D. Del. Oct. 30, 2017).

[19]Hearing Transcript, *In re M&G USA Corporation*, No. 17-12307, at 65 (Bankr. D. Del. Mar. 28, 2018).

[20]*Dr. Pepper/Seven-Up Companies, Inc. v. F.T.C.*, 991 F.2d 859, 885 (D.C. Cir. 1993) (an unsuccessful search canvassed several potential buyers but "further efforts would be unlikely to bear fruit"); *cf. United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415, 445 (D. Del. 2017) (seller failed to make affirmative search for ultimate buyers and only engaged with one other potential bidder); *Citizen Publishing Co*., 394 U.S. at 138 (1969) (noting failure of seller in hiring a broker); *Golden Grain Macaroni Co. v. F. T. C.*, 472 F.2d 882 (9th Cir. 1972) (merely showing that other companies looked at—but didn't buy—the seller is not enough to prove the challenged purchaser was the only prospective purchaser). *Cf. California v. Sutter Health System*, 130 F. Supp. 2d 1109, 1136 (N.D. Cal. 2001) (acquired company conducted a four-year search with an investment banker to elicit bona fide offers, even repeatedly contacting the second potential bidder to elicit another offer).

[21]*M.P.M.*, 397 F. Supp. at 102-03 (noting seller's "earnest, wide-ranging" but "uniformly fruitless" efforts to elicit bids).

[22]*Id.*

[23]*Declaration of Jonathan Brownstein in Support of Debtors' Motion for Entry of Orders Approving (I) Sale of Certain Assets of the Debtors and (II) The New DIP Facility*, *In re M&G USA Corp.*, No. 17-12307, at 5 (Bankr. D. Del. Mar. 22, 2018).

[24]*U.S. v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 781-82 (D. Md. 1976) (seller did not attempt to secure a purchaser alternative to the eventual buyer, and actively discouraged other prospects from bidding); *United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415, 445 (D. Del. 2017) (seller engaged with only one other bidder who was left in the dark and basically ran a single bidder process; it was well-known in the industry that buyer made frequent overtures to purchase seller).

[25]Analysis of Consent Order, at 3 ("Without the proposed Consent Agreement, the Transaction would substantially lessen competition in the North American PET market by facilitating or increasing the likelihood of coordination between and among the joint venture members and by increasing the likelihood that the joint venture members, acting alone or in concert, would exercise market power.").

[26]*Id.*

[27]Federal Trade Commission, *Power shopping for an alternative buyer*, Competition Matters Blog (Mar. 31, 2015) (emphasis in original), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/power-shopping-alternative-buyer.

[28]*See* U.S. Contribution on Roundtable on Failing Firm Defence, Directorate for Financial Enterprise Affairs Competition Committee (Oct. 6, 2009), *available at* https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/failingfirm.pdf.

[29]Horizontal Merger Guidelines, at 32 ("If the relevant assets would otherwise exit the market, customers are not worse off after the merger than they would have been had the merger been enjoined"); *United States v. General Dynamics Corp.*, 415 U.S. 48, 507 (1974) (the failing firm doctrine applies a "choice of evils" approach where "the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business").

[30]*U.S. v. Culbro Corp.*, 504 F. Supp. 661, 669 (S.D. N.Y. 1981) (rejecting the DOJ's attempt to contact a potential purchaser on the "very eve of trial" because no proposal was ever made); *Sutter Health*, 84 F. Supp. 2d at 1136 (rejecting party as a viable alternative purchaser after it failed to respond to inquiries over several months and eventually said, "[W]e are no in a position to make an offer").

[31]*Culbro*, 504 F. Supp. at 669.

NEW EU FRAMEWORK TO COORDINATE EU MEMBERS' FOREIGN INVESTMENT SCREENING

By James Modrall

James Modrall is a partner in the Brussels office of Norton Rose Fulbright LLP. Contact: jay.modrall@nortonrosefulbright.com.

