

Martin Milán CSIRSZKI*
The Early Stage of US Antitrust and Trade Regulation in the Agricultural
Sector**

Abstract

The article aims to analyse the legal history of antitrust and trade regulation provisions exclusively applying to the agricultural sector in the United States of America. Through the analysis of legal history, the article attempts to explore whether the agricultural sector and agricultural producers have always been in a privileged situation with regard to competition policy and regulation, and if they have, what the main impetus was for adopting agriculture-specific antitrust and trade regulation provisions. Within the study, first, I examine the historical antecedents of the Sherman Act. Second, I turn my attention to the first agricultural antitrust exemption under antitrust laws, namely, to Section 6 of the Clayton Act. Third, I present the historical aspects of the „Magna Charta” of agricultural cooperative marketing, the Capper-Volstead Act, then, fourth, I briefly map further federal trade regulation laws which regulate agricultural markets. In the end, I conclude.

Keywords: antitrust, trade regulation, United States, agricultural sector, historical development.

1. Introduction

The United States has always played a pioneering role in competition policy. Not only general rules applying to all economic sectors but also sector-specific provisions were adopted to govern competition. The United States was the first jurisdiction to pass an agriculture-specific exemption under antitrust laws in connection with the prohibition of anti-competitive agreements, as well as it was a frontrunner to regulate markets from a sectoral perspective.

The article aims to shed light on and analyse those federal laws which have been of paramount importance to the agricultural sector. The scrutiny covers both antitrust and trade regulation acts in order that a full picture of US competition regulation could be established regarding the agricultural sector.

I start the analysis with the first modern antitrust statute, the Sherman Act. I aim to find those historical aspects of this law which are related to agriculture. Second, I turn my attention to the Clayton Act which was the first piece of legislation exempting certain agricultural entities under antitrust law.

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Third, I present the historical background of the Capper-Volstead Act which is called the ‘Magna Charta’ of agricultural cooperative marketing. Fourth, I briefly examine other trade regulations laws which apply to the agricultural sector: the Unfair Trade Practices Affecting Producers of Agricultural Products Act, the Packers and Stockyards Act and the Perishable Agricultural Commodities Act.

Through the analysis of legal history, the article aims to explore whether the agricultural sector and agricultural producers have always been in a privileged situation with regard to competition policy and regulation, and if they have, what the main impetus was for adopting agriculture-specific antitrust and trade regulation provisions.

2. Sherman Act

The modern origins of antitrust date back to the end of the 19th century, when the Sherman Act was passed in the United States of America. The Sherman Act was signed into law by President Benjamin Harrison on 2 July 1890 and was the first federal law to address anti-competitive practices as we know them today.

The word ‘antitrust’ itself derives from the fact that the primary form of the creation of monopoly was the legal institution ‘trust’, a specific construct of common law jurisdictions. Nevertheless, *Wayne D. Collins* notes that the era’s state and federal antitrust legislation was aimed not against large firms but the combinations of competitors, and “[r]egardless of their technical legal form, these combinations came at the time to be called trusts.”¹

The Sherman Act came into public consciousness as a reaction against the trust created by S.C.T. Dodd in 1882. Dodd was an attorney for Rockefeller’s Standard Oil Company, who sought to create through the trust a close association of oil refiners able to influence prices and supply in the marketplace while avoiding state taxes and corporate regulation. Although many economists at the time opposed the creation of a federal antitrust statute, saying that it would adversely affect rising real wages and falling prices, the camp of opponents refused to give up their belief in fair competition. However, the question of how to achieve undistorted and fair competition remained unresolved on their side. In agriculture, for example, technological progress has made it impossible for individual producers and small businesses to keep pace with their larger competitors. The populist tendency of the last third of the 1800s, often identified with the Granger movement that emerged in the decade following the American Civil War, accelerated the emergence of antitrust.² The mastermind behind the Granger movement was Oliver Hudson Kelley, an employee of the Department of Agriculture, who founded the organisation known as ‘The Patrons of Husbandry’ in 1867. The organisation was made up of local units called ‘Granges’. Most adherents were attracted to the movement by the need to take action against the monopoly of railway companies and grain elevators (often owned by the railway companies), which charged farmers exorbitant fees for handling and transporting grain and other agricultural products.³

¹ Collins 2013, 2280.

