Institute for Agriculture & Trade Policy

September 8, 2023

Federal Trade Commission/Department of Justice

Re: FTC-2023-0043-0001 - Draft Merger Guidelines for Public Comment

The Institute for Agriculture and Trade Policy (IATP) welcomes the opportunity to comment on the Draft Merger Guidelines. IATP is a 37-year-old nonprofit organization based in Minnesota that works locally, nationally and internationally for fair and sustainable food, farm and trade systems. IATP has identified corporate concentration and a lack of competition in the agriculture sector as a major contributor to economic, environmental and social harms within our current food system.

IATP strongly supports the proposed merger guidelines and urges the Department of Justice and Federal Trade Commission to finalize these rules as soon as possible.

In January, U.S. Department of Agriculture (USDA) Secretary Tom Vilsack told Senators that the government would not block global meat giant JBS from government procurement contracts due to violations of the Foreign Corrupt Practices Act because there would not be enough meat on the market from other sources.[1] This remarkable admission goes to the heart of many risks associated with a weak merger approval process and an agriculture sector now controlled largely by too-big-to-fail companies.

The agriculture sector is highly concentrated due to a steady series of mergers over the last 50 years. The top four beef companies now control 86% of the market, the top four soy processors control 80%, the top four pork companies control 67% and the top four poultry companies control 54%.[2] Earlier this year, USDA issued a report on the highly concentrated seed industry, documenting the many challenges for competition and innovation,[3] including fewer choices and higher prices.[4] There are both horizontal and vertical integration issues associated with mergers in the agriculture sector, with some of the larger players dominant in multiple segments of meat and feed or seeds and pesticides. In a recent example, animal feed giant Cargill acquired America's third-largest chicken business.[5]

[1] https://www.politico.com/news/2023/01/10/usda-meatpacker-bribery-case-00077093

[2] https://farmaction.us/wp-content/uploads/2021/05/Hendrickson-et-al.-2020.-Concentration-and-Its-Impacts_FINAL_Addended.pdf

[3] https://www.ams.usda.gov/sites/default/files/media/SeedsReport.pdf

[4] https://civileats.com/2019/01/11/the-sobering-details-behind-the-latest-seed-monopoly-chart/

[5] https://www.foodandpower.net/latest/cargill-sanderson-consent-decree-8-2022

MINNEAPOLIS | WASHINGTON, D.C. | BERLIN

1700 SECOND STREET NE, MINNEAPOLIS, MINNESOTA 55413 | +1 612-870-0453 | IATP.ORG

Many of agriculture's most dominant players have settled price-fixing charges over the last decade, including in beef,[6] pork[7] and poultry.[8] We agree with the proposed guidelines that deals between companies with a history of collusion should face more regulatory scrutiny under the merger approval process.

For farmers, high levels of concentration mean they are squeezed by powerful companies on both sides of their business. Farmers are price takers in this system, forced to pay what a limited number of seed, pesticide, equipment and animal genetics dealers charge as part of farm expenses, as well as forced to accept prices from what a small number of meat, poultry or grain companies offer. In many geographic markets, farmers have even fewer options from which to buy and sell.

Such levels of concentration make it extremely difficult, if not impossible, for new innovative companies to enter the sector. Innovation, responsiveness and diversity within the agriculture sector will be essential as the escalating climate crisis introduces growing risk to farming and our food supply. The most recent U.S. National Climate Assessment outlines what is coming for our food system, including increasing drought, wildfires, the depletion of water supplies, and new pests and diseases for crop and livestock production.[9] We will need to rapidly adjust seeds, pest management tools, animal breeds and cropping systems to adapt to these new conditions. We will also need to reconfigure our food processing infrastructure to be more decentralized and less dependent on vulnerable long supply chains.

The existing permissive merger approval process, and associated consolidation in the agriculture sector, has led to a lack of genetic diversity in seeds, cropping systems and animals in our agriculture system. Most U.S. cropping systems lack genetic diversity, leaving many of the nation's farms vulnerable to plant disease, a risk that is expected to rise with climate change.[10] The shift toward a large Concentrated Animal Feeding Operation (CAFO) model to raise cattle, hogs and poultry for a handful of companies has led to thousands, if not tens of thousands, of identical breeds in close quarters, an ideal environment for the rapid spread of disease. The CAFO system has been affected by mass disease outbreaks in the poultry[11] and pork industry[12] over the last several years.

