

Client Alert

Antitrust & Litigation Practice Group

May 18, 2011

DOJ Brings Two Merger Challenges

Last week, the Department of Justice (DOJ) filed two civil antitrust lawsuits, challenging, on May 10, the consummated merger between George's Inc. and Tyson Foods and, on May 12, the proposed acquisition by Verifone Systems, Inc. of Hypercom Corp. Neither transaction was subject to the pre-merger notifications under the Hart-Scott-Rodino Improvements Act of 1976.

In *U.S. v. George's Foods, LLC*, the DOJ challenges the consummated transaction between George's Inc. and Tyson Foods, two chicken processing companies in Virginia's Shenandoah Valley. The lawsuit requests that the court declare the acquisition unlawful under Section 7 of the Clayton Act and to require equitable relief in the form of the divestiture of one of the company's processing plants. The press release regarding the lawsuit is available at <http://www.justice.gov/opa/pr/2011/May/11-at-593.html>.

On March 18, George's Foods announced its intention to acquire Tyson's Harrisonburg, Virginia, chicken processing plant. The acquisition was not reportable under the HSR Act because the purchase price was below the minimum threshold. The DOJ's Antitrust Division opened an investigation into the acquisition and issued Civil Investigative Demands (equivalent to a Second Request) seeking information from the companies. Without complying with these requests, the parties closed the transaction on May 7, 2011. The DOJ's lawsuit alleges that the deal would reduce the number of chicken processors in Virginia's Shenandoah Valley from three to two. Interestingly, the DOJ's central concern is that the deal would *reduce* prices that farmers pay for the companies' services. Because a farmer's capacity to switch to a competing processor is often the only bargaining tool available, the DOJ contends that the elimination of a significant processor in the region will force farmers to accept unfavorable contract terms.

In *U.S. v. Verifone, Inc.* the DOJ seeks to block the acquisition of Hypercom Corporation by Verifone Systems, Inc., which, according to the DOJ, together control 60% of market in point-of-sale (POS) terminals to the country's largest retailers. The DOJ's Complaint alleges that the transaction violates Section 7 of the Clayton Act and Section 1 of the Sherman Act. The press release regarding the Verifone lawsuit is available at <http://www.justice.gov/opa/pr/2011/May/11-at-611.html>.

According to the DOJ, Verifone and Hypercom Corporation are two of three "substantial" competitors in the sale of POS terminals in the U.S. POS

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terminals allow retailers to accept electronic payments such as credit or debit cards. The complaint concerns two POS segments: small seller-countertop terminals, used by small business, and multi-line POS terminals, used by large retailers, which allow customers to swipe cards independent of a cashier.

On Nov. 17, 2010, Verifone announced its intention to buy Hypercom for approximately \$485 million and that it would divest its U.S. business to Ingenico S.A., which, according to the DOJ, is the only other significant competitor in the multi-line POS terminal segment. The DOJ's Complaint characterizes the proposed divestiture as an inadequate "franchise agreement" and alleges the licensing agreement would not allow Ingenico to maintain even the level of market control that Hypercom maintained pre-merger. Instead, the limited assets involved in the divestiture would allow Verifone to maintain control over intellectual property and require Ingenico to rely on Verifone for maintenance, upgrades and ongoing technical support. Therefore, the DOJ alleges, this arrangement would heighten the potential for coordinated behavior due to the ongoing entanglement between the companies. Finally, the DOJ claims that the parties intentionally structured the transaction to avoid premerger notification under the HSR Act.

The Verifone merger challenge suggests that DOJ will take a close look at any structural remedies that companies devise to gain antitrust approval. Both merger challenges indicate the DOJ continues to ramp up its enforcement efforts, and it is clear that companies contemplating mergers in highly-concentrated markets may face intense antitrust scrutiny from the government, even if the transaction is not reportable under HSR.

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