



COMMENTARY

JANUARY 2019

## Tronox's Antitrust Woes Continue with Cristal Acquisition

### IN SHORT

**The Development:** A Federal Trade Commission ("FTC") administrative judge ("ALJ") has blocked Tronox Corporation's proposed acquisition of the titanium dioxide ("TiO<sub>2</sub>") business of The National Titanium Dioxide Company Limited ("Cristal"), concluding that the transaction may substantially lessen competition for the sale of chloride process TiO<sub>2</sub> in North America.

**The Result:** The ruling aligns with the prior federal district court preliminary injunction decision in September 2018 and extends Tronox's odyssey to more than two years.

**Looking Ahead:** Tronox can make its case to the full Commission; however, its agreement with Cristal expires in March 2019.

### Background

Since it announced the Cristal acquisition in February 2017, Tronox has faced numerous antitrust roadblocks. As detailed in our [April 2018 Commentary](#), following the HSR filing, the FTC investigated and challenged the deal in its administrative court. Normally, the FTC also files a federal court action seeking a preliminary injunction ("PI") to prevent the transaction closing pending the FTC administrative trial. In this case, the FTC opted not to go to federal court right away because the European Commission's ("EC") pending investigation barred closing. Parties often prefer to litigate in federal court because the courts typically produce a speedier outcome and are independent of the agency that sought to block the transaction in the first place.

Looking for a way out of the FTC's administrative court, Tronox unsuccessfully sought a declaratory judgment to force the FTC to litigate in Mississippi federal court or simply approve the merger. Faced with far-off resolution with both the EC and FTC, Tronox extended its merger agreement to March 2019 and proceeded with the administrative trial in May 2018.

In cases (as here) where the FTC seeks a preliminary injunction in federal court, the Commission automatically reviews the ALJ's decision. Therefore, the parties have another opportunity to argue that their remedy is an alternative to prohibition of the deal.

### Dual Courts, Dual Agencies

In July 2018, Tronox secured conditional approval from the EC, which prompted the FTC to seek a PI in federal court. With changed fortunes, Tronox had alternatives by which it could complete the Cristal acquisition:

- **Federal Court Trial.** Tronox could seek to persuade the federal court not to issue a PI, which would allow it to close its deal, and which might prompt the FTC to abandon the administrative trial.
- **Settlement.** Tronox could try to negotiate a remedy with the FTC to resolve the matter.

Earlier in 2018, Tronox had signed an agreement with Venator, another TiO<sub>2</sub> producer, to sell Cristal's Ashtabula, Ohio, TiO<sub>2</sub> plant, conditioned on completion of the Cristal acquisition.

In August 2018, the U.S. District Court for the District of Columbia held a three-day hearing on the FTC's PI motion. The case turned almost entirely on market definition: Are chloride process and sulfate process TiO<sub>2</sub> part of the same market? Tronox argued for the broader market, but the court agreed with the FTC that chloride TiO<sub>2</sub> (the only TiO<sub>2</sub> the parties make in North America) was in a separate market. According to the court, many customers could not substitute sulfate TiO<sub>2</sub> for chloride TiO<sub>2</sub> in response to a price increase.

In the narrow chloride TiO<sub>2</sub> market, Tronox and Cristal had substantial shares, and the combination would have resulted in a highly concentrated market. The court therefore held that the FTC made a prima facie showing of competitive harm, which the parties could not rebut.

Tronox also tried "litigating the fix." Tronox argued that an injunction was unnecessary because it had agreed to remedy the FTC's concerns by selling the Ashtabula plant to Venator. However, the court dismissed the possibility of a post-closing divestiture, citing limited harm to Tronox from a PI, given the pending administrative decision.

### **Another Remedy, Another Court, Another Loss**

By November 2018, Tronox moved on from Venator and agreed to sell Cristal's Ashtabula plant to INEOS Enterprises A.G. When the FTC again rejected Tronox's plan, Tronox sought, on the eve of the ALJ decision in early December 2018, permission to suspend the administrative process and submit its remedy directly to the FTC commissioners. The ALJ rejected this long-shot proposal, ruled against Tronox, and directed the parties to abandon their transaction.

### **Next Steps**

The ALJ's ruling ended the administrative trial, but not the FTC process. In cases (as here) where the FTC seeks a PI in federal court, the Commission automatically reviews the ALJ's decision. Therefore, the parties have another opportunity to argue that their remedy is an alternative to prohibition of the deal.

Although the FTC staff expressed skepticism about the new remedy, Tronox now can appeal to the five commissioners, none of whom were part of the Commission that voted out the complaint in December 2017. Tronox's odds of winning on the merits of market definition or competitive effects are slim, considering that the FTC staff has twice won rulings against the deal. Tronox may hope this new group of commissioners will be more receptive to its remedy than the staff. Tronox also has indicated that it plans to continue to work with the FTC staff on its proposed divestiture to INEOS.

Tronox again has a looming termination date (March 2019) in its merger agreement with Cristal. Tronox previously bargained for more time, but it may not have been enough. If the parties are loath to negotiate another extension, Tronox may have no way to salvage the deal.

## **TWO KEY TAKEAWAYS**

1. This case highlights the importance of considering a settlement strategy before the antitrust agencies turn to litigation in deals where divestiture is possible. Once in court, the antitrust agencies rarely settle merger cases.
2. Increasingly, antitrust authorities across the world cooperate on reviews and point to pending suspensory approvals (or other necessary consents) as a reason to withhold a decision. Parties therefore should consider carefully the timing of international antitrust reviews and the impact on potential litigation and the termination date in the merger agreement.



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