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ADDRESS BY

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FEDERAL TRADE COMMISSION

ON

# AGRICULTURAL COOPERATIVES AND THE ANTITRUST LAWS

BEFORE THE

AMERICAN INSTITUTE OF COOPERATION


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# AGRICULTURAL COOPERATIVES AND THE ANTITRUST LAWS

One of the prerequisites of a healthy economy is a rough equality in the buying and selling sides of the market. 1/ In a sense this truism suggests the function of the cooperative in our economy, whether it is constituted of farm producers, consumers, or small businessmen, and it will serve as an introduction to the topic I would like to explore with you today -- the role of the agricultural cooperative in the context of economic concentration and antitrust. Basic to such an evaluation is an assessment of whether the concept of cooperation exemplified by the cooperative movement and the concept of competition which underlies all our antitrust thinking are mutually exclusive or complementary. In my view, the two concepts can be readily reconciled. Antitrust is good for the cooperative and the cooperative movement has a vital role to play in our competitive economy.

The economy, however, is changing rapidly and many students of the economic scene are calling for a reassessment of the role of the cooperative if it is to play the function assigned to it for the benefit of its own members, as well as the economy at large. Increasingly, economists, and generally those in and out of Government concerned with antitrust, have become

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1/ Mark Massell, Competition and Monopoly, The Brookings Institution (1962), pp. 24-25.

concerned with the question of concentration in our economy. Obviously this preoccupation with our economic structure is by no means new, but the study and volume of comment devoted to this issue has markedly increased within the last few years. Very simply put, the issue is: Are big companies getting bigger and is their share of the market becoming so large that it will be increasingly difficult for small business to enter or maintain itself in the marketplace?

The economic data supplied by the chief economist of the Federal Trade Commission in the recent Senate hearings on economic concentration is significant. He testified that the need for understanding the implications of the accumulations of economic power created around 1900 is more compelling today than at the turn of the century. He pointed out in this connection that in 1963 the combined sales, amounting to approximately 36 billion of the three largest manufacturing corporations, were nearly as large as the gross receipts of America's several million farms in that year. Further, the sales of the three largest manufacturers exceeded, taking into consideration changes in the price level, the combined sales of the 204,750 manufacturing establishments listed by the 1899 census. 2/ Dr. Mueller warned that profound changes, if continued for too long a period of time, may irrevocably change the competitive

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2/ Statement of Willard F. Mueller, Hearings before the Subcommittee on Antitrust and Monopoly, United States Senate, on Economic Concentration, 88th Cong., 2d Sess. (1964), pp. 109-10.

structure of entire industries, and that antitrust policy based on an improper diagnosis of the true nature of industrial organization could constitute a drag on business decision-making and economic growth. 3/ The cooperative movement, too, in making its decisions as to its goals for growth and the manner in which it will best serve its members, will necessarily have to keep in mind the changing economic scene.

In this connection, it has been noted that the relatively small size of the agricultural cooperatives has made it increasingly difficult for these associations to effectively serve their members and that neither the farmers nor the small cooperative can effectively bargain with the agricultural producers' customers or suppliers on equal terms. This view is apparently receiving significant support on the highest Governmental levels. For example, the President, in his agricultural economy message to the Congress in January of 1964, advocated the strengthening of cooperatives. He stated that:

> ". . . Farmers should be encouraged to maintain their position in the marketplace through their own efforts, and to utilize cooperative organizations for this purpose. . . ."

Significantly he added that:

> ". . . New legislation is needed to clarify the right of cooperatives to expand their operations by merger and acquisition. . . ." 4/

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3/ Id. at 110.

4/ Agricultural Economy-Message from the President, 110 Cong. Rec. 1398 (88th Cong., 2d Sess., January 31, 1964).

