National Pork Producers Council®

The Global Voice for the U.S. Pork Industry

August 8, 2022

Administrator Bruce Summers
Agricultural Marketing Service
United States Department of Agriculture
Room 2095, South Agriculture Building
1400 Independence Avenue SW
Washington, DC 20250

RE: Comments of the National Pork Producers Council in Response to Proposed Rule "Transparency in Poultry Grower Contracting and Tournaments (AMS-FTPP-21-0044-0001)

Administrator Summers:

The National Pork Producers Council (NPPC), which represents the interests of America's more than 60,000 pork producers, submits the following comments on the Agricultural Marketing Service's (AMS) Proposed Rule "Transparency in Poultry Grower Contracting and Tournaments (AMS-FTPP-21-0044-0001) (the "Proposed Rule") regarding poultry grower contracting.

To be clear, NPPC has no position on the proposed poultry rule. However, as this rule is one part of a series of rules to come on enforcement and interpretation of the Packer's and Stockyards Act (PSA), NPPC would like to highlight some key considerations for AMS as it continues to engage in this space. More specifically, NPPC would like to highlight the potential for competitive issues that mandatory reporting and increased transparency measures could raise.

Legal Analysis of Transparency in the Context of the Poultry Rule and its Antitrust Implications

The Proposed Rule includes heightened disclosure requirements between dealers and growers, allowing growers to exchange specific contractual information with competing growers and other industry participants. For example, the Proposed Rule requires dealers to disclose to growers a summary of any information the dealer collects or maintains pertaining to grower variable costs inherent to poultry production, as well as specific information pertaining to the dealer's inputs and distribution of those inputs across competitors.[1] The Proposed Rule also requires dealers to include additional competitively sensitive information in their contracts governing their growing arrangements.[2] Growers, in turn, are permitted to disclose the specific terms of their growing arrangements with other growers and more broadly any "business associate" with whom the grower has a "valid business reason for consulting when entering into or operating under a poultry growing arrangement," notwithstanding any confidentiality provision in the contract.[3] Accordingly,

[1] Proposed Rule §§ 201.100(d); 201.214(b); 201.214(c).
[2] See id. §§ 201.100(i); 201.214(b); 201.100(b)(5).
[3] Id. § 201.100(b)(7).

the Proposed Rule may have the effect of creating an information exchange of specific and competitively sensitive information between a wide range of actual and potential competitors.

Information exchanges between competitors without adequate informational safeguards may raise competitive concerns. As courts have recognized, information exchanges may facilitate collusion that leads to anticompetitive effects. *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) ("[I]nformation exchange is an example of a facilitating practice that can help support an inference of price-fixing."). Indeed, "[p]rice exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices." *Id*. at 212 (citing *United States v. Container Corp. of Am.*, 393 U.S. 333, 334–38). Thus, courts have long recognized that information exchanges, even in the absence of an actual agreement to fix prices, may lead to anticompetitive effects. See, e.g., United States v. Container Corp. of Am., 393 U.S. 333 (1969) (finding agreement to exchange price information without allegations of an agreement to fix prices may lead to price fixing).

In determining whether an information exchange violates the antitrust laws, courts analyze the exchange under the rule of reason analysis, in which a court will balance any anticompetitive effects the information exchange is alleged to have caused with the exchange's procompetitive benefits and find a violation if the anticompetitive effects outweigh the procompetitive benefits. *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 113 (1975) (holding not all information exchanges are per se illegal). Courts assess a number of factors in determining whether information sharing causes anticompetitive effects, including the nature of the goods or services involved, the "structure of the industry" and level of consolidation, and the "nature of the information exchanged" such as the specificity of the information, how current it is, and whether the information is publicly available. *Todd*, 279 F.3d at 199, 209–13 (quoting *United States v. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)). Indeed, the Department of Justice ("DOJ") has recognized that information exchanges may lead to anticompetitive effects and has concluded that certain industries are "more vulnerable to coordinate[d] [pricing] conduct if each competitively important firm's significant competitive initiatives can be promptly and confidentially observed by that firm's rivals." Horizontal Merger Guidelines (2010) at § 7.2. Further, information exchanges may be anticompetitive because, in some instances, they can "reduce competitive incentives." *Todd*, 279 F.3d at 214.

