



COMMENTARY
APRIL 2018

Tronox Runs Into Procedural Quagmire with Challenges to Cristal Acquisition

IN SHORT

The FTC Challenge: The FTC pursued an administrative challenge against Tronox's proposed acquisition of Cristal without also seeking a preliminary injunction. Following an HSR investigation, the FTC normally seeks a preliminary injunction in federal district court, and the future of the merger hinges on the outcome of the federal court action.

The Tactics: The FTC was able to depart from its standard procedure because the Tronox-Cristal deal cannot close until a European Commission deadline has passed. This allows the FTC the option of further delaying the transaction by filing for a preliminary injunction after the EC deadline.

[SKIP TO THE FULL VERSION.](#)

In February 2017, Tronox Corporation ("Tronox") announced its acquisition of Cristal, in a deal that would create the world's largest producer of titanium dioxide ("TiO₂"). Following an extended investigation under the Hart-Scott-Rodino ("HSR") Act, the Federal Trade Commission ("FTC") filed an administrative complaint in December 2017, alleging the \$2.4 billion deal would harm competition for the supply of chloride-based TiO₂. Because the transaction also faced an ongoing (and suspensory) parallel review at the European Commission ("EC"), the FTC did not follow its normal process of seeking a federal preliminary injunction simultaneously with the filing of its administrative complaint.

In an effort to preserve the original timing for the transaction, Tronox initially tried to force the FTC into federal court through a declaratory judgment action. When that did not provide relief, Tronox ultimately had to extend the deadline of its merger agreement with Cristal by nearly a full year to 2019.



Whether this results in an effective trial on the merits in federal court or an actual trial on the merits through the FTC's administrative litigation process, Tronox is likely to face several more months of delay before it can get any resolution.



Tronox believes that the FTC is still attempting to block or delay the transaction without having to prove its case on the merits in court. Tronox may now be on track to get a resolution in the European Union by the end of June 2018, and the FTC administrative process does not prevent the parties from closing, but the FTC posture means that Tronox may risk closing the deal while the administrative process is still pending. More likely, the FTC will seek an injunction only when the EU process is concluded.

Whether this results in an effective trial on the merits in federal court or an actual trial on the merits through the FTC's administrative litigation process, Tronox is likely to face several more months of delay before it can get any resolution. Thus, Tronox believes the FTC is attempting to "run out the clock" on the merger without ever having to carry its burden of proof in court.

Insights

A New Consideration in Multijurisdictional Reviews. Many transactions need to navigate the complexity of multijurisdictional reviews. Tronox expected the FTC would pursue a federal court action at the conclusion of the HSR review and concurrently with the EU review. Instead, Tronox faces the prospect of sequential review of its transaction by the European Union followed by litigation in the United States. Tronox did not have enough time to resolve both with the time it originally negotiated and found itself forced to extend the end date by nearly another year. Parties with transactions subject to multijurisdictional review will need to develop timing and strategies around the possibility that the FTC (or the DOJ) will not commence a preliminary injunction action until other suspensory reviews are finished.

SMARTER Act Implications. Whether Tronox prevails in federal district court or administrative proceedings, its case may bring renewed attention to the differences in process between the FTC and Department of Justice ("DOJ"). Currently, the FTC can commence administrative litigation to keep the threat of enforcement action in a way that the DOJ cannot. After the HSR investigation, the DOJ can challenge transactions in federal court under the Clayton Act (15 U.S.C. § 25) only on the grounds that the transaction is likely to "substantially lessen competition." Without an administrative trial pending, the DOJ's review may be substantially shorter than the FTC's review.

These differences in timing, and potential outcome, between the antitrust agencies already have been a

source of concern for Congress. In April 2017, the House Judiciary Committee voted in favor of the Standard Merger and Acquisition Reviews Through Equal Rules ("SMARTER") Act for the third straight legislative session. The SMARTER Act would require the FTC to litigate mergers in federal court, instead of relying on its usual administrative proceedings, and harmonize the standards between the DOJ and FTC to obtain a preliminary injunction.

Now, the U.S. Senate has taken a renewed interest in merging the standards. During confirmation hearings in February 2018, Senator Mike Lee (R-Utah) asked FTC commissioner nominees whether the DOJ and FTC should have different preliminary injunction standards. Joe Simons, up for FTC chairman, agreed an agency should get only "one bite at the apple. And if the agency loses [in federal court], they shouldn't be going to administrative trial."

With the support of a GOP-led Congress, the SMARTER Act may very well pass. The FTC will then lose the benefit of using administrative trials to challenge a transaction and be forced to adhere to the DOJ's higher evidentiary standard in federal court.

THREE KEY TAKEAWAYS

1. Parties with transactions subject to multijurisdictional review will need to develop timing and strategies around the possibility that the FTC (or the DOJ) will not commence a preliminary injunction action until other suspensory reviews are finished.
2. While the DOJ's only option for blocking a merger is to challenge the transaction in federal court, the FTC also has the option of commencing administrative litigation. This can lead to a substantially shorter period of review for the DOJ than the FTC.
3. If the proposed SMARTER Act passes, the FTC will also be limited to litigating mergers in federal court. The standards for obtaining a preliminary injunction may also be harmonized between the DOJ and FTC.

[WANT TO KNOW MORE
READ THE FULL VERSION.](#)

CONTACTS



Peter J. Love
Washington

Kristie Xian, an associate in the Washington Office, assisted in the preparation of this Commentary.

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[Institutional Investor Shareholdings Come Under European Commission Scrutiny](#)



[All Merger Side Letters Must Be Included in HSR Filings](#)



[DOJ Toughens Antitrust Consent Decree Enforcement](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113