A recognition of the practical distinction between the bargaining power of the farmer and other sectors of the economy in an era of growing concentration is undoubtedly prerequisite to defining the role of the producer cooperative now and in the future. In this connection, the National Advisory Committee on Cooperatives recently stressed the disparity between the individual farmer and those to whom he sells and from whom he buys. As a countervailing factor to increasing concentration in other segments of the agricultural economy, the Advisory Committee apparently recommends that the cooperatives increase their rate of growth by way of integration with agriculturally related businesses in processing and distribution. 5/ This view seems widespread. Modern technology emphasizing mass and continuous production,

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5/ ". . . Individually, the farmer is a virtually helpless bargaining unit. This would be just as true if there were only 1,000,000 farmers, as it is where there are about 4,000,000 farmers. This weak bargaining position becomes more evident as the marketing mechanisms for agricultural products fall into the hands of fewer and fewer buyers, processors and distributors. It is further amplified as horizontal integration takes place among the suppliers of agricultural in-puts, and as the costs and importance of these in-puts increase. The one long-term correction of this economic imbalance, the one way in which the weakness of the bargaining position of the individual farmer can be turned to strength, is the cooperative ownership by many farmers and rural people of substantial portions of the usually profitable businesses which are related to and dependent upon agriculture . . . ."
Observations and Recommendations of the National Advisory Committee on Cooperatives, April 10, 1964.

economic changes to which farmers find it difficult to adjust without help, as well as concentration in the agricultural supply and marketing industries, have all been cited as forces stimulating integration in the agricultural field, including cooperatives. Apparently the increasing control which retailers exert throughout the food distribution system is particularly significant in this connection. 6/ Another commentator on the problem framed the issue very simply when he stated that cooperative leaders and others should disabuse themselves of the notion that cooperatives are already big enough. 7/ If these assumptions and recommendations for the cooperatives of the future are valid, then those of us in and out of Government responsible for antitrust policy must consider the antitrust impact of mergers by cooperatives, federations of cooperatives and possibly joint activities by cooperatives and other business entities.

Since these will be, to my mind, the significant antitrust problems of the future as far as cooperatives are concerned, I will confine my discussion of the cases primarily to the two Supreme Court decisions which at least furnish some guidelines to antitrust policy in these areas, namely, Maryland and Virginia Milk Producers Association, Inc. v. United States, 8/

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6/ Willard F. Mueller, The Economics of Vertical Integration, American Cooperation (1958).

7/ Roy, Cooperatives: Today and Tomorrow, The Interstate Printers Publishers, Inc. (1964), p. 545.

8/ 362 U.S. 458 (1960).

and Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co. 9/ Before turning to these cases, however, a few words on the legislative antitrust exemptions might be in order.

Subsequent to the passage of the Sherman Act, considerable anxiety had arisen in both union and cooperative circles that under the new statute their activities might be viewed as combinations in restraint of trade, since this legislation incorporated no exemptions for their activities. Congress, to allay this anxiety, passed a number of statutes designed to provide cooperatives exemption from the operation of the antitrust laws. The first step was the enactment of Section 6 of the Clayton Act in 1914, 10/ which provided, essentially, that the antitrust laws were not to be construed as forbidding the operation of nonstock labor or agricultural organizations instituted for mutual help and that such organizations should not be held as illegal combinations or conspiracies under the antitrust laws. The general belief, however, was that this legislation did not completely and effectively assure farmers of the right to form marketing cooperatives. 11/ Farm groups,

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9/ 370 U.S. 19 (1962).

10/ 38 Stat. 731 (1914), 15 U.S.C. §17 (1958).

11/ Mischler, Agricultural Cooperative Law, 30 Rocky Mt. L. Rev. 381, 392 (1958). Congress itself was not unanimous on the scope of the exemption, which was not defined with precision by the statute. Comment, 43 Neb. L. Rev. 73, 76-77 (1963).

in consequence, brought considerable pressure on Congress to clarify the situation with further legislative enactment. As a result, the Capper-Volstead Act 12/ was passed in 1922. This Act specifically permits collective activities for the purpose of processing, preparing for market and marketing the products of the members. Capper-Volstead also permits marketing agreements and related contracts, provided the associations are operated for the mutual benefit of the members and certain voting and other requirements are met. Agricultural cooperative associations are, however, not granted complete immunity under the Act. 13/ Although Capper-Volstead reaffirmed the right of farmers to associate, it embraces only those cooperatives engaged in marketing agricultural products, and it failed to explicitly define the extent of the exemption granted to the cooperatives. 14/ On the whole, the three leading Supreme Court decisions on this issue seem to have settled the question, with the holding that the immunity conferred by these Acts is limited rather than broad.