Information exchanges in a monopsony (a market where there is a single buyer) or an oligopsony (a market where there are a limited number of buyers) can present significant competitive concerns. *Campfield v. State Farm Mut. Auto Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008) (quoting *Todd*, 279 F.3d at 202) ("When considering market power in a monopsony [or oligopsony] situation, the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes."). USDA has described the poultry tournament system as an oligopsony.

Courts have found that product buyers violated antitrust laws as a result of their participation in information exchanges. For example, in *National Macaroni Manufacturers Association v. FTC*, F.2d 421, 426 (7th Cir. 1965), the Seventh Circuit found that pasta manufacturers conspired to lower prices of durum wheat by coordinating on the composition of pasta, stating "where all or the dominant firms in the market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements." *Id*.

While courts have found overly transparent information exchanges may cause anticompetitive effects, courts have also recognized important carve-outs for information exchanges that contain safeguards such as aggregated or anonymized data, especially in the context of trade associations. *See, e.g.*, *In re Citric Acid Litig.*, 191 F.3d 1090, 1100 (9th Cir. 1999) (exchange of aggregated price information was not a violation of the Sherman Act); see also *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 113 (1975) (distribution of standardized interest rate information not a violation of the Sherman Act). As such, information exchanges may be lawful, and benefit competition, if parties put in place appropriate safeguards, including the use of aggregated data or other anonymizing features. Indeed, courts have long recognized that trade associations are lawfully able to share aggregated trade data among their members. *Maple Flooring Mfrs. Asso. v. United States*, 268 U.S. 563, 585 (1925) ("[T]he members of trade associations [do not] become . . . conspirators merely because they gather and disseminate information"); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 35 (D.D.C. 2008) (same).

Specific Considerations with Regard to Transparency-Focused Market Reform

Increased transparency in contracting and reporting requirements could create information exchanges that would allow for the communication of specific and competitively sensitive information to a wide-range of actual and potential competitors, which may lead to anticompetitive effects. In order to alleviate potential competitive concerns increased transparency measures could raise, AMS must ensure adequate safeguards are put in place to prevent the misuse of competitively sensitive information. Without such safeguards, heightened information exchanging requirements such as those contained in the Proposed Rule could create information exchanges that may facilitate collusion and other anticompetitive behavior arising from the availability of sensitive information between competitors.

This is not to say that information exchanges are inherently dangerous; indeed, they can be procompetitive. In fact, the pork industry relies on a government-mandated information exchange as its basis for price discovery. This is, however, to highlight that large, aggregated data publishing such as that found in Livestock Mandatory Reporting (LMR) may already be the best framework for some livestock categories for information sharing that balances the need for information symmetry with confidentiality-driven protections from price signaling. Indeed, USDA seems to have correctly supported the confidentiality provisions in its response to the initial version of the *Cattle Price Discovery and Transparency Act* which threatened to override the 3/70/20 confidentiality guideline.

One other important principle to highlight is that, depending on the scale of some measures, the procompetitive benefits of current livestock marketing schemes – specifically marketing agreements – may experience a chilling effect depending on the degree of a proposed transparency mandate. Most significantly, increased transparency could lead to a dealer offering growers uniform contract terms, which would diminish the competitive nature of the market and the bargaining power of individual growers. If dealers are required to disclose certain performance metrics, inputs, and terms across all growers and then face increased legal liability this may lead to uniform terms. Ultimately, those terms and metrics may end up being the lowest common denominator.

Conclusion

To reiterate, NPPC does not have any position on the poultry rules proposed by AMS as it is not involved in the poultry industry. However, as AMS continues its rulemaking under the Packers and Stockyards Act – especially as it relates to transparency - pork producers urge that the AMS consider the principles described above. Pork producers rely heavily on information sharing through LMR, and recognize that information symmetry is the most important factor in ensuring that a fair price is agreed to. However, it is equally important that these measures do not create opportunities for anticompetitive behavior or, when paired with changes to PSA enforcement, a chilling effect on the offerings of marketing agreements.

If you should have any questions as you consider these comments as part of writing rules related to the Packers and Stockyards Act, please contact NPPC Vice President and Counsel, Global Government Affairs Nick Giordano at giordann@nppc.org.

Respectfully Submitted,

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