

Competition Authorities' Priorities in the Food Sector

Peter C. Carstensen
Emeritus Professor of Law
University of Wisconsin Law School
Senior Fellow, American Antitrust Institute

I. Structure—Merger Policy—the First Priority

- A. Merger policy in agriculture and food should include a strong focus on *buyer power*
 1. Workably competitive markets for commodities require 5 or more substantial buyers
 2. Grocery retailers have the strongest buyer power because they are the conduit to reaching the consumer
 - i. Retailer concentration needs to be measured in terms of regional or national buyer power as well as local retail market power
 - ii. American experience with partial divestitures is that this remedy can often work badly resulting in long term structure that is as bad as if no action were taken
 3. Food processor mergers need to be evaluated for their overlap in input purchases even if their outputs are unrelated.
 4. Downstream mergers become justifications for upstream mergers leading to further aggregation of buyer power at multiple levels in the system. Hence neither existing buyer nor seller power should excuse a merger creating an undue control over either buying or selling.
- B. Mergers involving inputs to agriculture need stricter standards than are presently evident.
 1. Seed mergers have already created serious, entrenched competitive issues
 2. Fertilizer and equipment markets also are unduly concentrated leaving buyers with significant risks of exploitation
- C. Merger policy should block mergers where competitive risks are plausible and involve more than a modest element of one or both enterprises. Such mergers rarely produce significant long run efficiency gains that were not otherwise achievable but do create market structures that are very likely to impose long run rigidity on the market. Partial divestitures have proven to be poor remedies and conduct commitments are even more undesirable.

II. Monopoly Power-Monopsony Power and Anticompetitive Conduct

- A. *Structural remedies* should be preferred when legally permitted because they eliminate the source of the problem, but even when permitted such remedies are disfavored and may be dysfunctional in smaller economies because the number of viable competitors would be limited. Also economies of scale and scope in smaller economies may make structure relief impossible.

- B. *Conduct remedies* need to focus on the task of inducing conduct that is as close an approximation of a workably competitive market as is feasible.
 - 1. Control over the abuse of seed patenting—eliminate control over entire genome by requiring patent holder to maintain publicly available, uncorrupted versions of each type of seed to which patented genes are attached.
 - 2. Buyer contracting needs rules that compel open access as much as is feasible.
 - i. Bans on category captains and placement payments
 - ii. Bundling by either buyers or sellers has exclusionary effect and should be restricted unless there is a compelling justification for the package.
 - iii. Tight limits on exclusive dealing and long term supply contracts that have exclusionary effect on competitors of the buyer
- C. Innovative solutions to the problem of concentration should be developed
 - 1. Require use of public commodity markets run by third parties in lieu of direct contracting.
 - 2. Require disclosure of contract terms and, where feasible, seek joint—buyer and seller development of standard contracts with limits on burdens on producers.

III. Horizontal Agreements among Buyers Create Serious Competitive Risks

- A. *Buyer cartels* for food inputs both express and tacit should be challenged.
 - 1. Remedy for tacit cartels resulting from oligopsony among buyers is a core challenge. Whenever a remedy is possible to reduce collusive effects, then tacit collusion should be challenged (eliminate facilitating devices).
 - 2. Buyer cartels can include more participants with fewer visible policing devices because of shared interest in driving down the price of inputs; hence, conventional seller side analysis and inferences are not good guides to inferring buyer side collusion.
- B. *Buyer groups* can provide important economies of scale and scope for small and middle sized retailers, but should be no more inclusive in membership or activity than necessary to achieve economies.
 - 1. Buyers have shared interest in reducing price; hence buyer groups can impose cartelistic constraints if powerful
 - 2. If a buying group takes a substantial share, 20% or more of an input, its buying practices need to be reviewed to limit potential adverse effects on suppliers.

IV. Global Attention to Competitive Effects

- A. Mergers among developed country processors or retailers can create buyer power that affects developing countries.
 - 1. The developed countries looking at their immediate competitive concerns may see no harm, but the resulting buyer power/oligopsony creates serious risks to upstream suppliers. Without a global concern for the preservation and protection of the competitive process these effects will be ignored.

2. The developing countries may see the probable the probable adverse effects on their economy but lack the resources and jurisdiction to enforce their law on mergers involving companies largely based outside such countries.
 3. Only by taking global responsibility for the competitive process can agencies overcome this dangerous parochialism.
 - i. SAB-Miller
 - ii. Syngenta
 - iii. Smithfield Pork
 - iv. Coffee, grain, and banana mergers (banana dropped)
- B. Monopoly and monopsony require global solutions.
1. Examples of failure include Microsoft and Intel.
 2. Global focus demands conduct controls over abuse of buyer power in developing countries.
 - i. Give affected developing countries standing to invoke developed country competition law (perhaps using a class basis) and recognition that adverse effects on developing countries creates violation of such laws; or
 - ii. Create a multinational authority to oversee food markets including competition authority to reject mergers and condemn abusive buying practices.
- C. Buyer groups or cartels based in developed countries can exploit developing country agriculture. Concern for a global competitive process requires that developed country agencies challenge such conduct because of its harm to competition overall or allow developing country authorities to challenge such conduct through the developed country legal system to seek effective remedies.