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12/ 42 Stat. 388 (1922), 7 U.S.C. §§291-292 (1958).

13/ The statute stipulated that if the Secretary of Agriculture has reason to believe that an association is monopolizing or restraining trade to such an extent that the prices are unduly enhanced, he may direct a cease and desist order to such practices. If an association fails to comply with such an order, the responsibility for enforcement passes over to the Department of Justice.

14/ The text of the statute and the legislative history of Capper-Volstead are somewhat ambiguous in defining Congress' intent on the scope of the antitrust immunity granted. See Saunders, The Status of Agricultural Cooperatives Under the Antitrust Laws, 20 Fed. B. J. 35, 36-40 (1960).

The Supreme Court first took up the question in United States v. Borden Co., 15/ where it held that Capper-Volstead does not authorize combinations or conspiracies on the part of cooperatives which restrain trade in contravention of Section 1 of the Sherman Act with persons outside the producer cooperative. In short, the decision formulated what may be described as the "other persons" rule. That decision terminated with finality the notion that Capper-Volstead cooperatives enjoyed absolute immunity from antitrust prosecution.

The second important Supreme Court opinion to give further definition to the statutory antitrust exemption conferred on agricultural cooperatives is Maryland and Virginia Milk Producers Association v. United States. 16/ That case is significant because, among other activities, it dealt with the acquisition by a producer's cooperative of Embassy Dairy, a milk distributor in the Washington, D. C. metropolitan area. 17/ The defendant cooperative was charged with monopolization and a conspiracy to eliminate competition in violation of Sections 2 and 3 of the Sherman Act and with violating

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15/ 308 U.S. 188 (1939).

16/ Supra n. 8.

17/ The defendant cooperative purchased the area's largest milk distributor, Embassy Dairy. The defendant, which was not involved in either milk distribution or processing, controlled 80 to 85 percent of the area's milk supply. Embassy's share of the milk distribution in the market was 10 percent.

Section 7 of the Clayton Act by the purchase of Embassy's assets. The complaint further alleged that the association had engaged in a wide variety of predatory and coercive activities. In answer, the defendant asserted it had complete antitrust immunity against these charges under Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act.

The Court rejected this defense. 18/ Significantly, in construing Section 6 of the Clayton Act and the Capper-Volstead Act, it stressed that both statutes had been enacted to enable cooperatives to carry out the legitimate objects of farm organization, viz, to market their products collectively through joint marketing agencies. The Court held it was not the Congressional desire to give cooperatives unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers.

In short, the Court in this proceeding articulated what may be characterized as the "legitimate objects" test, limiting the immunity to those activities which the statutory exemptions were designed to protect. It should be noted, however, that the Court did not rule, and had no occasion for ruling, that a cooperative may not obtain complete monopoly power in the economic sense as long as it does so solely through those steps

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18/ It ruled Sections 2 and 3 of the Sherman Act overlapped and that its reasoning in Borden--that the defense was not absolute under Section 1--applies with equal force to Sections 2 and 3.

involving cooperative purchasing and selling unaccompanied by predatory practices or bad faith use of otherwise legitimate devices. 19/

In the case of the Section 7 charge, the district court had rejected the contention that the acquisitions were beyond the scope of the merger statute by virtue of the Capper-Volstead proviso empowering a cooperative to make contracts and agreements necessary to effectuate the association's purpose. It held that repeal of one statute by another by implication is not favored. 20/ The Supreme Court affirmed, holding that under Section 7, contrary to the association's position, the Secretary of Agriculture had no statutory authority to approve an acquisition as a "marketing agreement". It is interesting to note, however, that the Section 3 Sherman Act and Section 7 Clayton Act charges were considered on the same evidence. A crucial element in the charge of concerted action was the purchase contract containing provisions requiring the sellers to refrain from competing in the area for a number of years and to persuade their former suppliers to either join the association or to avoid the Washington market. The application of the "legitimate objects doctrine" by the

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19/ Cf., Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 900, 907 (D. Mass. 1954).