² Phillips Sawyer 2019, 2.

³ See: The Editors of Encyclopaedia Britannica: *Granger movement – American Farm Coalition*.

With regard to the latter problem, it is worth mentioning and briefly outlining the case that reached the US Supreme Court. In *Munn v. Illinois*, in one of the so-called Granger cases, the Supreme Court ruled that, within the limits of the powers inherent in its sovereignty, the government may regulate the conduct of its citizens towards each other and, where the public good so requires, the manner in which individual citizens should use their property. In order to clarify this *ratio decidendi*, declared in principle, the facts of the case may be summarised as follows. The Illinois state legislation, influenced by the Granger movement, set maximum rates that grain elevators could charge for storage and transportation.⁴ After Munn & Scott was fined under this legislative act, and the Illinois Supreme Court upheld the ruling, the company appealed to the United States Supreme Court, arguing that the Illinois regulation violated the United States Constitution because it unconstitutionally restricted the right holder's exercise of his property rights, thus infringing the right to property. This argument was rejected by the Supreme Court, and the essence of the ruling was that the states' regulatory power extends to the relations of private corporations when they affect the public interest. Since the granaries were also intended for use in the public interest, charges imposed by them could be regulated by the State.⁵ This holding highlights and confirms the possibility for states to take action by means of certain legal instruments in order to ensure fair competition, even though this means – by definition – the imposition of property restrictions on certain entities, determining how they should operate in the market.

Although the administration emphasised that the Sherman Act was necessary because of the Standard Oil Trust's unscrupulous and – in many cases – unlawful trading practices,⁶ as well as the exploitation of the agricultural sector by industry,⁷ some authors argued that it was wrong to use the vulnerability of agricultural sector as an impetus for antitrust legislation,⁸ given that agriculture is not a sector that is exclusively exposed to industry, and the facts show that the practices of railroad companies stabilised and increased the income of farmers.⁹ There are authors who see Sherman's personal motives behind the passage of the Act. It was Russell A. Alger who helped Benjamin Harrison get the Republican Party nomination for president, which Sherman resented, so Sherman targeted Alger's trust, 'Diamond Match'. This was done by means of the Antitrust Act of 1890.

⁴ The General Assembly of Illinois – An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State (approved April 25, 1871), Section 15: “*The maximum charge of storage and handling of grain, including the cost of receiving and delivering, shall be for the first thirty days or part thereof two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one cent per bushel.*”

⁵ *Munn v. Illinois*, 94 U.S. 113 (1876) – US Supreme Court decision.

⁶ Thorelli 1955, 92.

⁷ Letwin 1965, 67–68.

⁸ Bradley Jr. 1990, 739.

⁹ Stigler 1985, 1–12.

It is also argued that Sherman – the most influential member of the Senate’s Committee on Finance – directly supported a tariff policy of high tariffs, which is in inextricable contrast to his efforts to limit trusts.¹⁰ In view of these considerations, it is believed that there were more personal motivations behind Sherman Antitrust Act.

However, it is better to choose a middle way and not to overemphasise the power of a personal motif. If Sherman’s individual ‘desire for revenge’ had been the sole basis for the Act’s adoption, Congress would not have voted for it. In any case, the exploited agricultural sector in general, including the Granger movement and the vulnerable agricultural producers, played a decisive role on the road to the passage of the Sherman Act. With the Standard Oil Company having been in a monopolistic position and causing resentment because of governmental manifestations combined with the belief in free competition, which dominated the views of all parties, led to the submission and passage of the Sherman Act. The extent to which Sherman’s personal motivation played a role in this is irrelevant, as the Act could not have been passed without the then current anti-competitive and distortive trade practices that preceded it and the public outcry against them. As can be seen from the brief memento, the need to protect farmers was an important starting point for the adoption of Sherman Act, which is known as the first modern antitrust law. Equally important is the principle enunciated in *Munn v. Illinois*, which had agricultural relevance and which provided case-law justification for competition rules and a solid basis for the creation of federal antitrust laws in the United States.

