DEPARTMENT OF JUSTICE

ANTITRUST ENFORCEMENT IN THE MEATPACKING INDUSTRY

Address by

ANNE K. BINGAMAN
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the

American Meat Institute

Washington, D.C.

May 14, 1996

I am pleased to be here this morning to say a few words about the role of the federal antitrust laws and the Justice Department's Antitrust Division in ensuring that the meat packing industry remains subject to healthy competitive market forces. As many have noted, concentration in this industry has increased significantly over the last 15 years, and we have been monitoring this industry on an ongoing basis since before I arrived.

Recent Department Activities

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

In the merger area, we conducted an investigation in 1993 and 1994 following reports that Cargill's large meat-packing subsidiary Excel might be interested in acquiring Beef America, a significant Nebraska beef packer. Excel never put forth a public proposal. Last winter, we investigated the acquisition by Smithfield, a major pork packing firm centered in the Southeast, of John Morrell, a smaller but still significant pork packer centered in the Midwest. And this spring, we investigated IBP's acquisition of Calhoun. As part of that investigation, we deposed the Chairman and CEO of IBP, and the vice president of IBP's cow division, and questioned them under oath. That's already a matter of public record, which is why I can mention it. This brief summary gives you some idea about how carefully we are looking at mergers, acquisitions, and other practices affecting the price of livestock.

In addition to numerous meetings held in connection with these and other investigations, Antitrust Division officials have conducted a number of what I would call "outreach" meetings during the last two years, here in Washington and around the country, with concerned livestock

producers and other people in various segments of the industry. For example, in June of 1994, a Division attorney spoke at the annual meeting of the National Cattleman's Association in Omaha. In October of that year, a Division attorney spoke at the Center for Rural Affairs conference in Kansas City, and in Rapid City at a "livestock summit" put on by the Western Organization of Resource Councils. In May of 1995, I personally traveled to Omaha to speak with cattle producers and packers. In late August and early September, Division officials traveled to Huron, South Dakota for a congressional field hearing and a meeting with cattle producers. In February of this year, a Division attorney spoke at the National Meat Association's convention in San Francisco. In March, we had three outreach meetings with groups here in Washington, and another just a couple of weeks ago. We have had other meetings, and many telephone conversations, that I am not at liberty to describe specifically.

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

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

What the Antitrust Laws Prohibit

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

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

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

1. Mergers

First I will mention mergers, since that is what you invited me here to speak about. A merger or acquisition that would substantially lessen competition in a particular product market and geographic market would violate section 7 of the Clayton Act.

The Clayton Act legal standard for evaluating mergers is different from the Sherman Act standards for collusion and monopolization, which I will discuss in a moment. The Sherman Act requires proof of anticompetitive conduct -- fittingly so, because Sherman Act violations can subject violators to stiff criminal fines and jail sentences. In contrast, under Clayton Act merger

review, the principal focus is not on the conduct of the merging parties, but on whether the merger would change the market to a degree that competition would be substantially lessened. And the remedy for a merger that violates the Clayton Act is typically to stop the merger, or to insist that it be modified to remove the cause for antitrust concern.

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

The starting point in evaluating any merger is determining the scope of the product markets and geographic markets that would be affected by it. The scope of a market is largely defined by the smallest area in which a firm, assuming it faced no competition in that area, could make a small but significant change in price stick -- that is, could change the price without customers or suppliers, as the case may be, being able to thwart the firm's effort by going outside the market for their buying or selling needs. A judgment as to the dimensions of this area is usually reached by examining recent commercial interactions in the marketplace, but it can also depend on a variety of other, more subtle factors.

Past analyses of mergers in the meat packing industry have shown that steer/heifer and cow/bull are usually distinct product markets for antitrust purposes, for example. This is because the livestock used in these two markets are not considered readily suitable for use in the other.

Past analyses have also shown that geographic markets may not be isolated local markets, and may in some circumstances be multi-state.

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

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

Since you specifically asked about poultry mergers as well, I should mention that the Antitrust Division shares antitrust enforcement responsibility with the Federal Trade Commission. To avoid duplicating each other's investigative efforts, we have developed a formal liaison process to determine cooperatively which agency will investigate a particular matter. If one agency has greater current expertise in a particular industrial sector, usually as a

result of previous investigations, that agency will generally handle new matters in that sector. Pursuant to this arrangement, it has worked out that the Antitrust Division has handled investigations in the cattle, hog, and lamb sectors, while the FTC has handled investigations in the poultry sector.

2. Collusion

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

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

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

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

A third type of antitrust violation, less common than collusion but also a serious willful subversion of the free marketplace, is monopolization or attempt to monopolize, which violates section 2 of the Sherman Act. This would occur if one firm -- a meat packer, for example -- attempted to drive other packers out of business by interfering with their ability to engage in the business, such as by refusing to buy from producers who sell to the other packers, refusing to ship with transportation companies who ship for the other packers, or refusing to sell to distributors or retailers who handle the products of the other packers.

But it is not enough just to prove that a firm has engaged in the restrictive conduct. The law also requires proof that the firm either had a monopoly already -- and that means an extremely high market share all to itself -- and engaged in the restrictive conduct in order to acquire or maintain the monopoly. Or, in the case of attempted monopolization, it must be proved that the firm stood a "dangerous probability" of obtaining a monopoly as a result of the restrictive conduct. And to prove "dangerous probability," the courts generally require, for

starters, that the firm involved in the restrictive conduct already have a quite large market share -- probably larger than the market shares we are currently dealing with in your industry. And even a large market share might not be enough, if other facts indicate that the scheme is unlikely to succeed in creating a monopoly.

Coordination with GIPSA

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

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

Conclusion

This brief outline of the antitrust laws is intended to show how the law applies to the livestock industry, just as it does to virtually every industry in this country, and to show that we

in the Antitrust Division are committed to full and fair enforcement of the law in all sectors of our economy. That is our job, and we work hard at it.

If you have any questions about how the law applies in a particular fact situation, please call us. And if you have any information that you think is relevant to our enforcement activities, we want to hear about that as well. We have no bias, fear, or favor, and are committed to a goal of "equal justice under law" in this and other industries.