Consolidation and Competition in Agribusiness

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My remarks today will focus on four aspects of antitrust merger review specific to agriculture:

I. Protecting Farmers Is a Goal of the Merger Laws

II. Accounting for Innovation in Agricultural Markets

III. Global Nature of Agricultural Merger Enforcement

IV. The Challenges of Remedying a Problematic Merger
I. Protecting Farmers

• Merger law is designed to prevent firms from acquiring “market power” through a merger or acquisition
  – Market power is the ability to raise price, reduce output, diminish innovation or otherwise harm consumers

• Antitrust law clearly protects consumers, but what about farmers or other “upstream” producers?
  – Certain mergers may allow the combined firm to reduce the prices paid for goods or services

• For example, assume there are only two grain elevators in a geographic area. If they merge, they could have the ability to lower the prices they pay to farmers
  – Is the lower price an efficiency (i.e., lower costs) or anticompetitive harm (an exercise of market power)?
I. Protecting Farmers

• This area of antitrust law was unsettled given the view that antitrust law is designed to protect consumers

• But, over the last 15 years, it is clear that the federal antitrust agencies (DOJ/FTC) take into account “upstream” harm

• Rationale: Even though “monopsony” power results in lower prices, there is still harm to the competitive process
  – Causes transfer of wealth and inefficiently reduces supply
  – Harm even if no downstream consumer effect

• Antitrust Agencies put this principle in their 2010 Merger Guidelines, specifically enshrining the “farmer example” (n.24)
  – Harm if merging local grain elevators reduce prices to local farmers even if no change in the ultimate price of grain to consumers
I. Protecting Farmers

• The DOJ has applied this principle to block deals or insist on remedies in numerous agriculture mergers:

  – *U.S. v. Cargill* (2000) (acquisition of competing grain trader would harm competition in grain purchasing services; divestiture)

  – *U.S. v. JBS* (2008) (acquisition of competing beef packer would harm competition for purchase of fed cattle; parties abandoned deal)

  – *U.S. v. George’s Foods* (2011) (acquisition of competing chicken processor would harm competition in market for purchase of broiler growing services; remedy to protect growers)

  – *U.S. v. Tyson Foods* (2014) (acquisition of competing pork purchaser would reduce competition for purchase of sows from farmers; divestiture of sow procurement business)
II. Protecting Innovation

• General assumption that competition spurs firms to innovate
  – But, it is hard to quantify or predict “innovation”

• The antitrust concern is that a merger may decrease the rate of innovation or reduce the incentive to innovate

• The 2010 Merger Guidelines addresses innovation effects
  – Will merger cause firms to curtail innovative efforts?
  – If so, could other firms step up?
  – Or, could the merger even promote innovation by combining different capabilities?

• How do these issues play out in practice? The Antitrust Division’s recent challenge to Deere’s acquisition of Precision Planting from Monsanto provides a case example.
U.S. v. Deere/Monsanto: the Precision Planting matter

• “Planters” are critical pieces of farm equipment
  – Used only once a year, but entire crop depends on its success

• Precision Planting (a subsidiary of Monsanto): Reputation for developing innovative technology for planters
  – Precision Planting sold after-market parts for use on Deere planters
  – Equipment companies such as CNH Industrial and AGCO worked with Precision Planting
Market moving toward “High Speed Precision Systems”

- Deere and Precision Planting had only viable technologies for high-speed; each system was patent-protected

**Precision Planting**

- SpeedTube **Belt** Delivery System

**Deere**

- **Brush** Delivery System

VS.
DOJ Sues to Block Deere’s Acquisition of Precision (Aug. 2016)

DOJ’s complaint focused on how the merger would impact innovation:

- Described how Deere and Precision each tried to leapfrog the other’s technology. “Within the past three years, Deere and Precision Planting have each introduced high-speed precision planting systems that represent a ‘True Gamechanger for Agriculture.’” (¶ 1)

- “Competition between Deere and Precision Planting benefits farmers through lower prices and more innovative high-speed precision planting systems in the marketplace.” (¶ 6)

- “The transaction would . . . likely result in the elimination of innovation rivalry by the two leading innovators in the high-speed precision planting systems market.” (¶ 48)
Parties Abandon Transaction on Eve of Trial

• On May 17, 2017, Monsanto abandoned the deal
  – Note that the administration changed between the filing of the Complaint and the abandonment of the deal

• The Antitrust Division (under the new Trump administration) issued a public statement confirming that it would continue to focus on agriculture and farmers:
  – “The companies’ decision to abandon this transaction is a **victory for American farmers** and consumers .... **Agriculture is one of the most important sectors of our economy** and the **Antitrust Division will remain vigilant to ensure that competition in agriculture markets is not thwarted through illegal transactions.”

• After the deal was abandoned, AGCO purchased Precision
III. Global Nature of Merger Enforcement

• A major trend in merger enforcement is the growing number of international agencies with merger review
  – Global companies must navigate the thicket of multiple agency review

• And, many agencies have “cooperation” agreements with U.S.

• Given global agriculture markets, most deals require international review, adding time for the review and potentially resulting in more complex remedies
IV. Crafting Remedies

• How do you fix a problematic deal?
  – Blocking the deal provides complete relief; but is there a way to preserve any merger benefits while remedying the harm?

• Curing the competitive harm is the goal
  – The dollar amount of a remedy is irrelevant
  – The more complex a deal, the harder it is to fix

• Agencies’ policy views on divestiture remedies:
  – The risk of a failed remedy should be borne by the parties, not consumers
  – Remedy must be complete and effective
  – Need a strong buyer ready, willing and able to compete
IV. Crafting Remedies

• Agencies favor (1) structural remedies over behavioral ones and (2) lines of business over asset carve-outs

• Problems with behavioral remedies:
  – Turns DOJ into a regulator (a “hall monitor for business”)
  – May only delay exercise of market power
  – Too much time spent investigating compliance

• Problems with asset carve-out divestitures
  – Government lawyers deciding bucket of assets
  – High execution risk, especially when dealing with a global deal
  – May require ongoing entanglements with merging parties