---

[6] https://www.reuters.com/legal/litigation/jbs-pay-25-mln-latest-beef-price-fixing-settlement-us-court-2023-04-17/

[7] https://www.reuters.com/legal/pork-consumers-75-million-price-fixing-accord-with-smithfield-approved-2023-04-12/#:~:text=Pork%20consumers'%20%2475%20million%20price%2Dfixing%20accord%20with%20Smithfield%20approved,-By%20Mike%20Scarcella&text=April%2012%20(Reuters)%20%2D%20A,to%20keep%20prices%20artificially%20high.

[8] https://www.fooddive.com/news/pilgrims-pride-perdue-farms-settle-poultry-chicken-price-fixing-case-for-35-million-washington-state/647195/

[9] https://nca2018.globalchange.gov/chapter/10/

[10] https://grist.org/agriculture/next-pandemic-will-be-plants-not-people/

[11] https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/avian/avian-influenza/hpai-2022/2022-hpai-commercial-backyard-flocks

[12] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7266596/

We are encouraged to see the new merger guidelines incorporate additional considerations beyond the "consumer welfare standard." In agriculture, the impact of mergers has been felt by farmers and workers, small businesses, our environment and health. A narrow merger review based on consumer welfare, without considering other harms, has been overly limiting and ultimately has caused harms to many market participants not previously considered.

IATP strongly agrees with the 13 core guidelines included in the proposed rules. For agriculture, we believe the following guidelines are particularly relevant when evaluating future mergers:

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets. When sectors such as agriculture are already significantly concentrated, any additional levels of concentration will cause harm. We welcome the proposed benchmark that any deal that results in a post-merger HHI of greater than 1,800 (and an HHI increase of 100) would represent undue concentration. We also support scrutiny of a merged firm when the merger results in an increase above 30% of the market. These straightforward thresholds should set clear expectations for market participants.

Guideline 3: Mergers Should Not Increase the Risk of Coordination. In a highly concentrated sector like agriculture, which has already experienced a series of major price-fixing settlements, this guideline is critically important. Too often, past corporate behavior has not been fully considered when approving mergers. Additionally, transparency has steadily declined in agriculture markets with the growing use of private contracts, further increasing the risk of coordination.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market. The barriers to entry in many segments of the agriculture sector are significant. Not only are new entrants forced to compete against dominant national players, but they must also compete against global agriculture giants. Companies like JBS, Cargill, Tyson Foods, Smithfield, Archer Daniels Midland, Bayer and Bunge operate in markets around the world and are able to undercut new entrants or simply buy them, as they have time and again.

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition. In agriculture, seed purchases are often directly linked to pest and weed control. Companies like Cargill are major beef and poultry producers, and also major feed providers for these animals. These bundled market structures reduce competition and make it difficult for new entrants. The rising number of farmers operating on contract, where the contracts are often secret, further limits the opportunity for a transparent and competitive market.

Guideline 8: Mergers Should Not Further a Trend Toward Concentration. As stated previously, the trend toward mergers and more concentration in agriculture is well documented.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series. The dominant market position of seed companies like Bayer or meat companies like JBS has occurred through the purchase of numerous smaller companies.[13] Corporate consolidation in the pork sector came from a series of mergers starting with the entry of Premium Standard Farms, which was bought by Continental Grain, which was bought by Smithfield Foods (who had purchased Murphy Farms), who was then bought by WH Group.[14] Moving forward, it will be critical for the agriculture sector to consider this pattern of multiple acquisitions and the cumulative impact these mergers have on the market.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers. This is a critically important guideline for farmers and rural communities. Farmers are both buyers and sellers in the marketplace. Mergers can reduce the buying options for farmers on seeds, inputs and implements. They can also limit market options into which farmers can sell. This guideline also should consider small agriculture businesses, such as meat and other food processing, as buyers and sellers. The loss of local, small-scale meat processing and processing for a diversity of crops, such as small grains, has adversely affected farmers and rural small towns around the country.

Farmers and rural communities should not have to face more mergers in the agriculture sector without rigorous scrutiny from regulators. Mergers affect farmers' options for who they buy from and who they sell to. They affect the ability of rural small businesses to compete and enter the marketplace. And they can stifle innovation in an agriculture sector under pressure from increasing climate disruption.

IATP thanks the Department of Justice and the Federal Trade Commission for considering these comments. We welcome any questions regarding our submission.

[13] https://philhowardnet.files.wordpress.com/2023/01/seed2022.pdf

[14] https://missouriindependent.com/2023/09/05/history-of-the-hog-industry-shows-how-to-save-the-cattle-industry/