When Routine Merger Review Opened More Than a Can of Tuna

The shelf-stable tuna industry has been decidedly unstable behind the shelves. In 2014, two of the “big three” industry leaders—Bumble Bee Foods and Chicken of the Sea—announced a proposed merger that would have swamped the then-industry leader StarKist.

By Carl W. Hittinger and Alyse F. Stach

The proposed merger between Thai Union Group P.C.L., owner of Chicken of the Sea, with Bumble Bee would have combined the second and third largest sellers of shelf-stable tuna in the United States. The parties agreed to drop their plans to merge after the Department of Justice informed them that it had serious concerns that the proposed transaction could substantially harm competition. The DOJ made clear, however, that this was not a standard merger blocked due to potentially negative competitive effects. Assistant Attorney General Bill Baer of the department’s antitrust division said at the time, “our investigation convinced us— and the parties knew or should have known from the get-go—that the market is not functioning competitively today, and further consolidation would only make things worse.”

Indeed, what the parties should have known is that through the merger investigation, the antitrust division would uncover evidence of a massive industrywide price fixing scheme. In 2015, the DOJ cited Bumble Bee, StarKist and Chicken of the Sea as co-conspirators. According to the criminal charges filed, Bumble Bee, Chicken of the Sea and StarKist agreed to fix the prices of shelf-stable tuna from as early as the first quarter of 2011 through at least as late as the fourth quarter of 2013.

The three co-conspirators each ended up being treated differentially by the DOJ as the investigation unfolded. Chicken of the Sea completely avoided a monetary fine and was awarded amnesty after it agreed early to cooperate with the DOJ’s investigation. Bumble Bee, after it pleaded guilty to the price-fixing charges, agreed to pay $25 million in fines, or $81.5 million in the event of a sale of the company. The DOJ had initially requested a larger fine, but Bumble Bee successfully argued that it was unable to pay more and doing so would put it out of business, thereby further concentrating the shelf-stable tuna industry. StarKist, which also pleaded guilty, did not fare as well with its inability to pay argument and was ordered to pay a $100 million fine, the statutory maximum. The DOJ argued that StarKist was not entitled to the same reduction in fine as Bumble Bee because its “financial exigencies” were not the same because it had sufficient financial resources to pay the fine. Also, “Bumble Bee’s fine reflected a downward departure of over $50 million for substantial assistance [to prosecutors]—a reduction that StarKist did not earn or receive,” the DOJ argued.

In addition, four individuals were criminally charged in the investigation, three of whom pleaded guilty. The fourth, Chris Lischewski, the former president and CEO of Bumble Bee, took his chance at trial and was found guilty in December 2019, of one count of price fixing by a federal jury in the U.S. District Court for the Northern District of California. At sentencing in April 2020, he faces up to 10 years in prison and a $1 million fine. The other three individuals, like two of the three companies, traded cooperation for leniency and testified for prosecutors at Lischewski’s trial.
Piling on to the criminal cases, each of the big three as well as numerous individuals have been named in civil antitrust lawsuits from grocers, distributors and others alleging price fixing. The lawsuits were initially filed in 2015 and are ongoing. In 2019, plaintiffs were granted class action status but that decision is now being reviewed by the U.S. Court of Appeals for the Ninth Circuit. The companies have already settled some claims with certain plaintiffs, but the court is taking a hard look at newly proposed settlements and recently rejected a $6.5 million proposed settlement between Chicken of the Sea and food preparers as now being in the class’ best interest.

Now, Bumble Bee has found itself in even more murky water. Perhaps indicative of the distressed financial situation that convinced the DOJ to lower its fine, in November 2019 Bumble Bee filed for Chapter 11 bankruptcy protection. The bankruptcy court has just conditionally approved its sale to Taiwan-based FCF Co., Bumble Bee’s largest unsecured creditor, for an estimated $925 million. Among the list of Bumble Bee’s other creditors is the DOJ, to which, as of its bankruptcy filing, it still owed $17 million. Whether Bumble Bee will be able to continue operating at a competitive level in the already concentrated shelf-stable tuna industry remains to be seen.

So far, Starkist’s own predicted downfall due to its fine has not so far come to fruition, which may indicate that the DOJ got their accounting analytics right on that one. Even so, the canned tuna industry has had more than its share of problems. It is hard to argue that the price-fixing lid would not have been blown eventually, but one has to wonder if there would have been this much fallout if the two of the three co-conspirators had not attempted to merge exposing themselves to government review. Lessons should certainly be learned about the need for effective antitrust compliance and the letting loose of the antitrust dogs of war through an ill-conceived merger foray. Stay tuned.

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