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Merger Enforcement in U.S. Food Industry Markets

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I. INTRODUCTION: INCREASED ATTENTION IN AGRICULTURAL SECTORS

During the Obama Administration, the U.S. competition authorities have made food and agriculture a priority for antitrust enforcement. These efforts, undertaken by both the Antitrust Division of the Department of Justice (“DOJ”) and the Bureau of Competition of the Federal Trade Commission (“FTC”), have concentrated primarily on preventing anticompetitive harm to buyers and sellers in food industries through merger enforcement mechanisms. While antitrust authorities can, and have, investigated other anticompetitive conduct such as price-fixing, bid-rigging, and market allocation, recent enforcement actions have made clear that mergers are of primary importance in the agricultural space.

In August 2009, Attorney General Eric Holder organized a series of cooperative workshops between DOJ and the United States Department of Agriculture (“USDA”) exploring competition issues in the agriculture industry. Those workshops brought together industry participants at all levels of manufacturing and distribution and were designed to enhance the U.S. antitrust authorities’ understanding of competition issues facing these markets. As a result of those workshops, DOJ identified two main areas of concern in the agricultural sector that could be addressed by the antitrust laws: (1) anticompetitive mergers and (2) unlawful acquisitions or maintenance of monopoly power.

II. CHALLENGES BASED ON BOTH BUYER AND SELLER POWER

Following the conclusions drawn from the workshops, the U.S. antitrust agencies have vigorously investigated and challenged mergers in various agricultural markets. In October 2008, DOJ and a number of states filed a challenge to the acquisition of National Beef (the nation’s then fourth-largest beef processor) by JBS (the third-largest beef packer) for \$560 million. The complaint alleged that the transaction would lessen competition among packers for cattle in two important geographic markets. In addition to concerns about buyer power, DOJ also alleged that the transaction would give the combined company inappropriate power as a seller in the nationwide market for boxed beef. Following months of litigation, the parties decided to abandon the transaction, demonstrating DOJ’s focus on both buyer- and seller-power in food industry markets.

Challenges are no less likely when companies enter into joint ventures that reduce competition in agriculture markets through a combination of assets. In *Conagra*,² DOJ challenged a joint venture among (i) ConAgra Foods, Inc., (ii) Cargill, Incorporated, and (iii)

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² *United States v. ConAgra Foods, Inc., et al.*, No. 1:14-cv-00823 (D.D.C.)

CHS Inc., which combined the companies' wheat flour milling assets into a joint venture known as Ardent Mills. As a part of the consent agreement settling the lawsuit, the joint venture was required to divest four flour mills, as well as institute measures designed to prevent the parent companies from disclosing non-public competitive information regarding wheat sales and usage to the combined entity.

III. SMALLER TRANSACTIONS NOT EXEMPT

Tellingly, government agencies have not just focused their efforts on large-scale transactions. In *George's Food*,³ DOJ challenged George's Food's ("George's") purchase of a single chicken processing plant from Tyson Foods, Inc. ("Tyson") in western Virginia for \$3.1 million. Despite the small size of the transaction, DOJ observed that the merger would decrease the number of competitors in the chicken-purchasing market from three to two in the fifty- to seventy-five-mile area surrounding the purchased facility, effectively giving George's monopsony power that it could abuse in the form of lower prices or degradations of other contract terms. George's entered into a consent decree with DOJ requiring the company to make capital improvements at its processing facilities that would increase its capacity, thereby ameliorating some of the harm to chicken growers caused by the decrease in competition.

Similarly, in *Dean Foods*,⁴ DOJ joined a group of states filing a challenge to undo Dean Food Company's \$35 million acquisition of dairy processing plants in Wisconsin from Foremost Farms USA after the transaction had occurred. In its complaint, DOJ focused on harm to the downstream consumer market, arguing that the combination would substantially lessen competition in the sale of milk to school districts, supermarkets, and grocery stores in Illinois, Michigan, and Wisconsin. In March 2011, DOJ settled with Dean Foods and required it to divest a dairy processing plant and brand name to preserve competition in the market.

Both *George's Food* and *Dean Foods* demonstrate willingness on the part of antitrust authorities to challenge relatively small mergers that may affect competition in agricultural markets, even when those mergers do not meet the applicable merger reporting thresholds and have already been consummated. *George's Food* further demonstrates DOJ's willingness and ability to craft merger remedies that address the unique competitive concerns of relationships in the agricultural sector, above and beyond the standard remedy of divestment of assets in affected markets.

IV. SUPERMARKET MERGERS ALSO CHALLENGED

Mergers between upstream food processors and manufacturers are not the only targets of U.S. antitrust enforcement, with government agencies also bringing enforcement actions in several supermarket company mergers. Traditionally, mergers in the supermarket industry are investigated by the Federal Trade Commission. Unlike for some other industries, where the relevant market for analyzing effects on competition can be entire states, or even the entire country, government authorities draw narrow markets when analyzing supermarket mergers. For instance, in *Lone Star Fund*,⁵ the FTC investigated Bi-Lo Holdings, LLC's ("Bi-Lo") \$265

³ *George's Food United States v. George's Food, LLC*, No. 5:11-cv-00043-gec (W.D. Va. May 10, 2011)

⁴ *United States v. Dean Foods Co.*, No. 10-00059 (E.D. Wis.)

⁵ *In the Matter of Lone Star Fund V (U.S.), L.P., et al.*, Docket No. C-4440.

million acquisition of 154 supermarkets from Delhaize America. The investigation found competitive harm in 11 different local markets that consisted of areas within a three- to ten-mile radius of the parties' stores, and the FTC required Bi-Lo to divest twelve supermarkets in the affected areas.

Similarly narrow markets can be seen in *AB Acquisition*,⁶ in which the FTC reached a consent requiring the parent company of Albertson's LLC ("Albertson's") to divest two grocery stores in the local grocery markets of Amarillo and Wichita Falls, Texas following its acquisition of United Supermarkets LLC. In addition to the required divestitures, the consent order also prohibited Albertson's from interfering with the hiring or employment of current employees in the two divested stores for one year. These additional restrictions were designed to make sure the divested supermarkets were well-positioned to compete in those local markets.

In addition to narrow geographic markets, the U.S. antitrust agencies may examine narrow product markets in grocery transactions. The FTC based its challenge to Whole Foods' acquisition of Wild Oats in 2007 on the premise that there was a separate market for "premium and natural organic supermarkets" that was differentiated from the market for regular grocery stores. The FTC and the parties eventually settled a long, contentious litigation by agreeing that Whole Foods would divest 32 stores in 17 geographic markets that were impacted by the acquisition. Whole Foods also agreed to divest the Wild Oats intellectual property, including unrestricted rights to the "Wild Oats" brand.

V. CONCLUSION

Recent enforcement actions have shown that U.S. antitrust authorities have made merger enforcement in agricultural sectors a priority. This focus is particularly stringent when mergers enhance the pricing power of large companies in situations where that power balance is already disparate, e.g. small farmers' relationship with large processing companies and consumers' relationship with large supermarket chains. Moving forward, DOJ and FTC show little sign of slowing this pursuit.

⁶ In the Matter of AB Acquisition, LLC, Docket No. C-4424.