20/ 167 F. Supp. 45 (D.D.C. 1958). Judge Holtzoff further stated he had no doubt the cooperative was subject to the jurisdiction of the Federal Trade Commission and consequently within the terms of Section 7, as amended.

Supreme Court to the Section 3 charge holding the purchasing contract "as a weapon to restrain and suppress" competition seems equally applicable to the Section 7 count.

The Maryland and Virginia decision has been described as standing for the proposition that acquisition agreements involving non-Capper-Volstead firms are necessarily outside of the scope of the immunity provided by the statute. 21/ I am not fully persuaded the decision went that far. 22/ Obviously, this is an important question in the light of the recommendations by many authorities that cooperatives increase their bargaining position by growth through integration. Much of this might be expected to come through merger and acquisition. It may be argued that the Supreme Court, in Maryland and Virginia, implicitly applied the "other persons" rule to the Section 7 charge. It seems plain, however, that in their disposition of the claim for immunity with respect to the acquisition both the trial court and the Supreme Court were influenced by the

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21/ E.g., Stark, Capper-Volstead Revisited, American Cooperation, American Institute of Cooperation (1960), 453, 464; Comment, 43 Neb. L. Rev. 73, 95 (1963); cf., Saunders, The Status of Agricultural Cooperatives Under the Antitrust Laws, 20 Fed. B.J. 35, 53 (1960).

22/ The district court decision, insofar as it applied the Borden "other persons" rule, in my opinion largely confined that rule to the Sherman Act charges. On review the Supreme Court did not explicitly apply the Borden rule to the merger situation. (167 F. Supp. 45, 52, 53 (D.D.C. 1958).)

fact that the proposed merger was inextricably involved with predatory action not calculated to further the legitimate objects of the cooperative. In short, I am not sure that Maryland and Virginia necessarily stands for the proposition that the acquisition by a cooperative of a non-Capper-Volstead corporation will never come within the scope of the exemption. The Supreme Court, it should be noted, in this connection has stated, somewhat enigmatically, that the purchase of the assets of a non-Capper-Volstead corporation simply for business use, without more, often would be permitted and would be lawful under Capper-Volstead. It seems to me that the acquisition of the assets of a non-Capper-Volstead corporation by a qualified cooperative might well be sheltered by the exemption, provided that under the facts of the particular case such acquisitions could be brought within the language of the Capper-Volstead proviso immunizing contracts and agreements necessary for the processing, handling and marketing of members' products. At any rate, I agree with the observation that on the basis of the Maryland and Virginia decision it seems that the intent behind the acquisition may be a more significant factor for evaluating the mergers undertaken by a cooperative than in the case of an ordinary business corporation. 23/

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23/ Stark, Capper-Volstead Revisited, supra n. 21, at 464.

There has also been considerable speculation as to the application of the intra-enterprise conspiracy doctrine to federations of cooperative associations. Obviously, this, too, is a very important issue currently, at a time when the cooperatives are urged by many in and out of Government to take action to increase their bargaining position. Federated marketing agencies formed from a federation of agricultural cooperatives were not specifically authorized by the law but it was generally assumed that such federations were exempt. 24/ The question has now been ruled upon by the Supreme Court. Farmer cooperatives are not subject to the same antitrust restrictions on the intra-enterprise conspiracy theory as are ordinary business corporations and their subsidiaries. Reversing the Ninth Circuit, 25/ a unanimous Supreme Court,

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24/ ". . . Obviously, it is convenient, if not indeed necessary, to any effective cooperative association, that local associations should act through centralized marketing agencies . . . [S]uch methods of cooperation and association between agricultural producers were intended to be authorized under the very broad language of this statute [Capper-Volstead]." 36 Ops. Att'y Gen. 326, 339-40 (1930); see also, Cooperative Marketing Act, 44 Stat. 802 (1926), 7 U.S.C. §453(a) (1958).

