BakerHostetler

Third Circuit Upholds Sugar Merger Over DOJ's Objection

In Philadelphia, the U.S. Court of Appeals for the Third Circuit upheld a September 2022 ruling by U.S. District Judge Maryellen Noreika of the District of Delaware allowing Florida-based U.S. Sugar Corp. to buy financially troubled Imperial Sugar Co. The decision was unanimous among a panel that included Judges Thomas L. Ambro, David J. Porter and Arianna J. Freeman, with Porter writing for the court.

July 24, 2023

By: Carl W. Hittinger and Alyse F. Stach

The U.S. Department of Justice (DOJ) had filed suit to block the purchase, arguing the deal violated U.S. antitrust law, would create a duopoly of refined sugar sellers in the U.S. Southeast, would substantially raise sugar prices and could strain supply chains. The DOJ had asked the court to temporarily block the closing of the deal while it appealed the ruling. That request was earlier denied, so the $315 million deal closed in November 2022.

In March 2021, U.S. Sugar agreed to buy Imperial Sugar from commodities trader Louis Dreyfus Co., which had paid $78 million for the company in an earlier transaction. The DOJ sued in November 2021—its first merger challenge with Jonathan Kanter as the assistant attorney general for the Antitrust Division—seeking to enjoin the merger. The DOJ alleged that the merger would lead to increased prices because just two companies—U.S. Sugar and American Sugar Refining, which sells under the Domino brand—would control 75% of refined sugar sales in the Southeast.

The district court, and now the Third Circuit, rejected the DOJ's claim that the merger would violate antitrust law and increase prices for consumers and businesses.

This is a significant loss for the DOJ in its mission to stop what it perceives as anticompetitive mergers. At the district court level, Noreika found that a U.S. government-run sugar program that limits sugar supply and imports was a contributing factor to high sugar prices that was overlooked by the DOJ. She also said that the DOJ overlooked the ability of distributors to sell their own supplies to keep prices lower.

At the district court level, the DOJ had defined the relevant product market as the production and sale of refined sugar, which would exclude companies that sell but do not produce sugar, such as distributors and wholesalers. On appeal, the DOJ argued that the district court had improperly included distributors in the relevant product market in finding that the merger did not violate the antitrust laws. The DOJ argued that distributors were customers, not suppliers, and that the district court had erred by subdividing the market into sales to industrial customers and sales to retail customers. The Third Circuit rejected those arguments, finding that where distributors compete with producers, it is appropriate to include them in the relevant market. Further, the Third Circuit found that there was no evidence that buyers cared about whether their sugar products come from a refiner, marketing entity, cooperative or distributor. "So defining the product market to include production and sale is irrelevant to consumer welfare and a purely self-serving description by the government," wrote Porter for the panel.

However, including distributors in the market definition when analyzing potentially anti-competitive horizontal mergers could have significance for other merger challenges in industries where distributors are sellers as well as brokers of their product. In such instances, proving potentially anticompetitive market power could be more difficult when the merger is between two horizontally competing manufacturers.

Significantly, the Third Circuit did reverse the part of the district court's ruling that credited the existence of the U.S. Department of Agriculture's (USDA) sugar program's ability

to artificially inflate prices by prohibiting most imports. The Third Circuit found that the ability of the regulator to control prices does not inherently mean antitrust laws don't apply. Specifically, repeals of U.S. antitrust laws in favor of regulation must be clearly stated in legislation, and there is no law that shields the sugar industry from antitrust liability. "The government's simultaneous efforts to keep sugar prices high through USDA policy and to lower them through antitrust suits may seem contradictory, but it is not unlawful for the government to pursue contradictory aims, and price supports do not create immunity from antitrust," wrote Porter. That decision could have an impact on other cases involving the heavily regulated agricultural industry, which is often subject to antitrust scrutiny due to its impact on everyday prices paid by consumers.

Also of note, the DOJ and Federal Trade Commission's Proposed Joint Merger Guidelines, which were released on July 19, might have had an impact on the merger analysis had they been in place at the time of the merger. While many of the proposed guidelines seem to be aimed at multisided platforms prevalent in the tech industry, they place a greater emphasis on accounting for monopsony power, especially in labor markets. Thus, if the merger had been found to decrease jobs in an already concentrated industry, that factor could have weighed in the district court's decision if it had decided to follow the proposed guidelines.

Stay tuned.

Carl W. Hittinger is a senior partner at Baker & Hostetler and serves as the firm's antitrust and competition practice national team leader and also litigation group leader for the Philadelphia office. He concentrates his practice on complex antitrust and unfair competition matters, including class actions. His experience also includes a judicial clerkship with U.S. District Chief Judge Emeritus Louis C. Bechtle of the Eastern District of Pennsylvania. He was appointed a special master in several complex matters by Bechtle. He can be reached at 215-564-2898 or chittinger@bakerlaw.com.

Alyse F. Stach is counsel in the firm's litigation group focusing on antitrust and complex commercial litigation matters. Stach has experience handling matters through all stages of litigation before state and federal courts and alternative dispute resolution tribunals. She can be reached at 215-564-5768 or astach@bakerlaw.com.

bakerlaw.com

BakerHostetler helps clients around the world address their most complex and critical business and regulatory issues. Our highly ranked attorneys deliver sophisticated counsel and outstanding client service. We have six core practice groups – Business, Digital Assets and Data Management, Intellectual Property, Labor and Employment, Litigation and Tax – and more than 1,000 lawyers coast to coast. For more information, visit bakerlaw.com.

Baker & Hostetler LLP publications inform our clients and friends of the firm about recent legal developments. This publication is for informational purposes only and does not constitute an opinion of Baker & Hostetler LLP. Do not rely on this publication without seeking legal counsel.

© 2023 BakerHostetler® 26.07.23.17.12_p01

This article is reprinted with permission from the July 24, 2023, edition of *The Legal Intelligencer*.