In connection with the Sherman Act and the goals of antitrust, we must mention one of the most, if not the most, influential antitrust lawyers in the United States, namely Robert Bork, a leading figure of the Chicago School. A major breakthrough and a totally different approach towards antitrust legislation was brought by his article titled *Legislative Intent and the Policy of the Sherman Act*.¹¹ In this scholarly writing, Bork examined the controversies about the Sherman Act, and he concluded the following: “*My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction.*”¹²

The die has been cast: it was that moment which brought to light the goal of consumer welfare in antitrust policy. Bork’s extremism lies in the fact that he thought of consumer welfare as the one and only objective antitrust legislation and enforcement should follow. “*In Bork’s critique, it seemed an antitrust law driven by anything but consumer welfare was the law of the libertine, degenerate and debauched. Economic analysis was now righteous and self-restrained. As such, Bork managed to embed the culture war into one’s method of interpreting the Sherman Act.*”¹³ Although increased debates surrounded his views from the 1960s to the 1980s,¹⁴ opposing voices have already calmed down.

¹⁰ Bradley Jr. 1990, 739–740.

¹¹ Bork 1966, 7–48.

¹² Bork 1966, 7.

¹³ Wu 2018.

¹⁴ Orbach 2010, 133–164.

As Hovenkamp says: “Few people dispute that antitrust’s core mission is protecting consumers’ right to the low prices, innovation, and diverse production that competition promises.”¹⁵ And the paradigm of consumer welfare has been adopted not only by US antitrust enforcement authorities, but also it has penetrated into the discourse on the goals of EU competition law.¹⁶ The days of a more economic approach have come to the world of US antitrust law and, with some delay, that of EU competition law.¹⁷ The more economic approach is connected to the notion of consumer welfare through the fact that consumer welfare is borrowed from the vocabulary of economics, and its measurement is based on consumer surplus. However, it is unclear that consumer welfare only includes the maximisation of consumers’ surplus, or it also aims to include the maximisation of producers’ surplus. According to Hovenkamp, Robert “Bork did not use the term ‘consumer welfare’ in the same way that most people use it today. For Bork, ‘consumer welfare’ referred to the sum of the welfare, or surplus, enjoyed by both consumers and producers. [...] A large part of the welfare that emerges from Bork’s model accrues to producers rather than consumers.”¹⁸ Nevertheless, one thing is certain: the aim of introducing the concept to antitrust law has not resulted in the expected outcomes with regard to legal certainty and clarity.¹⁹

This short outlook on the legislative intent of the Sherman Act in the interpretation of Robert Bork is necessary because it has implications beyond itself, and it started a revolution in US antitrust law. It makes a difference whether one considers consumer welfare as the sole objective of competition law or whether one also formulates other objectives competition law should achieve. The narrow interpretation of antitrust law which only contributes to the generating of consumer surplus has serious side effects on such a sensitive topic as competition in agri-food markets. It determines not only the depth and extent of intervention but also the roles one expects the agricultural sector to play. A commitment to a narrow interpretation of antitrust law has far-reaching implications for agricultural society as a whole, resulting in the exclusion of social concerns from competition policy which may bring about harmful outcomes for the agricultural sector.

3. Clayton Act

Although the adoption of the Sherman Act was seen as a major breakthrough, events in the late 19th and early 20th centuries proved that it did not provide adequate protection against distortions and restrictions of competition. This period also saw the so-called *Merger Movement*, during which corporate empires were created in spite of the Sherman Act, by using other legal constructions instead of trusts.

¹⁵ Hovenkamp 2008, 1–2.

¹⁶ See for example: Pera & Auricchio 2005; Lovdahl Gormsen 2007; Akman 2009; Chirita 2010; Zäch & Künzler 2010, 61–86; Kaplow 2012, 3–26; Negrinotti 2012, 295–337; Daskalova 2015; Coates & Middelschulte 2019; Marty 2020.

¹⁷ Witt 2016.

¹⁸ Hovenkamp 2019, 1.

¹⁹ Daskalova 2015.

