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# Food Industry Antitrust During Covid-19

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# Food Industry Antitrust During Covid-19

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Covid-19 is having a significant impact on the food industry and drawing acute antitrust scrutiny from government bodies and private litigants. It is important for companies in the food industry to understand why the scrutiny exists, the current state of litigation and investigations, and how to avoid becoming embroiled in both.

## Increased Activity

In spring 2020, President Donald Trump asked the Department of Justice to investigate meatpacker pricing activity, a coalition of Democratic senators sent a letter to the U.S. attorney general demanding an investigation into reports of price fixing in the cattle market in the wake of the pandemic, and 11 state attorneys general sent a letter to the U.S. attorney general asking for a DOJ investigation into competition issues in agricultural markets.

Meanwhile, the DOJ's Antitrust Division indicted four executives in the broiler chickens industry and, prior to that, had engaged in a merger review that resulted in a 40-month jail sentence for a canned tuna chief executive, all while private litigants have continued to file multiple antitrust suits against food distributors and producers.

## Conditions Ripe for Scrutiny

There are two primary characteristics in the food industry that lead to antitrust scrutiny. First, there are relatively few major players in many food sectors. Even during a pandemic with stay-at-home orders in place, everyone needs to eat, and when consumers see shortages and price spikes while farmers see prices plummet, antitrust allegations may result. While there are often market reasons for such fluctuations, they aren't always apparent to those crying foul.

Second, many food companies often face supply challenges characteristic of the industry, such as perishability of products, seasonal availability and weather-determined supply. The industry's inherently unpredictable supply/demand dynamic is even more challenging in a global pandemic. While efforts to smooth out supply and avoid a glut can lead to efficiency, they can also be alleged to be anticompetitive. A variety of supply management efforts undertaken by farmers have been challenged as anticompetitive in recent years—examples include potatoes, dairy cows, and chickens.

It is now more important than ever for companies in the food and retail industries to understand the ongoing antitrust investigations and litigation. The following is a summary of recent matters and some takeaways for avoiding antitrust risk.

## Poultry Industry

There have been recent criminal charges and private suits in the poultry industry. On June 3, 2020, the DOJ's Antitrust Division obtained an indictment in Denver, Co., of four high-level poultry executives, including the chief executive and former vice president of the second-largest poultry company and the president and vice president of another, for their roles in a conspiracy to fix prices and rig bids for broiler chickens. In 2019, the Antitrust Division intervened in the civil suit, asking the court to stay discovery for six months while the Antitrust Division pursued potential criminal charges. The class action alleged that some of the biggest poultry companies coordinated prices between 2008 and 2016, resulting in a 50% price hike for broiler chickens. The complaint further alleges that they took this action "despite input costs … falling roughly 20% to 23% over the same time period...."

The use of an online tool to compile information on pricing and supply appears to be an important element of the price-fixing claim in the private and government chicken antitrust investigations. While there is nothing per se illegal about these sites, they can raise suspicions on behalf of public enforcers and litigants as possibly being a platform for facilitating collusion on prices; therefore, participation or utilization should be carefully considered.

While the antitrust lawsuit and government investigation into the poultry industry preceded the pandemic, the industry should expect continued antitrust scrutiny given pandemic-driven supply and pricing concerns, and additional charges and suits are likely.


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## Meatpacking Industry

The meatpacking industry, which has seen its fair share of Covid-19-related disruption due to plant closures, has also drawn antitrust scrutiny. President Trump and state attorneys general specifically asked the DOJ to investigate competition issues and pricing trends in the meatpacking industry. And 11 state attorneys general sent a letter to U.S. Attorney General William Barr asking for a DOJ investigation, stating that competition issues "arising from agricultural markets existed long before the Covid-19 pandemic and will persist long after we defeat the current crisis. Concerns about concentration in the U.S. beef processing market leading to sizeable profit margins while cattle farmers see decreased purchase prices underlie these calls for investigations."

There are reports that the Antitrust Division sent civil investigative demands to the country's four biggest meatpackers regarding potential antitrust violations. CIDs are indicative of a civil investigation, but the uncovering of any horizontal price fixing could lead to criminal charges against corporations and individuals that carry steep penalties, including potential jail time. The interest paid to the beef industry by the DOJ recently prompted a class action lawsuit against some of the largest beef producers, alleging that the companies violated Section 1 of the Sherman Act by conspiring to constrain beef supplies in the U.S., thereby artificially inflating domestic beef prices paid by direct purchasers. See *Samuels v. Cargill, Inc.,* No. 0:20-cv-01319 (D. Minn. Jun. 6, 2020).

