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# GOT MERGERS? DAIRY FARM BANKRUPTCIES PROMPT ANTITRUST PROBE

[Agriculture \(/full-blog/category/Agriculture\)](#)

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Speaking at a dairy expo in Wisconsin, United States Secretary of Agriculture Sonny Perdue remarked that “in America, the big get bigger and the small go out.” Unfortunately for his audience that day, and for dairy farmers across the country, this has proved true. Although “big” is generally

equated with “bad,” given the abysmal state of the dairy industry, big dairy farms are not necessarily bad for consumers.

American dairy farmers have been struggling for years.[i] Many attribute the increase in dairy farm failures to health concerns and the proliferation of dairy alternatives.[ii] Trade wars have proved to be a source of distress for farmers in recent years.[iii] Decreased demand, coupled with increased production are also to blame, resulting in low milk prices for the last several years.[iv] To offset considerable dairy surpluses, the United States (U.S.) government has spent billions of dollars bailing out dairy farmers.[v] These funds are dispersed through programs such as the U.S. Department of Agriculture’s (USDA) Dairy Margin Coverage Program, which “provides financial protection to dairy producers when the difference between the all milk price and the average feed cost (the margin) falls below a certain dollar amount.”[vi] Overproduction also prompts the American government to purchase dairy from farmers.[vii] According to the USDA, the government stockpiled 1.39 billion pounds of cheese as of June 2018.[viii]

Despite substantial federal aid, more than 2,700 family-run dairy farms shut down in 2019.[ix] In early 2020, Borden Dairy Co., one of America’s largest dairy companies, filed bankruptcy.[x] America’s largest milk producer, Dean Foods, filed bankruptcy just a few months prior.[xi] Dairy Farmers of America (D.F.A.) announced its desire to purchase a portion of Dean Foods shortly thereafter.[xii] D.F.A is a dairy cooperative, comprised of groups of farmers who sell their milk.[xiii] Since 1922, agriculture cooperatives have enjoyed limited exemptions from antitrust laws to allow small participants in the industry to market their products more effectively.[xiv] Despite this limited protection, D.F.A. previously faced accusations for alleged anticompetitive practices.[xv] The recently proposed merger piqued the interest of the Department of Justice (DOJ), who announced a probe into the potential acquisition of Dean Foods by D.F.A. in 2019.[xvi]





Credit (<https://www.cnn.com/2017/01/05/health/milk-bread-toilet-paper-snow/index.html>)

In investigating mergers of firms competing in the same market, referred to as “horizontal mergers,” antitrust enforcers seek to determine whether the merger would substantially lessen competition in the market.[xvii] The antitrust enforcers, the DOJ and Federal Trade Commission, published guidelines regarding inquiries into horizontal mergers, including review of potential price-related and non-price related harm to consumers.[xviii] Price-related harm arises from the potential for firms with enhanced market power to elevate prices charged to consumers.[xix] Non-price harm can result from diminished product quality or variety, and decreased incentive to innovate.[xx] Antitrust enforcers are also concerned with preventing mergers that would result in a market comprised of only a small number of firms.[xxi] The merger guidelines acknowledge that mergers can be beneficial to the economy because of their potential to generate efficiencies, which may result in lower prices or improved quality.[xxii] Former Assistant Attorney General Bill Baxter’s view of mergers as “an important and extremely valuable capital market phenomenon, that... are to be in general facilitated” continues to be accepted by DOJ leaders today.[xxiii]

Those opposed to dairy farm mergers fear large firms will reduce competition.[xxiv] But this argument overlooks the fact many dairy farms already continuously operate at a loss and rely on government bailouts to stay afloat.[xxv] Given the current financial struggles facing dairy farmers, it is unlikely that the proposed merger would create additional harm to the industry. Such a merger could actually benefit the American dairy sector by providing stability to local dairy suppliers.[xxvi] Consolidation also has the potential to facilitate innovation and efficiencies, which can create cost-savings that can be passed to consumers.[xxvii] Government bailouts only exacerbate the problems facing the industry by encouraging wasteful overproduction.[xxviii] Taxpayers should not be expected to foot the bill for chronic excess dairy production.

The U.S. Department of Agriculture already claims that the federal government has an “active role in regulating and assisting” the dairy industry.[xxix] Further government intervention by blocking dairy farm mergers is unnecessary. In light of the DOJ’s permissive view toward most mergers, it is unlikely that the proposed merger would meet the requisite harm to justify a meritorious challenge.

[i] See Dan Nosowitz, *With Dairy Farmers Struggling, USDA to Buy \$50 Million Worth of Milk*, Modern Farmer (Aug. 15, 2018), <https://modernfarmer.com/2018/08/with-dairy-farmers-struggling-usda-to-buy-50-million-worth-of-milk/> [<https://perma.cc/5EXD-BZ7D>].

[ii] See *U.S. Non-Dairy Milk Sales Grow 61% Over the Last Five Years*, Mintel (Jan. 4, 2018), <https://www.mintel.com/press-centre/food-and-drink/us-non-dairy-milk-sales-grow-61-over-the-last-five-years> [<https://perma.cc/9ZLR-443V>] (reporting that one in five Americans cite health reasons for consuming less dairy).

[iii] Morning Edition, *Wisconsin is Again Leading the Nation in Farm Bankruptcies*, NPR (Sept. 10, 2019, 5:07 AM), <https://www.npr.org/2019/09/10/759296506/wisconsin-is-again-leading-the-nation-in-farm-bankruptcies> [<https://perma.cc/ZLA8-Z2N9>].

