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DOJ Loses Challenge to U.S. Sugar-Imperial Sugar Deal

- The DOJ recently lost a lawsuit seeking to enjoin the acquisition of Imperial Sugar by U.S. Sugar because the court found that the government failed to prove that the market it alleged was a proper antitrust market.
- The case illustrates the critical role of market definition in merger cases, the importance of credible experts (especially when the expert is relied upon for critical elements of a case) and the overarching relevance of real-world evidence, which, in this case, appears to have carried the day.

After determining that the DOJ failed to meet its burden of proof, a Delaware federal court denied the government's request to enjoin the \$315 million acquisition of Imperial Sugar by U.S. Sugar. The court found that the DOJ failed to prove a proper antitrust market and criticized the government's expert for, among other things, failing to take account of the realities of the sugar industry in the United States. The public version of the court's opinion was docketed on September 28. The DOJ has appealed, and the Third Circuit ordered expedited briefing but denied the DOJ's motion for an injunction pending appeal.

The DOJ sued to stop the transaction in November 2021, eight months after the deal was announced. U.S. Sugar grows and refines sugar in Florida and sells its sugar through United Sugars, a sugar-selling cooperative. Imperial is a sugar refiner that operates in Georgia and is owned by Louis Dreyfus. The government alleged that the transaction would be likely substantially to lessen competition in a market for "the production and sale of refined sugar to wholesale customers" in the "East South Central and South Atlantic United States" (or, alternatively, "the narrower region of Georgia and its bordering states").

Much of the court's opinion deals with whether sugar distributors should be included in the market along with refiners. The DOJ argued that distributors should be excluded because "they do not produce the refined sugar they are selling," but are instead "more properly considered customers." In contrast, the defendant parties to the transaction argued that distributors should be included in the market because they are "competitive sellers of refined sugar."

The court ultimately sided with the defendants, finding that the government's proposed product market was too narrow. The judge wrote that the "record is replete with evidence of distributors competing with refiner producers . . . as well as with cooperatives like United" and that "distributors account for approximately 25% of sales of refined sugar in the U.S." In particular, the court noted that distributors "can purchase large volumes of sugar from a variety of sources and move sugar to other locations in the country experiencing a sugar deficit or high prices." The court also found that because "a division of the refined sugar market into 'refiner or cooperative sold' refined sugar and 'distributor sold' refined sugar would be inconsistent with the commercial realities of the industry," the product market proposed by the DOJ had to be rejected. (Interestingly, the court also concluded that the government's proposed product market was too broad in that it included purchasers that are "industrial food and beverage producers" along with purchasers that are "retail companies" and "food service companies." The court found that the DOJ "introduced no evidence to support a finding that industrial companies have the same competitive options and purchasing behavior as any other wholesale customer included in its proposed market.")

The court went on to find that the government’s proposed geographic markets were too narrow – though it noted that the lack of a proper product market “is dispositive.” Here, the court cited “abundant evidence of sugar consumers” located in the proposed markets “purchasing their refined sugar outside those geographic regions.” The court also found that “many customers either pick up their purchased refined sugar at locations outside” the proposed markets “or have the capacity to do so in the future.” The court concluded that “the process of identifying the relevant geographic market must conform to the economic realities of the industry to recognize competition where competition exists. . . . Here, the economic reality is that sugar flows easily across the country from areas of surplus to deficit in responses to prices and demand.”

Without a proper product and geographic market, the court held that the DOJ was unable to establish a *prima facie* case that the transaction would be anticompetitive.

In its opinion, the court was quite critical of the expert proffered by the DOJ to support its asserted market definition, writing that “his credentials and experience appear to be lacking.” (Conversely, the court found the defendants’ expert to be “particularly credible.”) The court said that the government expert’s “assumptions . . . were flawed,” and his proposed market definition “was at times internally inconsistent” and inconsistent with the trial testimony of numerous witnesses. Elsewhere, the court wrote that the DOJ expert’s proposed market was “simply not credible.”

Notably, the court spent several pages at the end of the opinion explaining the role of the government in the U.S. sugar industry, in particular the USDA’s role in sugar price support. The court returned to this theme when it denied the DOJ’s request for an injunction pending appeal, writing: “The United States Government, through the Federal Sugar Program administered by the United States Department of Agriculture, ensures that purchasers and consumers in the United States pay higher rates for refined sugar than those in other parts of the world.”

Significance. This case illustrates the critical role of proper market definition in merger cases, the importance of credible experts (especially when relying on the expert for critical elements of a case) and the overarching relevance of real-world evidence, which, in this case, appears to have carried the day.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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