See also Noakes, Exemption for Cooperatives, 19 A.B.A. Antitrust Section, 407, 418 (1961); Mischler, Agricultural Cooperative Law, 30 Rocky Mt. L. Rev. 381, 394; Att'y Gen. Nat'l Comm., Antitrust Laws Rep. 308 (1955); Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 Rocky Mt. Law Rev. 181, 190 (1948).

25/ Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1 (9th Cir. 1960), rev'd, 370 U.S. 19 (1962).

in the Sunkist case, 26/ held the antitrust laws inapplicable to the agreements between a citrus growers' cooperative, a subsidiary nonprofit stock corporation, and another stock company owned by local associations and members of the parent cooperative. The Court held that Section 6 of the Clayton Act and the Capper-Volstead Act allowed a cooperative to form a single entity to handle collectively all the processing and marketing of citrus fruits. 27/ Ruling that the statutory exemption applied, the Court treated the three separate legal entities as a single cooperative organization, stating:

> ". . . To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. . . ."

The Court noted that there was no indication 28/ that the use of separate corporations had any economic significance or that outsiders dealt with the three entities as independent organizations. The Court concluded, however, by stating the decision should not be taken in any way as detracting from earlier cases holding cooperatives liable for conspiracies with outside groups and for monopolization. 29/

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26/ Supra n. 9.

27/ ". . . The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products . . .". Id. at 28.

28/ Id. at 29.

29/ Id. at 30.

The intra-enterprise conspiracy doctrine, it has been suggested, may go beyond an attack on merely conspiratorial practices and also be used as a vehicle to challenge bigness and concentration itself. In the context of this discussion it, therefore, is significant that the decision's refusal to apply the intra-enterprise conspiracy doctrine has been praised on the ground that this approach is simply not suited to the problem of agriculture. The problem of the farmer, it was noted, appears to be excessive dispersion rather than an over-concentration of productive forces. 30/

Considered together, the three leading Supreme Court decisions on the subject lead to the following conclusions: In the case of combinations between a qualified Capper-Volstead cooperative with a nonqualified person or firm, the exemptions do not apply and the cooperative's activities with other persons are subject to the same antitrust prohibitions as those of any other business entity. Where the cooperative has a business relationship with other qualified cooperatives or with its own members as subsidiaries, the exemption from antitrust will be allowed, provided that the particular activity is within the legitimate objects of the cooperative's function involving no predatory practices. On the basis of the Maryland and Virginia and Borden cases, it is a fair assumption that

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30/ Note, Sherman Act: Agricultural Cooperatives Not Subject to Intra-Enterprise Conspiracy Doctrine, 47 Minn. L. Rev. 900 (1963).

combinations of nonfederated cooperatives and conspiracies between qualified cooperatives are outside the scope of the exemption. Where the relationships of qualified cooperatives with each other are in issue, the courts will apply the "legitimate objects" test, proceeding on a case-by-case basis to examine the methods and intent of these associations. This interpretation harmonizes Borden, Maryland and Virginia, and Sunkist. Sunkist, of course, went no further than holding that a combination of related cooperatives was not, in and of itself, unlawful. Although the case gives some sanction to joint marketing activities by federated cooperatives, predatory practices, in my view, would immediately remove the exemption from the cooperative associations, whatever their relationship.

In short, per se hard-core violations of the antitrust laws as, for example, predatory pricing or price fixing agreements, will be prosecuted in the future in the case of cooperatives as they have been in the past. In such instances, the antitrust exemption obviously will not apply. On the other hand, in those instances where an acquisition or other form of integration by a cooperative is concerned and where no predatory activity is involved in the transaction, it is my belief that the antitrust enforcement agencies will apply the rule of reason unless the antitrust exemption is applicable in the particular case. In that connection, it may be

worthwhile to enumerate the policy considerations and economic facts which might influence the application of the rule.