On February 14, 2019, the European Parliament adopted a regulation ("the FDI Regulation") creating a new framework for screening foreign direct investments ("FDI") into the European Union ("EU").[1] In spite of its sensitive subject matter and EU Member States' reluctance to grant the EU Commission new powers, especially in areas touching on national security, the FDI Regulation was approved very quickly by EU standards. The regulation must be applied by all Member States and the EU Commission ("the Commission") starting 18 months from publication, *i.e.,* in the second half of 2020. The new

there was access to the federal facilities where the contract was to be performed, and other variables. Where federal contractors could not perform during the shutdown, and contractors (or their employees) suffered financially as a result, the ability of the contractors to obtain relief will depend on the terms of the contracts and the manner in which appropriations were restored post-shutdown. As with past shutdowns, there is certain to be post-shutdown claims and litigation by government contractors seeking to be made whole for their losses. The outcome of these disputes will fall within a wide-spectrum, ranging from clear entitlement to relief in instances in which contractors could not access federal facilities in order to perform, to more challenging actions based on indirect losses such as the costs of extending lease terms on equipment or obtaining financing to maintain operations. In agencies affected by the shutdown, the norm during the shutdown was that no new contracts or modifications to existing contracts were awarded. Contractors experienced delays during the shutdown in the acquisition process for procurements and the payment of invoices—and will continue to experience delays given the backlog that now exists. Contractors should not assume that any statutory deadlines for filing claims and bid protests automatically will be extended.

Litigation. Federal courts, including the U.S. Supreme Court, operated on reserve funds during the shutdown. The Case Management/Electronic Case Files (CM/ECF) system remained in operation for the electronic filing of documents. Criminal cases in federal court generally proceeded without interruption, albeit staffed by federal attorneys and some agents who were required to work without pay. Many federal courts, including the United States District Court for the Southern District of New York, announced stays of civil cases in which the U.S. Attorney's Office was representing the government. Such orders were published on court internet sites. Many U.S. Department of Justice Civil Division attorneys were furloughed and prohibited from working on their pending cases. As such, in litigation where these attorneys represented the United States or federal agencies, or federal officials were parties, the Justice Department often filed motions seeking to stay the proceedings (including pending filing deadlines) until the "lapse in appropriations" ended, and asked for extensions commensurate with the length of the shutdown. For the most part, particularly where there was no opposition, courts granted the motions. However, there were several notable exceptions, particularly in cases seeking injunctive relief and matters where the federal agencies involved (such as the Department of Defense) were unaffected by the shutdown. In cases where the United States is the plaintiff, some courts held that the government needed to be treated like any other civil litigant and either prosecute the case or dismiss it. In the event of another shutdown, it is likely that this judicial sentiment will grow.

TRONOX'S ANTITRUST WOES CONTINUE WITH CRISTAL ACQUISITION

By Peter Love, Michael Gleason and Kristie Xian

Peter Love and Michael Gleason are partners, and Kristie Xian is an associate, in the Washington, DC office of Jones Day. Contact: pjlove@jonesday.com or magleason@jonesday.com or hkxian@jonesday.com.

Since it announced the Cristal acquisition in February 2017, Tronox has faced numerous antitrust roadblocks. As detailed in our earlier article on the subject,[1] 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.

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 TiO2 producer, to sell Cristal's Ashtabula, Ohio, TiO2 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 TiO2 part of the same market? Tronox argued for the broader market, but the court agreed with the FTC that chloride TiO2 (the only TiO2 the parties make in North America) was in a separate market. According to the court, many customers could not substitute sulfate TiO2 for chloride TiO2 in response to a price increase.

In the narrow chloride TiO2 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

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.

Increasingly, antitrust authorities across the world co-

operate 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.

ENDNOTES:

[1]"The Tale of Tronox and Its Procedural Quagmire," Peter J. Love and Kristie Xian, *The M&A Lawyer,* May 2018, Vol. 22, Issue 5.