Comment on Buyer Side Merger Analysis

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During our panel discussion of buyer-side merger analysis on September 21, several speakers asked for examples of cases where buyer side issues were not taken into consideration and, presumably, ought to have been. I failed at the time to reference several examples of this failure. This comment makes up for that omission on my part.

The first example is the Disney acquisition of Fox's media assets. The Antitrust Division only focused on the loss of direct competition in sports broadcasting and the resulting risks to downstream buyers. It ignored, so far as the public record reveals, the impact resulting from the combination of buying power with respect to writers who produce the scripts used in theaters, television, and online video programs. This merger created a single buyer of these skills with a 30% market share (see comment from Garrett Schneider on behalf of Writers Guild of America West, August 20, 2018). Moreover, when the combinations of ATT with Time Warner, and Comcast's acquisition of NBC Universal are included, these three entities now buy 60% of the services sold in this market. Yet neither the complaint nor the competitive impact statement from the Antitrust Division even acknowledge that there might be an issue with respect to buyer power. See, generally, filings in United States v. The Walt Disney Company, available at https://www.justice.gov/atr/case/us-v-walt-disney-company-and-twenty-first-century-fox-inc.

The second example is the failure of the Federal Trade Commission to remedy the buyer power of Pool Corp. that resulted from its acquisition of wholesale supplies in various markets. The FTC condemned Pool Corp.'s use of its buyer power to exclude and disadvantage its wholesale competitors. See, *Complaint, In the Matter of Pool Corporation*, Dk. No. C-4345

(2012). But the FTC failed to do anything about the buyer power that it recognized Pool Corp. had acquired by merger. Because the settlement left that buyer power in place, Pool Corp. retained the capacity to exploit that power in other ways including demanding unjustified discounts that could have a waterbed effect on the prices paid by its competitors.

The third example was the decision of the Antitrust Division to allow Smithfield to acquire Premium Standard Brands. See, *Statemen of the Department of Justice Antitrust Division on its Decision to Close Its Investigation of Smithfield Inc.'s Acquisition of Premium Standard Farms Inc*., May 4, 2007 available at https://www.justice.gov/archive/atr/public/press_releases/2007/223077.htm. These two major pork packers were the only two major buyers doing business in the Southeast—basically Virginia and North Carolina. In the Midwest, the other major hog producing region, there were more competitors. Overall, there was an argument that the merger would not unduly concentrate the selling market in pork. But in January of 2007, i.e., while Smithfield's proposed acquisition was being reviewed, a study done for the USDA of livestock marketing reported that using national data there was evidence of substantial buyer power in obtaining hogs. RTI INTERNATIONAL, 4 GIPSA LIVESTOCK AND MEAT MARKETING STUDY: HOG AND PORK INDUSTRIES ES-3, 3-29 (2007) available at https://www.gipsa.usda.gov/psp/publication/livemarketstudy/LMMS_Vol_4.pdf. Manifestly, the greatest impact of such buyer power would have been in the Southeast. See, ID. at 2-27 (eastern prices lower than the national average)

The buyers primarily used contractual vertical integration to obtain hogs in the Southeast region. The processors owned the hogs and contracted with farmers operating feeding operations to provide care for the hogs. The absence of a significant "cash" market for hogs in the region meant that the processors had even more power over the farmers because even if a farmer wished to use the nearest available alternative processor located substantial distance away it would have to change its entire business plan—acquire pigs, feed, etc. Hog feeding operations themselves can be large and involve substantial capital investment (sometimes much larger than in the case of poultry) as a result these operations maybe more likely to be able to bargain for reasonable compensation even if they have only one customer. But those relationships also mean that there is little or no potential for new entry by a competing processor. Creating an entire infra-structure for such entry would be very challenging and costly. The dominant, monopsonist, can use longer term contracts to tie up such a producer as well as selectively targeting any farmer that might be induced to leave with a competing offer. These strategies in combination create an nearly insuperable barrier to entry. Thus, the failure to protect the market structure in the Southeast has created a long-term monopsony in the purchase of hog raising services.

An older example also involves hogs. In 2003, the Farmland Cooperative went into bankruptcy because of problems in its fertilizer operations. It also owned a successful pork processing facility. The management of that facility found funding to purchase it. But Smithfield which already had several other facilities in the region offered a higher price. At that time, many more hogs, especially in the Midwest, were sold in the cash market. Smaller farms were particularly likely to participate in that segment and were more constrained in the distance over which they could ship hogs. Hence, this merger had an adverse effect on access to the market for farmers most proximately located in the area where Farmland had its facilities. Once again, there is no evidence that the Antitrust Division considered the competitive risks resulting from this acquisition. See, Thomas Geyer, *Smithfield Bid for Farmland Poses Dilemma*, QUAD-CITY TIMES, Aug. 9, 2003 available at https://qctimes.com/business/smithfield-bid-for-farmland-poses-dilemma/article_448d3de3-9425-5d29-90fe-4a5f9fc62e65.html; Chris Flores, *Smithfield Foods to Acquire Farmland Outbids Ribal Cargill with $367M Offer*, DAILY PRESS, Oct. 14, 2003, at C8, available at http://www.dailypress.com/news/dp-xpm-20031014-2003-10-14-0310140173-story.html. The loss of a competitor in the cash market further reduced the opportunity for farmers interested in raising hogs to have the choice of methods of production. In the longer run, the overall movement of hog production to vertical contractual integration will facilitate both coordinated reduction in output harming consumers and producers.

These examples provide illustrations of combinations where the competitive risks on the buyer side were ignored. It is worth emphasizing that these examples range from specialized labor markets to wholesaling of swimming pool supplies to agricultural markets. The Pool Corp. example would not have been visible but for its extremely abusive conduct that triggered subsequent litigation. Absent more comprehensive data on the market shares of inputs affected by various mergers, it will remain difficult to identify specific cases. Hence, one important test of the scope of buyer-side competitive risks created by mergers is to gather better data through the HSR process.