Certainly pertinent to any discussion of the cooperative movement in the context of antitrust is that line of comment holding that the Sherman Act and subsequent antitrust statutes had "a social purpose at least coordinate with its economic purpose." 31/ Or, as a distinguished economist has put it, the "American politico-economic philosophy is grounded in the belief that power should be diffused rather than concentrated," describing the antitrust laws as the equivalent of a system of political checks and balances in economic affairs. 32/ Such an analysis indicates that strengthening the farmer cooperatives may play an important complementary role supplementing enforcement of the antitrust statutes. Study along these lines may well be pertinent to the issue of

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31/ Statement of Dr. Stelzer, Hearings on Economic Concentration, supra n. 2, at 189. E.g., one noted commentator speaks of the Sherman Act's "eminently 'social' purpose" in safeguarding the rights of the "common man" in business as opposed to the more impersonal forms of enterprise. Hans B. Thorelli, The Federal Antitrust Policy: Origination of an American Tradition, Baltimore, Johns Hopkins Press (1955), p. 227.

32/ Statement of Corwin Edwards, Hearings on Economic Concentration, supra n. 2, at 37, 38.

the extent and manner of cooperative expansion which should be permitted now and in the future. This is certainly the case if the statement by a well-known economist in recent Senate hearings on economic concentration is valid, namely, that the atomistic economy around which past economic theory had been built has ceased to exist and that "Policy must now deal with an economy in which big corporations and inflexible administered prices play a major role." 33/ At this time I am not prepared to evaluate the validity of that statement. Dr. Means's position has apparently, however, found some support. For example, George L. Mehren, Assistant Secretary of Agriculture, recently stated:

> "Instead of half a million small retail stores we now have, in some respects at least, a basically different retailing and wholesaling food system. A comparatively few buyers call for uniform products oriented to consumer demand and mass handling and geared to specified delivery terms. No longer do we depend exclusively upon price or a series of open assembly markets to make the system work." 34/ (Emphasis supplied.)

Clearly, should the economic evidence finally substantiate this point of view, then it has profound implications to the

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33/ Statement of Dr. Gardiner Means, Hearings on Economic Concentration, supra n. 2, at 11.

34/ Address by Assistant Secretary of Agriculture George L. Mehren, What Cooperatives Contribute to the Consumer, October 16, 1964, p. 14.

economy as a whole and particularly to the agricultural cooperative. 35/

The publications of the Department of Agriculture and the speeches of its officials indicate that it is the Department's policy to encourage cooperative growth through merger or acquisition. A few references will serve to illustrate this point. For example, Stanley F. Krause of the Marketing Division advised:

> ". . . Cooperatives can no longer be passive about merger. For many cooperatives this point is not whether or not to merge, but how to merge . . . ." 36/

Job K. Savage, Director, Management Services Division, was equally direct, stating:

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35/ Certainly some of the figures presented by Dr. Mueller in the course of the Senate hearings with respect to economic concentration should give any serious student of our economy pause. He indicated in his testimony that the percentage of all manufacturing assets held by the hundred largest corporations increased from 38.6 percent in 1950 to 45 percent in 1962 and that the same percentage of the two hundred largest companies went from 46.7 to 54.6 percent in this period, an increase of 17 percent. Dr. Mueller further indicates that these figures may represent a minimum estimate of the actual increase in concentration in this period, since the assets of a number of joint ventures were not credited to their parents. (Statement of Willard F. Mueller, Hearings on Economic Concentration, supra n. 2, at 120, 121.)

36/ Talk of Stanley F. Krause, Thinking About Merger, before Aroostook Federation of Farmers, Caribou, Me., February 11, 1965, p. 6.

> "Automation and a necessity to constantly increase the efficiency of operation calls for increased size. The power struggle among cooperatives and between cooperatives and their competitors dictates more mergers, consolidations, and acquisitions." 37/

The agencies responsible for antitrust enforcement are, of course, not bound by such expressions of policy. 38/ Nevertheless, these views of the agency primarily responsible for the welfare of the agricultural sector of the economy should at least be considered as individual cases come up for disposition. Certainly the Federal Trade Commission and the Department of Justice should not operate in a vacuum without an awareness of the relevant policies of other Governmental agencies having general responsibility for that part of the economy involved in a particular proceeding.