As early as 1899, the seriousness of the problem was felt, and the *Civic Federation of Chicago* convened and held a conference to address the problem of trusts. Here, some already expressed their fear for agricultural regions, as the *Merger Movement* had created companies with market power that could raise the price of manufactured goods while lowering the price of raw materials.²⁰ The need for a new law was already mooted by John Bates Clark, which was very similar to the provisions of the Clayton Act passed fifteen years later.²¹

One of the notable differences between the Sherman Act and the Clayton Act is that while the former does not, the latter contains a direct provision for the agricultural sector. The Sherman Act did not differentiate between sectors, and there was a widespread public perception that the first federal antitrust law was in part enacted with the intention of cracking down on large agricultural cooperatives. On the other hand, it was also suggested that the Sherman Act's provisions could be interpreted as meaning that mutual assistance between local farmers managing small farms violate the Act. Around the 1890s, there were already about a thousand agricultural cooperatives in the United States, which brought together producers and sought to coordinate their activities in order to reduce the vulnerability of farmers and improve their bargaining position against their buyers.²² They were, however, covered by the Sherman Act in the same way as any other undertaking engaged in any other activity.

There are authors in the literature who describe the Sherman Act as simply bad law,²³ and given that many see it as a response to the defencelessness of agricultural sector and yet it does not contain specific rules for certain sectors with different needs, such as agriculture, there may be some basis for negative opinions. And if not bad, it can certainly be described as an oversimplified legislative product. The Clayton Act of 1914 attempted to change this by seeking to place a differentiated emphasis on sectors where there was a specific need to do so. The Sherman Act was not repealed by the Clayton Act, the latter merely supplemented and strengthened the former. There are authors who have seen the Clayton Act as an excellent attempt to increase the strength of the Sherman Act,²⁴ and one can agree that the Clayton Act's provisions, a quarter of a century later, can be thought of as an improvement. Approached from the other direction, one could not necessarily have expected more from the Sherman Act, for it lacked background experience which legislation could gain from case law in the decades that followed.

The Clayton Act declares that “[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”²⁵

²⁰ Martin 1959, 6.

²¹ Martin 1959, 7.

²² Varney 2010, 1.

²³ Bradley Jr. 1990, 741.

²⁴ Nagel 1930, 323.

²⁵ 15 U.S. Code § 17 – Antitrust laws not applicable to labor organizations.

Prior to the adoption of Section 6 of the Clayton Act, the position of agricultural cooperatives was not unambiguous in case law. Some state courts drew parallels between cartels and agricultural cooperatives by applying antitrust provisions to them; there were other much more tolerant courts.²⁶

One of the most striking examples of questionable judicial application of antitrust laws was the *Ford v. Chicago Milk Shippers' Association* ruling, in which the Illinois Supreme Court held that the cooperative had influenced milk prices in a way that had restricted competition, and both the cooperative itself and its members had achieved this goal in parallel to the detriment of retailers.²⁷ The case can be summarised as follows. Dairy farmers in Chicago formed a cooperative marketing association to determine prices that farmers would receive for milk and other dairy products. A milk trader entered into a purchase agreement with the cooperative but subsequently refused to pay the purchase price. When the cooperative brought an action to enforce payment, the trader relied on an 1891 Illinois state law that allowed buyers "*who signed a contract to buy goods from a participant in a combination that violated the law could refuse to pay for the goods.*" The Illinois Supreme Court, without reference to the Sherman Act, ruled in favour of the dealer, holding that the cooperative was formed for the purpose of fixing prices and influencing and limiting the amount of milk that could be marketed. It is unlawful for the cooperative to pursue these objectives. Although the cooperative sought to argue that the cooperative itself and its members are a single legal entity, making it incapable that the cooperative conspired with itself to restrict competition, the Illinois Supreme Court broke the unity between the cooperative and its members.²⁸

In general, in the early cases dating back to before the adoption of state cooperative laws, state courts ruled predominantly against cooperatives. This trend was later reversed and cooperatives were considered as specific market actors. Not only was it realised that the vulnerability of farmers to market conditions could be alleviated through cooperatives, but also that their operation had to be balanced with antitrust law. This could not be done other than by exempting them from the scope *rationae personae* of antitrust law, thus placing them in a privileged position. However, this finding was realised almost 25 years after the passage of the Sherman Act. This realisation may certainly be described as a first resolution of the conflicts between agricultural law and competition law, which set in motion the trend in competition law that has continued to this day: treating agricultural sector specially in relation to competition-related provisions.