## Egg Industry

While certainly no stranger to antitrust scrutiny, the egg industry has seen renewed interest in its activity due to climbing prices during the pandemic in both Texas and California. The Texas attorney general and a group of private parties in California filed suit separately in late April 2020 against the largest egg producer in the U.S. for what they called excessive, unfair, and illegal profits obtained during the pandemic. Specifically, in the private class action in California, the consumers allege that the price of eggs nearly tripled between the onset of the pandemic and the end of March, and remained more than 10% higher than they were before the declaration of emergency in California—an alleged violation of California's price-gouging law. See *Adrienne Fraser et al. v. Cal-Maine Foods Inc. et al*., Case No. 3:20-cv-02733 (N.D. Cal.).

While there is no federal price-gouging law applicable to the food industry, most states do have laws in place, which are triggered by a state-declared emergency, like the current pandemic. While price-gouging laws vary from state to state, they usually label excessive price hikes on certain products during an emergency as price gouging, which can result in fines and even jail time. Producers need to recognize that intent does not matter under these statutes—even innocent price increases can be a violation. The good news for suppliers facing increased costs during the pandemic is that state price-gouging laws all contain some type of defense or exception for increased prices due to increased costs.

## Grocery Stores and Price Gouging

Retail sellers of food and essential products can also face risks when they raise prices during the pandemic. According to a recent lawsuit, it is alleged that a major grocery store has been drastically increasing prices for high-demand items like toilet paper and other essential goods amid the pandemic, according to a proposed class action filed in California federal court. According to the suit, certain grocery stores are selling essential items like toilet paper far in excess of their pre-Covid-19 prices and in violation of California's price-gouging law, according to the 12-page complaint filed in early June 2020.

## Pork Industry

Long before Covid-19, the pork industry faced antitrust scrutiny, particularly in light of concerns about industry consolidation. In 2009, Smithfield, one of the largest pork processors in the U.S., was charged by the government with violations on two separate occasions involving failure to comply with requirements under the Hart-Scott-Rodino Act before purchasing stock in a rival and pursuing an acquisition and merger.

In times like these, when both suppliers and distributors are feeling the pinch, they may be tempted to work together to fix the problem, but that in and of itself can be seen as a type of anticompetitive collaboration. Recognizing, however, that we are in a global crisis, the government has stepped up to help producers ameliorate distribution problems without violating antitrust laws.


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Antitrust agencies have recognized the time-sensitive challenges brought about by the Covid-19 crisis and have issued guidance on such collaboration and provided for expedited review of such proposed collaborations. This expedited review process was recently used in the pork industry. The National Pork Producers Council sought a DOJ business review regarding managing the farm-level surplus of hogs pursuant to an expedited, temporary business review procedure detailed in a joint DOJ/Federal Trade Commission antitrust statement regarding Covid-19.

Soon thereafter, on May 15, 2020 the DOJ issued its business review, announcing that it had no present intention to challenge the proposed collaborative efforts of the NPPC and the U.S. Department of Agriculture to address certain hardships facing hog farmers as a result of the pandemic.

## Online Delivery Platforms

Third-party delivery companies also have faced recent antitrust lawsuits. In April 2020, a few popular food delivery companies were accused of forcing restaurants to charge "uniform prices for restaurants'" menu items throughout all purchase platforms, preventing "restaurants from charging different prices to meal delivery customers than they charge to dine-in customers for the same menu items." And although this lawsuit was not tied to the pandemic, delivery platforms face increased scrutiny during the pandemic, as they are used by so many to have food delivered to their homes.

## Merger Review Beware

Merging parties should be aware that if there is anticompetitive activity occurring, a merger review may reveal it. The DOJ's review of the proposed merger of two tuna companies uncovered price fixing that ended with a tuna company pleading guilty for its role in fixing the prices of shelf-stable tuna fish sold in the U.S. and agreeing to pay a $25 million fine. The criminal investigation had its genesis in a potential merger between two major players that DOJ started reviewing after the companies applied for a merger; the merger review spawned a criminal investigation. Due to that investigation, the chief executive of one of those companies was convicted of price fixing and was sentenced to a 40-month term of incarceration and ordered to pay a $100,000 fine.

## Takeaways

Even though times may be difficult during the current pandemic, antitrust laws remain in full effect and businesses within the food industry need to be aware of potential antitrust risks. Consider the following to avoid inadvertently running afoul of antitrust laws:

- Always set prices independently. Competitors should not share sensitive information such as future pricing or supply amounts.
- While collaboration can be helpful in these trying times, be wary of collaboration about future prices, supply, or allocation of markets, customers or suppliers.
- If prices need to be raised due to increased costs or supply issues, be aware of state price-gouging laws as well as federal restrictions on hoarding and price gouging due to the pandemic.
- If considering a collaboration with competitors during the pandemic, seek legal advice and consider asking the DOJ and FTC for guidance through the expedited review process.
- Have an effective antitrust compliance program in place so that employees are aware of antitrust risks and potential violations.


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