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37/ Savage, Some Major Cooperative Developments in 1964 and Their Impact, talk at 10th Annual Meeting of the New Mexico Cooperative Council, Clovis, New Mexico, February 3, 1965, p. 14. See also Mergers for Stronger Cooperatives, Reprint 208, Farmer Cooperative Service, U.S.D.A. (April 1961); Martin A. Abrahamsen, Deputy Administrator, Farmer Cooperative Service, U.S.D.A., Will Cooperatives Meet the Challenge, notes for a talk at the Seventh Midwest Member Relations Conference, Houston, Texas, April 2, 1965, p. 4; Frank W. Hussey, Assistant to the Secretary of Agriculture, Possibilities for Cooperative Growth, address at the meetings of the Agricultural Cooperative Council of Oregon, Salem, December 8, and the Idaho Cooperative Council, Boise, December 9 and 10, 1964; Mehren, What Cooperatives Contribute to the Consumer, supra n.34; U.S.D.A., Policy Statement on Cooperatives, Reprint 270 from News for Farmer Cooperatives. From Secretary's Memorandum No. 1540, July 9, 1963.

38/ Cf. United States v. Philadelphia National Bank, et al., 374 U.S. 321 (1963).

The available data suggests that mergers have not transformed the aggregate structure of the American agricultural cooperatives in a manner comparable to the way in which mergers have transformed some American industries. 39/ As a matter of fact, the statistics relating to the dairy cooperatives indicate that they have lost ground in terms of market share to noncooperative enterprises. 40/ Since 1924, a number of large-scale noncooperatives have entered the dairy market and by 1955 there were nine with sales of over one hundred million dollars. All but two were larger than the country's two largest dairy cooperatives. A comparison of the growth of the eight largest noncooperative dairies with eight of the largest cooperative dairies in the period 1945-1955 documented an average increase in sales of 128.7 percent by the noncooperatives

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39/ Mueller, The Role of Mergers in the Growth of Agricultural Cooperatives, Calif. Agricultural Experiment Station Bull. 777 (1961), p. 33; see also Address of Secretary of Agriculture Orville Freeman, The Great Society's Challenge to Cooperatives, October 7, 1964:

> "Cooperatives are still mostly 'small business.' One-fourth of them do less than $200,000 business a year; half do less than $500,000, and about three out of four do less than $1 million annually." (At p. 6.)

40/ For example, in 1924 the country's three largest dairy cooperatives had sales of about 48 percent as great as the three largest noncooperative dairies. In the following thirty years, however, these cooperatives consistently lost ground in terms of sales to the large noncooperatives. By 1945 this percentage had dropped to 18 percent and by 1955 to 15 percent. Mueller, The Role of Mergers in the Growth of Agricultural Cooperatives, supra n. 39, at 36.

as compared to 63.3 percent for the cooperatives. 41/ On the basis of such data the conclusion has been drawn that as a whole the large cooperatives have not done as well as the large noncooperatives. 42/ The same study indicated that merging cooperatives have grown more rapidly than nonmerging cooperatives, 43/ and suggested that because the internal structure of many markets prevents internal expansion, mergers present a superior avenue to growth. 44/ However, few cooperatives, whatever their avenue to growth, seem to have achieved absolute market power; rather, in most instances, they have increased competition. 45/

In an evaluation of the probable competitive impact of further growth and integration by the cooperative movement, it is not amiss to take into consideration the past performance of cooperatives in relation to antitrust. Noteworthy in this connection are the findings of the Committee on Small Business of the House of Representatives in its study, Competition of Cooperatives with Other Forms of Business Enterprise. The Committee concluded that:

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41/ Id. at 36.

42/ Id. at 61.

43/ Id. at 63.

44/ Id. at 27.

45/ Id. at 26.

> "There is substantial evidence to show that the cooperative movement operates as a very successful means of combating monopolistic concentrations and, as such, is a very healthy addition to the American economy.
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> The theory that the cooperative movement is seriously endangering other economic forms of business operation can be utterly disregarded inasmuch as the volume of business enjoyed by cooperatives and their degree of participation in the national income is very nominal." 46/

As a general rule, these conclusions are apparently still valid. They are obviously pertinent in considering the role of the cooperative in the context of antitrust policy and growing concentration.

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46/ H.R. Rep. 1888, 79th Cong., 2d Sess. (1946), p. 42.