetitive practices investigated by the SIC and the roles played by companies and business associations in each stage of the agricultural value chains. The last section summarizes the main findings of the research.

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<sup>2</sup> John M. Connor, *Antitrust Developments in Food and Pharma*, Annual Review of Resource Economics 7 (2015): 375-398.

<sup>3</sup> *Id.*

<sup>4</sup> Superintendencia de Industria y Comercio, Resolución número 29305 (2000).

<sup>5</sup> See Juan David Gutiérrez (2009). “Tacit collusion in Latin America: A comparative study of the competition laws and their enforcement in Argentina, Brazil, Chile, Colombia and Panama,” in E. M. Fox & D. D. Sokol (Eds.), “Competition law and policy in Latin America,” (pp. 205–251). Oxford: Hart. Juan David Gutiérrez (2012). “Competition Law Goals in Agricultural Markets: A Latin American Perspective.” In D. Zimmer (Ed.), *The goals of competition law* (pp. 450–475). Cheltenham: Edward Elgar.

<sup>6</sup> Juan David Gutiérrez (2012). “Competition Law Goals in Agricultural Markets: A Latin American Perspective,” in D. Zimmer (Ed.), *The goals of competition law* (pp. 450–475). Cheltenham: Edward Elgar.

<sup>7</sup> For example, the market intervention mechanisms established by Law 101 of 1993 (General Law of Agricultural and Fishing Development).



## II. GOVERNMENT MECHANISMS TO INTERVENE IN AGRICULTURAL MARKETS

The Colombian government has an array of market intervention mechanisms that are specifically tailored for the agricultural sector. Most of them are enshrined in Law 101 of 1993, the general agricultural and fishing statute. The five main instruments that have been used by the Ministry of Agriculture to intervene in Colombian markets are the following:

1. Price stabilization funds: Special accounts intended to provide a certain level of income for producers, which regulate national production and exports by stabilizing prices paid to national producers of agricultural and fishery goods.<sup>8</sup>
2. Parafiscal funds for agricultural development: Payments imposed by the law on economic agents that are part of the value chain in order to benefit a specific agricultural or fisheries subsector.<sup>9</sup> The resources obtained through this mechanism must be invested in the agricultural or fisheries subsectors supplying them, subject to the following objectives: (1) research or technology transfers, and technical advice and assistance; (2) adequacy of production and sanitary control; (3) organization and development of marketing; (4) export promotion and promotion of consumption; (5) support for the regulation of supply and demand to protect producers against abnormal price fluctuations and to provide them with a remunerative income; (6) Economic, social and infrastructure programs for the benefit of certain subsectors.<sup>10</sup>
3. Minimum guarantee prices: The minimum purchase prices are set by the Ministry of Agriculture, justified through a reasoned decision, which consider international market prices, the margin of protection granted by the tariff system, the port costs and the storage costs of national harvests.<sup>11</sup>
4. Agreements in agricultural value-chains: The Ministry of Agriculture supports agreements among members of an agricultural value-chain that aim at: (1) improving productivity and competitiveness; (2) market development of goods and chain factors; (3) reduction of transaction costs between different agents in the chain; (4) development of different types of strategic alliances; (5) improve the information available for the agents of the chain; (6) linking small producers and entrepreneurs to the chain; (7) Management of natural resources and environment; (8) training; and (9) research and technological development.<sup>12</sup>
5. Safeguard system: The national government can impose a restraint on international trade when the national production of agricultural or fishery goods “suffers injury” or when there is a “threat of injury” as a result of a significant increase in imports or a substantial fall in international prices. A petition for the imposition of such a measure may be filed by representatives of the sector that has been or is likely to be affected.<sup>13</sup>

Finally, Colombia’s first antitrust statute (Law 155 of 1959), provided for a so-called “block exemption.” This provision is not exclusive to agricultural markets, but it has been developed by decrees issued by the Ministry of Agriculture. The block exemption provides that the government can authorize agreements among market participants which, despite restricting freedom of competition, have the goal of bringing financial stability to a basic sector of production of goods or services or to the general economy.<sup>14</sup>

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<sup>8</sup> Article 36 of Law 101 of 1993.

<sup>9</sup> Article 29 of Law 101 of 1993.

<sup>10</sup> Article 31 of Law 101 of 1993.