After the adoption of Section 6 of the Clayton Act, the development of agricultural cooperatives began, but two problems remained unresolved. On one hand, cooperatives covered by the exemption could not issue capital stock, since the exemption applied only to agricultural cooperatives without it. However, capital stock would have been essential to balance the power of middle-class producers.

²⁶ Sagers & Cartensen 2007, 97.

²⁷ Beach 2007, 245.

²⁸ Frederick 2002, 68.

On the other hand, the question arose as to what was meant by the expression of 'lawfully carrying out the cooperative's legitimate objects'. To resolve these problems, the Capper-Volstead Act was passed in 1922.²⁹

4. Capper-Volstead Act

The Capper-Volstead Act imposes conditions on agricultural cooperatives which, if met by cooperatives, result that they are not completely subjected to the antitrust regime. Whereas Section 6 of the Clayton Act contains a mere provision on the issue—a general declaration that certain agricultural cooperatives are exempt from the scope of antitrust law, the Capper-Volstead Act establishes a complex regime.³⁰ Originally, the Clayton Act did not include agricultural cooperatives in the list of its exceptions, intended to give priority only to trade unions, but subsequently involved agricultural cooperatives among the exceptions. This raised the problem of how to interpret the expression 'lawfully carrying out the cooperative's legitimate objects'.³¹

The overall purpose of the Capper-Volstead Act is to enable farmers to compete more effectively and market their products more efficiently.³² Although in public consciousness the Act bears the names of its two most prominent proponents, its original title is as follows: An Act to authorize association of producers of agricultural products. The Act can be divided into two distinct parts: the first sets out the conditions under which a cooperative may be covered by the Act, and the second describes the procedure to be followed in the event a cooperative would commit an antitrust violation. The immunity granted by the Act is limited. Farmers can be held liable under antitrust law, if they abuse the tools available to them.

The Act's core provision is that “[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.”³³ Simply put, it means that agricultural producers can combine forces and will not fall under the prohibition of anti-competitive agreements included in Section 1 of the Sherman Act.

For being exempt, however, agricultural cooperatives shall fulfil certain criteria. The conditions to be met can be summarised as follows: (1) only those who are engaged in the production of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, may be members of a cooperative or an association; (2) they may act together in associations, corporate or otherwise, with or

²⁹ Baumer, Masson & Masson 1986, 190–191.

³⁰ See its critique: Peters 1963, 73–104. Peters (1963, 103) concludes: “The law relative to agricultural cooperatives can be succinctly described by one word – uncertainty. Agricultural cooperatives are in the anomalous situation of not knowing what is right or wrong. As a consequence, they are faced with a continual threat of costly criminal and civil prosecutions. It is undesirable public policy to place any societal group in a position where it must risk extensive litigation in order to determine its rights.”

³¹ Lemon 1970, 443–444.

³² Varney 2010, 3.

³³ 7 U.S. Code § 291 – Authorization of associations; powers.

without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce; (3) such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; (4) such associations are operated for the mutual benefit of the members thereof, as such producers; (5) no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum; (6) the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.³⁴ As can be seen, the Capper-Volstead Act establishes an extensive set of conditions. The two sub-conditions set out in point 5 are in an alternative relationship to each other, so it is sufficient to satisfy only one of them.

The first part, which establishes exact criteria to be followed by agricultural cooperatives, is complemented with complex procedural rules in the second part of the Act.³⁵

5. Other federal laws

Beyond the Capper-Volstead Act, the Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968 is worth mentioning. The latter was, among others, adopted because of addressing a gap in the Capper-Volstead Act. In some sectors farmers are not able to cooperate. A prime example of this is poultry growers. *‘They provide housing for the chickens that the integrator owns. The integrator, also, provides the feed, medicine, etc. Hence, such growers cannot engage in collective action as a farm cooperative because they are hired only to grow the poultry belonging to others and, probably, because the owners of the birds do not qualify as ‘farmers’ under Capper-Volstead this would also void the exemption.’*³⁶

The Unfair Trade Practices Affecting Producers of Agricultural Products Act enumerates prohibited practices related to the collective action of agricultural producers.³⁷

³⁴ 7 U.S. Code § 291 – Authorization of associations; powers.