[iv] Nat'l Agric. Statistics Serv., *Milk: Production by Year, U.S.*, U.S. Dep't of Agric. (Mar. 12, 2019), [https://www.nass.usda.gov/Charts\\_and\\_Maps/Milk\\_Production\\_and\\_Milk\\_Cows/milkprod.php](https://www.nass.usda.gov/Charts_and_Maps/Milk_Production_and_Milk_Cows/milkprod.php) [<https://perma.cc/Q37Q-MUVW>] (data indicates there was a 15% increase in U.S. dairy production from 2009-2018); Morning Edition, *Wisconsin is Again Leading the Nation in Farm Bankruptcies*, NPR (Sept. 10, 2019, 5:07 AM), <https://www.npr.org/2019/09/10/759296506/wisconsin-is-again-leading-the-nation-in-farm-bankruptcies> [<https://perma.cc/ZLA8-Z2N9>].

[v] See Newswire, *American Dairy Farmers Depend on Government Subsidies*, Markets Insider (Feb. 8, 2018 8:47 AM), <https://markets.businessinsider.com/news/stocks/american-dairy-farmers-depend-on-government-subsidies-1015126442> [<https://perma.cc/4XMG-SVPN>].

[vi] Lauren Moore, *4 Things to Know About the New Dairy Margin Coverage Program*, U.S. Dep't of Agric. Farmers.gov (May 20, 2019), <https://www.farmers.gov/connect/blog/ag-business/4-things-know-about-new-dairy-margin-coverage-program> [<https://perma.cc/KE8R-XX8D>].

[vii] See Caitlin Dewey, *America's Cheese Stockpile Just Hit an All-Time High*, Wash. Post (June 28, 2018, 10L41 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/06/28/americas-cheese-stockpile-just-hit-an-all-time-high/> [<https://perma.cc/PS6H-W8BQ>].

[viii] *Id.*

[ix] Chris Isidore, *One of America's Oldest and Largest Milk Producers Files for Bankruptcy*, CNN Bus. (Jan. 6, 2020, 12:52 PM), <https://www.cnn.com/2020/01/06/business/borden-dairy-bankruptcy/index.html> [<https://perma.cc/E4NG-R22Q>].

[x] *Id.*

[xi] *Id.*

[xii] Jordan Valinsky, *America's Largest Milk Producer Files for Bankruptcy*, CNN Bus. (Nov. 12, 2019, 10:33 AM), <https://www.cnn.com/2019/11/12/business/dean-foods-bankruptcy/index.html> [<https://perma.cc/VPN2-SRFF>].

[xiii] Phil McCausland, *Best Advice to U.S. Dairy Farmers? 'Sell Out as Fast as You Can,'* NBC News (June 30, 2018, 10:59 AM), <https://www.nbcnews.com/news/us-news/best-advice-u-s-dairy-farmers-sell-out-fast-you-n887941> [<https://perma.cc/SJQ5-PGES>].

[xiv] *See generally* Pub. L. No. 67-146, 42 Stat. 388 (codified at 7 U.S.C § 291) (stating the powers associated with authorization of associations).

[xv] *See* Leah Douglas, *Farmers' Case Against Giant Dairy Co-Op Will go to Trial*, Successful Farming (Oct. 2, 2019), <https://www.agriculture.com/news/business/farmers-case-against-giant-dairy-co-op-will-go-to-trial> [<https://perma.cc/3DZJ-Q3TG>].

[xvi] *See* Ryan McCrimmon, *Dairy Merger Faces Antitrust Probe*, Politico: Morning Agric. (Jan. 28, 2020 10:00 AM), <https://www.politico.com/newsletters/morning-agriculture/2020/01/28/dairy-merger-faces-antitrust-probe-784725> [<https://perma.cc/4AYX-M3JT>].

[xvii] U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, U.S. Dep't of Justice 2 (Aug. 19, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> [<https://perma.cc/F825-8E57>].

[xviii] *Id.*

[xix] *Id.*

[xx] *Id.*

[xxi] *Id.* at 24.

[xxii] *Id.* at 29.

[xxiii] *Assistant Attorney General Makan Delrahim Delivers Remarks at the 2018 Global Antitrust Enforcement Symposium*, U.S. Dep't of Justice (Sept. 25, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust> [<https://perma.cc/8UGF-95HC>].

[xxiv] David Yaffe-Bellany, *A Giant Milk Industry Merger Moves Closer with a \$425 Million Deal*, N.Y. Times (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/business/milk-merger-dean-foods.html> [<https://perma.cc/V89X-DQK9>].

[xxv] See Newswire, *supra* note v; see also Rick Barrett, *Dairy Farmers Are in Crisis – and it Could Change Wisconsin Forever*, Milwaukee J. Sentinel (Feb. 11, 2020, 9:29 PM), <https://www.jsonline.com/in-depth/news/special-reports/dairy-crisis/2019/02/21/wisconsin-dairy-farms-failing-milk-prices-fall/2540796002/> [<https://perma.cc/6FAF-F8SB>].

[xxvi] McCausland, *supra* note xi.

[xxvii] *Id.*

[xxviii] Gene Baur, *The Best Way to Help Dairy Farmers is to Get Them Out of Dairy Farming*, Wash. Post (Jun. 12, 2019, 7:54 PM), <https://www.washingtonpost.com/opinions/2019/06/12/best-way-help-dairy-farmers-is-get-them-out-dairy-farming/> [<https://perma.cc/WRT9-DNJN>].

[xxix] Econ. Research Serv., *Policy*, U.S. Dep't of Agric. (Nov. 12, 2019), <https://www.ers.usda.gov/topics/animal-products/dairy/policy.aspx> [<https://perma.cc/94GU-8TPK>].

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