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U.S. Challenges Nonreportable Acquisition Consummated During Investigation

Jeffrey May (Wolters Kluwer) · Thursday, May 12th, 2011

Time will tell whether it is a good idea to consummate an acquisition while the Department of Justice Antitrust Division is still investigating.

On May 10, the Antitrust Division filed a complaint in the federal district court in Harrisonburg, Virginia, challenging the acquisition of a Tyson Foods Harrisonburg chicken processing complex by George's, Inc.—the 15th largest chicken processor in the United States.

According to the government's complaint, the transaction reduced the number of chicken processors competing in Virginia's Shenandoah Valley region for the services of local chicken growers from three to two. In addition to the Harrisonburg facility, George's has operations in nearby Edinburg, Virginia. JBS/Pilgrim's Pride—the second largest chicken processor in the United States—has two facilities in the region.

Tysons Foods—the country's largest chicken processor—publicly announced the planned sale of the poultry complex in Harrisonburg to George's on March 18. According to the government's complaint, the Antitrust Division did not learn about the transaction until on or after that date. The sales price of the facility has not been disclosed, but the transaction was not reportable to the government under the Hart-Scott-Rodino Act premerger notification scheme. The purchase price of the transaction was less than the minimum reporting threshold.

On April 18, the Antitrust Division issued civil investigative demands (CIDs), seeking information on the potential competitive effects of the acquisition and George's proposed business justifications for purchasing the plant. Discussions between the government and the parties continued until the close of business on May 6.

The next day, "without any notice to the United States and before responding to the CIDs, George's and Tyson entered into an asset purchase agreement and simultaneously closed the transaction," the government contends. "The parties undertook this action even though they knew that the United States had serious concerns about the Transaction and had requested to be notified prior to the parties' closing the Transaction," it was alleged.

Because the government believes that the transaction will likely lessen competition for the "purchase of broiler grower services from chicken farmers in the Shenandoah Valley and nearby areas," it seeks "divesture of such assets and interests sufficient to restore competition in the

Shenandoah Valley" and an order permanently enjoining George's "from further ownership and operation of the assets acquired as part of the Transaction."

Competition in the Agricultural Sector

The complaint comes at a time when the government is closely scrutinizing competition in the agricultural sector. Last year, the Antitrust Division and the U.S. Department of Agriculture held a series of workshops on the topic, including one specifically focused on the poultry industry.

More recently, the Department of Justice completed an investigation into the proposed acquisition of Coleman Natural Foods by Perdue Farms Inc.'s parent company, FPP Family Investments. Perdue is the third-largest processor of conventional chicken in the United States. Coleman processes natural, antibiotic free and organic chicken, as well as pork and lamb products and prepared foods. In a May 2 statement (CCH Trade Regulation Reporter ¶50,267)announcing the closing of the investigation, the government said that the transaction was not likely to increase the risk of coordination in the industry.

The case is *U.S. v. George's Foods, LLC; George's Family Farms, LLC; and George's, Inc.*, Civil Action No. 5:11CV00043.

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