³⁵ 7 U.S. Code § 292 – Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure.

³⁶ Carstensen 2019, 7.

³⁷ See 7 U.S. Code § 2303 – Prohibited practices: *“It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices: (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or (b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or (c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or (d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or (e) To make false reports about the finances, management, or activities of associations of producers or handlers; or (f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter.”*

Enabling agricultural producers to cooperate with one another for strengthening their bargaining power, as well as ensuring antitrust exemption for these cooperatives are two pillars of great importance to agri-food markets. The Act provides protection for producers against the retaliation of their buyers. Retaliation is a common occurrence in the business relationship between agricultural producers and their buyers with (relative) market power.

One of the most important milestones in the history of US competition regulation on agri-food markets is the passage of the Packers and Stockyards Act. It does not only provide for an exception (a derogation) under (from) general antitrust rules like Section 6 of Clayton Act and the Capper-Volstead Act, but also establishes a completely special regime for handling sector-specific anomalies in the market of live animals.

During the Act's debate, the expression 'food dictator' was mentioned several times by Congressmen and a parallel was made between dictators and food dictators. It was claimed that having a dictator as head of government is as inadvisable as having a food dictator on top of the food system.³⁸

The journey to the adoption of the Packers and Stockyards Act, which was passed on 15 August 1921 and amended on 14 August 1935 to also cover live poultry dealers and handlers,³⁹ started with the Federal Trade Commission (hereinafter referred to as FTC) and the Department of Agriculture (hereinafter referred to as DoA) receiving appropriations for conducting research on "*whether there was reason to believe that the production, preparation, storage distribution and sale of foodstuffs were subject to control or manipulation.*"⁴⁰ Based on the inquiry,⁴¹ it was found that the five largest meat-packing companies had conspired to control "*the purchases of livestock, the preparation of meat and meat products and the distribution thereof in this country and abroad.*"⁴² The most important finding of the FTC report is reproduced here in full: "*Five corporations – Armour & Co., Swift & Co., Morris & Co., Wilson & Co., Inc., and the Cudahy Packing Co. – hereafter referred to as the 'Big Five' or 'The Packers,' together with their subsidiaries and affiliated companies, not only have a monopolistic control over the American meat industry, but have secured control, similar in purpose if not yet in extent, over the principal substitutes for meat, such as eggs, cheese, and vegetable-oil products, and are rapidly extending their power to cover fish and nearly every kind of foodstuff.*"⁴³

The FTC report also posited that the Big Five used, in an unfair and illegal way, their powers "*to manipulate live-stock markets, restrict interstate and international supplies of foods, control the prices of dressed meats and other foods, defraud both the producers of food and consumers, crush effective competition, secure special privileges from railroads, stockyard companies, and municipalities, and profiteer.*"⁴⁴

³⁸ Rosales 2004, 1497–1498.

³⁹ Toulmin 1949, 215.

⁴⁰ Colver 1919, 170.

⁴¹ See Federal Trade Commission 1919.

⁴² Flavin 1958, 161.

⁴³ Federal Trade Commission 1919, 31.

⁴⁴ Federal Trade Commission 1919, 32–33.

Another key source of trade regulation is the Perishable Agricultural Commodities Act of 1930. Its section titled ‘Unfair conduct’ consists of practices which, on one hand, are similar to general unfair competition conducts applying to all sectors,⁴⁵ and which, on the other hand, can be regarded as the consequence of superior bargaining power on the side of the buyer. To mention some examples for the latter: failing or refusing truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or failing, without reasonable cause, to perform any specification or

⁴⁵ See 7 U.S. Code § 499b – Unfair conduct: *‘It shall be unlawful in or in connection with any transaction in interstate or foreign commerce: (1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce. (2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer. (3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce. (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter. (5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated – (A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or (B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant; and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed \$2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation. (6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced. (7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.’*

duty, express or implied, arising out of any undertaking in connection with any such transaction.⁴⁶