<sup>11</sup> Article 50 of Law 101 of 1993.

<sup>12</sup> Article 101 of Law 101 of 1993.

<sup>13</sup> Article 5 of Law 101 of 1993.

<sup>14</sup> Article 1 of Law 155 of 1959.

### III. TENSIONS BETWEEN COMPETITION LAW ENFORCEMENT AND AGRICULTURAL POLICIES

Between 1994 and 2015, the SIC's position as regards the scope of antitrust laws in agricultural markets that were subject to intervention by the government varied significantly. From 1994 to 1999, the SIC considered that these interventions substantially restricted the scope of the antitrust regime. This interpretation was backed by Ministry of Agriculture.

For instance, in 1994, the National Federation of Oil Palm Growers, producers and agroindustry companies created a mechanism to establish a minimum sale price to be charged by producers.<sup>15</sup> Based on the application of the “block exemption” and some of the instruments established in Law 101 of 1993, the SIC decided that there was no basis to investigate the case.<sup>16</sup> Subsequently, the SIC defended its decision before the State Council, the highest tribunal in charge of the judicial review of administrative decisions, arguing that:

at the present time the market economy could not be understood as the *laissez faire, laissez passer* of the pure capitalism, because the Constitution included the principle of governmental intervention [...] its application could not be regarded as promoting anticompetitive agreements or the abuse of the dominant position.<sup>17</sup>

At the turn of the 21<sup>st</sup> century, the SIC and the Ministry of Agriculture appeared to be less synchronized with regards to the scope of the antitrust laws. In 2000, the Legal Department of the SIC issued an opinion that questioned the legality of the agreements promoted by the Ministry of Agriculture that established price systems among the members of the milk value chain. Moreover, between 2005 and 2012, the competition agency had a special task force that focused on the investigation of antitrust breaches in agricultural markets.

The amendment of Colombia's competition regime in 2009, through Law 1340, included an article that explicitly stated that the intervention mechanisms for agricultural markets, described in section 2 above, limited the scope of the competition rules. However, this reform did not modify the competition agency's interpretation of the law. For instance, in the cocoa (2009)<sup>18</sup> and sugar cane (2010)<sup>19</sup> cases, the authority stated that the implementation of government interventions (e.g. the promotion of “value chain agreements”) did not exempt economic agents from complying with antitrust laws. More specifically, the SIC was concerned with the conduct of market agents that could exceed the authorizations granted by the government, such as price fixing schemes.

In 2015, the SIC prosecuted several sugar mills that were part of a price stabilization fund, which was managed by their business association. The SIC claimed that the mills had used the intervention mechanism for the allocation of production or supply quotas in the national market.<sup>20</sup> In this case, the authority sanctioned the sugar mills and urged the government to evaluate the way the price stabilization fund was being used.

### IV. ANTITRUST CASES IN AGRICULTURAL VALUE CHAINS

Between 1994 and 1999, the competition agency only investigated two cases in agricultural markets (less than 5 percent of the total number of cases) and both of them were filed. In contrast, between 2000 and 2015, the competition authority decided 22 agricultural cases (13 percent of the total): in 12 of them the companies were found guilty of anticompetitive conduct, 7 were finalized after the parties offered guarantees, and 3 were dropped because the evidence was insufficient to prove the alleged infringements.

The cases involved investigations in diverse stages of agricultural value chains: agricultural inputs and services (5 cases), production of agricultural goods (4 cases), purchase of agricultural goods (6 cases), and distribution and marketing of agricultural products (7 cases). The majority of cases related to agricultural inputs and services linked to cattle markets (2001, 2007, 2011, 2012). In all cases, the SIC assessed highly concentrated markets and, in most of them, the unilateral conduct of monopolies or monopsonies was investigated.

<sup>15</sup> Consejo de Estado, Sala de lo Contencioso Administrativo, Expediente No. 3488 (1997).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Superintendencia de Industria y Comercio, Resolución número 4946 (2009).

<sup>19</sup> Superintendencia de Industria y Comercio, Resolución número 42411 (2010).

<sup>20</sup> Superintendencia de Industria y Comercio, Resolución número 103652 (2015).

