

Weil Briefing: Antitrust/Competition

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Whole Foods Settles the FTC's Challenge to Its Acquisition of Wild Oats

On March 6, 2009, the Federal Trade Commission ("FTC") announced that it had reached a consent agreement with Whole Foods Market, Inc. ("Whole Foods") regarding Whole Foods' \$700 million acquisition of Wild Oats Markets, Inc. ("Wild Oats"). The consent agreement, which requires Whole Foods to divest a significant part of the Wild Oats assets within 17 different geographic markets alleged in the FTC's complaint, comes almost 21 months after the FTC first sued Whole Foods in federal court to stop the deal.

Case Background

Whole Foods and Wild Oats first announced their transaction on February 21, 2007. After investigating the proposed deal, the FTC filed for a preliminary injunction in D.C. District Court on June 6, 2007, seeking to stop the transaction. According to the FTC, Whole Foods and Wild Oats were the closest competitors in the market for premium natural and organic supermarkets ("PNOS"). The complaint alleged that the transaction would eliminate competition between Whole Foods and Wild Oats in 25 geographic markets where both grocers had a store. It also alleged that the deal would eliminate potential competition in seven geographic markets where one grocer was already operating a store and the other was planning to enter. The FTC simultaneously filed an administrative complaint against Whole Foods, but stayed the administrative proceedings pending the outcome of the federal district court case.

On August 16, 2007, the district court denied the FTC's motion for a preliminary injunction. The district court found that the FTC had failed to meet its preliminary injunction burden because its PNOS market was inappropriately narrow. The FTC immediately appealed the district court's decision to the Court of Appeals for the D.C. Circuit. After the Court of Appeals denied the FTC's emergency motion for an injunction pending appeal, Whole Foods and Wild Oats consummated their transaction on August 28, 2007. Whole Foods proceeded to integrate the Wild Oats assets, including re-branding certain Wild Oats stores, closing others and terminating certain leases.

On July 29, 2008, the Court of Appeals reversed the district court's decision, finding that the FTC had demonstrated the requisite likelihood of success in the preliminary injunction proceeding. The Court of Appeals remanded the case to the district court so that the lower court could evaluate the equities and determine any appropriate relief. Following the Court of Appeals' decision, the FTC lifted the stay on the administrative proceedings, and on September 8, 2008, issued an amended administrative complaint. The amended complaint alleged competitive harm in 22 geographic markets where both companies had stores, and in seven "potential competition" markets where Wild Oats was the only PNOS, but where Whole Foods would have entered but for the merger.

After the D.C. Court of Appeals denied both Whole Foods' request for *en banc* review and a separate challenge by Whole Foods to the FTC's administrative proceedings, on

January 26, 2009, Whole Foods filed a motion to withdraw its case from administrative litigation in order to fashion a settlement agreement. The FTC granted Whole Foods' motion and agreed to withdraw the matter from administrative litigation until March 6, 2009.

The Consent Agreement

The proposed consent agreement requires Whole Foods to divest 32 Wild Oats stores in 17 separate geographic markets (out of the 29 markets alleged in the amended administrative complaint) and extensive assets related to those Wild Oats stores. Specifically, the settlement requires the divestiture of 13 Wild Oats stores that Whole Foods is currently operating ("live stores") and 19 Wild Oats stores that Whole Foods has closed but still controls ("dark stores"). The FTC must approve any potential buyer, but the stores can be divested to more than one buyer.

Whole Foods must also divest other Wild Oats assets related to these stores, including intellectual property, leases, other physical property, and governmental permits. The Wild Oats intellectual property, including the use of the Wild Oats name, must be divested without restriction because "even months after the acquisition, the Wild Oats name retains significant brand equity." Although the stores can be divested to more than one FTC-approved buyer, the intellectual property can be sold to only a single buyer. Under the consent agreement, however, that buyer has the right to license the intellectual property to others throughout the United States.

The consent agreement provides immediate control over the divested assets to a divestiture trustee who will oversee the marketing and sale of the assets. The FTC appointed The Food Partners ("TFP"), an investment banking firm in the food-retailing industry, as the divestiture trustee. TFP will have six months to divest the Wild Oats assets, but the FTC can extend the divestiture period by another six months if TFP has received good faith offers from potential buyers within the first six-month period. The consent agreement also includes an order to maintain assets, which requires Whole Foods to operate the stores in a way that preserves their competitiveness and marketability, and appoints an interim monitor that will ensure that Whole Foods meets these obligations.

Implications

The Whole Foods matter is a significant case for merger enforcement, especially for any transaction that is reviewed by the FTC. First, the case emphasizes the importance of company documents, as Whole Foods had a number of damaging internal documents related to the transaction and competition in the grocery industry. These "hot documents" were highlighted in the FTC's complaint and were ultimately given significant weight by the D.C. Circuit.

Second, econometric data played an important role during the preliminary injunction hearing and in the D.C. Circuit's decision. The extensive discussion of pricing and other economic data underscores the growing importance of such evidence in merger law and litigation. Third, the Whole Foods case is another example where the FTC alleged a narrow product market (*i.e.*, PNOS) in the retail context.

Fourth, the Whole Foods case serves as a reminder that a preliminary injunction hearing at the district court level is not necessarily the end of an FTC merger challenge, even if the merging parties are successful. The FTC can appeal an adverse preliminary injunction ruling and also has

the ability to pursue administrative proceedings. This can lead to costly litigation, and expensive and disruptive post-closing divestitures.

Fifth, the case demonstrates the difficulties the FTC faces in fashioning effective post-merger relief. Despite what appears to be a significant settlement, there are still markets alleged in the complaint where there will not be divestiture relief or the relief will involve divestiture of only closed stores. Although the FTC points out that the remedy will provide a “springboard for broader competition nationwide,” it is unclear when this future competition can be expected to occur, if at all.

Finally, we expect that the FTC will continue to pursue an aggressive merger enforcement policy under the new Obama administration and new FTC Chairman Jon Leibowitz. We also expect that the Antitrust Division of the Department of Justice will increase its merger enforcement activities from the levels in the previous administration.

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