6. Conclusion

The analysis shows us that the first 25 years of US antitrust law – from 1890 to 1914 – lacked the legal means to distinguish agricultural producers from other market participants. It resulted that agricultural cooperatives established for the sake of mutual assistance were often held liable for antitrust violations. The situation reversed as a consequence of the adoption of Section 6 of the Clayton Act, and eight years later, that of the Capper-Volstead Act. These laws have since then meant the ‘Magna Charta’ of agricultural producers who can combine forces within cooperatives to market their produce. The legal solution for privileging the agricultural sector was realised through exempting agricultural cooperatives from the prohibition of anti-competitive agreements. However, the exemption does not mean that antitrust would not apply to these market actors at all; it reflects a limited alleviation for them.

A higher level of protection provided for agricultural producers in the competitive process is not only ensured through antitrust laws but also trade regulation provisions, such as the Packers and Stockyards Act applying to the sector of live animals, the Perishable Agricultural Commodities Act applying to the sector of fruit and vegetables, as well as the Unfair Trade Practices Affecting Producers of Agricultural Products Act applying to all agricultural sectors.

In conclusion, it is clear from the scrutiny that the beginnings of antitrust were not in favour of the agricultural sector despite of the fact that the vulnerability of farmers played a not negligible role on the road to modern antitrust. After a quarter of a century, however, the privileged position of agricultural producers (and cooperatives) was established in US competition policy. This direction has been maintained since then, and it has also served as an example for other jurisdictions which built up their competition regime later than the United States.

The impetus for adopting sector-specific rules applying to agriculture is twofold. On one hand, the rules aim to increase the bargaining power of farmers through enabling them to combine forces against their buyers, and, on the other hand, the provisions attempt to provide additional protection to agricultural producers against unfair business conducts which are not covered by conventional antitrust.

⁴⁶ 7 U.S. Code § 499b, 4.

Bibliography

1. Akman P (2009) 'Consumer Welfare' and Article 82EC: Practice and Rhetoric, *World Competition* 32(1), pp. 71–90.
2. Baumer DL, Masson RT & Masson RA (1986) Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture, *Villanova Law Review* 31(1), pp. 183–252.
3. Beach CF (2007) *A Treatise on the Law of Monopolies and Industrial Trusts, As Administered in England and in the United States of America*, New Jersey, The Lawbook Exchange Ltd.
4. Bork RH (1966) Legislative Intent and the Policy of the Sherman Act, *Journal of Law & Economics* 9(1), pp. 7–48.
5. Bradley Jr. RL (1990) On the Origins of the Sherman Antitrust Act, *Cato Journal* 9(3), pp. 737–742.
6. Carstensen P (2019) Controlling unfairness in American agriculture, in: Anchustegui IH, Gjendemsjø R, Carstensen P, Hedelin J & López AM (2019) Unfair trading practices in the food supply chain, *Concurrences* 2019/3.
7. Chirita AD (2010) Undistorted, (Un)fair Competition, Consumer Welfare and the Interpretation of Article 102 TFEU, *World Competition* 33(3), pp. 417–436.
8. Coates K & Middelschulte D (2019) Getting Consumer Welfare Right: the competition law implications of market-driven sustainability initiatives, *European Competition Journal* 15(2–3), pp. 318–326. doi: 10.1080/17441056.2019.1665940
9. Collins WD (2013) Trusts and the Origins of Antitrust Legislation, *Fordham Law Review* 81(5), pp. 2280–2348.
10. Colver WB (1919) The Federal Trade Commission and the Meat-Packing Industry, *The Annals of the American Academy of Political and Social Science* Vol. 82, pp. 170–174.
11. Daskalova V (2015) Consumer Welfare in EU Competition Law: What Is It (Not) About? *The Competition Law Review* 11(1), pp. 131–160.
12. Federal Trade Commission (1919) *Report of the Federal Trade Commission on the Meat-packing Industry – Summary and Part I*. Washington, Government Printing Office.
13. Flavin TJ (1958) The Packers and Stockyards Act, 1921, *The George Washington Law Review* Vol. 26, pp. 161–180.
14. Frederick DA (2002) *Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act*, U.S. Department of Agriculture, Rural Business-Cooperative Service.
15. Hovenkamp H (2008) *The Antitrust Enterprise: Principle and Execution*, Cambridge, Harvard University Press.
16. Hovenkamp H (2019) Is Antitrust's Consumer Welfare Principle Imperiled? Faculty Scholarship at Penn Law, https://scholarship.law.upenn.edu/faculty_scholarship/1985/ [07.03.2022].
17. Kaplow L (2012) On the choice of welfare standards in competition law, in: Zimmer D (ed.) *The Goals of Competition Law*, Cheltenham, Edward Elgar Publishing, pp. 3–26.
18. Lemon LG (1970) The Capper-Volstead Act – Will It Ever Grow Up? *Administrative Law Review* 22(3), pp. 443–454.