The cases associated with production of agricultural goods occurred in different markets: eggs and pullets, mushrooms, scallions, and sugar cane (for the production of fuel alcohol). In three of them, the market concentration was low and in one, the mushroom case, the producer had a dominant position. Additionally, in two of the cases, business associations played a dominant role in the investigated behavior: one association facilitated an anticompetitive agreement among its members (reducing production levels) and the other organized anticompetitive acts carried out by its affiliates (influencing prices).

The common characteristic of the cases linked to the purchase of agricultural goods (used as inputs in agroindustry processes) was that the markets had the structure of an oligopsony (with few buyers and a large number of sellers). Different markets were investigated by the SIC: sugar cane (twice), green paddy rice (twice), fresh milk, and cocoa. In the cocoa (2009) and sugar cane (2010) cases, the investigated parties argued that their behavior had been the consequence of the market interventions implemented by the Ministry of Agriculture. The SIC concluded in both cases that the penalized conduct was not a direct consequence of government intervention mechanisms.

Finally, the markets for distribution and marketing of agricultural products were the most investigated stage of the agricultural value chains. Diverse markets were investigated by the SIC: processed milk, commercialization of scallions (leasing of warehouses), vegetable oil, coffee, rice and sugar (twice). Furthermore, in three cases the business associations were also investigated (processed milk, coffee, and sugar), and in one of them the association was penalized for its behavior.

## V. CONCLUSIONS

Between 1994 and 2015, the relationship between the antitrust regime and the market intervention mechanisms had periods of harmony and of conflict. During the initial stage (1994-1999), the SIC did not question agricultural policies implemented by the Ministry of Agriculture that had an impact on the competition dynamics in these markets.

Since 2000, the competition agency and the Ministry of Agriculture started to differ in the legal interpretation of the scope of antitrust law in markets in which the government has intervened. These tensions were mainly present in two levels of the agricultural value chain: on the market for agricultural inputs and services and on the distribution and marketing of agricultural products. The disagreements were related to the use of the so-called “block exemption” and to the limits of antitrust enforcement.

Following the enactment of Law 1340 of 2009, which explicitly (although ambiguously) mentioned the limits of antitrust in markets where government interventions were implemented, the competition agency did not modify its position. In several cases, the SIC stated that these mechanisms of intervention do not justify anticompetitive practices such as price fixing and market sharing agreements.

The investigations conducted by Colombia’s antitrust agency offered insights into the competition issues at different stages of agricultural value chains. The following table summarizes the competition concerns that were raised in the cases in which the SIC penalized the investigated parties:



**Table 1 - Competition Concerns in Agricultural Value Chains (2000 – 2015)**

Level of the value chain	Prevalence of collusive practices	Prevalence of unilateral conduct	Business associations involved in cases	Tensions with government interventions
<b>1. Agricultural inputs and services</b>	No	Yes	Yes	No
<b>2. Agricultural production</b>	Yes	No	Yes	No
<b>3. Purchase of agricultural goods for processing</b>	Yes	No	Yes	Yes
<b>4. Distribution and marketing of agricultural products</b>	Yes	No	Yes	Yes

First, the value chains of agricultural inputs and services were mainly affected by unilateral anticompetitive conduct. Furthermore, the government's interventions in these markets were not an issue raised in these cases.

Second, some agricultural production markets with lower levels of concentration were affected by collusive practices. Those practices aimed to increase prices by reducing market supply. In two of these cases, business associations were promoted or facilitated the anticompetitive conduct. In these cases, government intervention mechanisms were not an issue.

Third, the markets for agricultural goods were affected by collusive practices in the context of oligopsony structures. In these cases, the anticompetitive conduct aimed to decrease the prices paid by buyers at a lower level of the production chain to the sellers of the input. Conflicts regarding the enforcement of antitrust and governmental intervention mechanisms were present in two cases (cocoa and sugar cane).<sup>21</sup>

The last stage of the agricultural value chain had the highest number of cases investigated by the competition agency. The SIC found that firms were involved in diverse types of anticompetitive practices: price-fixing (processed milk), market allocation (storing service – scallions), blocking the entry of additional producers to the market (sugar cane), and preventing retailers from lowering the final price of the good (rice). Furthermore, as it occurred in the other stages of the value chains, the competition agency found that business associations were directly involved in the infringement of competition laws.

<sup>21</sup> Superintendencia de Industria y Comercio, Resolución número 4946 (2009); Superintendencia de Industria y Comercio, Resolución número 6839 (2010).

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