19. Letwin W (1965) *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act*, New York, Random House.
20. Lovdahl Gormsen L (2007) The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC, *European Competition Journal* 3(2), pp. 329–344. doi: 10.5235/ecj.v3n2.329
21. Martin DD (1959) *Mergers and the Clayton Act*, Berkeley–Los Angeles, University of California Press.
22. Marty F (2020) Is the Consumer Welfare Obsolete? A European Union Competition Law Perspective, *GREDEG Working Papers 2020-13*, Groupe de Recherche en Droit, Economie, Gestion (GREDEG CNRS), Université Côte d'Azur, France.
23. Nagel C (1930) The Origin and Purpose of the Sherman Act, *St. Louis Law Review* 15(4), pp. 313–324.
24. Negrinotti M (2012) The single market imperative and consumer welfare: irreconcilable goals? Exploring the tensions amongst the objectives of European competition law through the lens of parallel trade in pharmaceuticals, in: Zimmer D (ed.) *The Goals of Competition Law*, Cheltenham, Edward Elgar, pp. 295–337.
25. Orbach BY (2010) The Antitrust Consumer Welfare Paradox, *Journal of Competition Law & Economics* 7(1), pp. 133–164.
26. Pera A & Auricchio V (2005) Consumer Welfare, Standard of Proof and the Objectives of Competition Policy, *European Competition Journal* 1(1), pp. 153–177. doi: 10.5235/ecj.v1n1.153
27. Peters WE (1963) Agricultural Cooperatives and the Antitrust Laws, *Nebraska Law Review* 43(1), pp. 73–104.
28. Phillips Sawyer L (2019) US Antitrust Law and Policy in Historical Perspective, *Harvard Business School Working Paper* 19-110, https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf [07.03.2022].
29. Rosales WE (2005) Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening, *Journal of Agricultural & Food Industrial Organization* 3(2), pp. 1–33. doi: 10.2202/1542-0485.1118
30. Sagers C & Carstensen P (2007) *Federal Statutory Exemptions from Antitrust Law*, Chicago, American Bar Association.
31. Stigler G (1985) The Origin of the Sherman Act, *The Journal of Legal Studies* 14(1), pp. 1–12.
32. The Editors of Encyclopaedia Britannica: Granger movement – American Farm Coalition, <https://www.britannica.com/event/Granger-movement> [07.03.2022].
33. Thorelli H (1955) *The Federal Antitrust Policy: Origination of an American Tradition*, Baltimore, Johns Hopkins University Press.
34. Toulmin HA (1949) *A Treatise on the Anti-trust Laws of the United States: And Including All Related Trade Regulatory Laws – Volume 3*, Ohio, W.H. Anderson Company.
35. Varney CA (2010) The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity, *The Antitrust Source* December 2010.
36. Witt AC (2016) *The More Economic Approach to EU Antitrust Law*, Oxford, Hart Publishing.

37. Wu T (2018) *The Curse of Bigness: Antitrust in the New Gilded Age*, New York, Columbia Global Reports [e-book].
38. Zäch R & Künzler A (2010) Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law, in: Zäch R, Heinemann A & Kellerhals A (eds.) *The Development of Competition Law – Global Perspectives*, Cheltenham, Edward Elgar, pp. 61–86.