

Justice Department Requires Divestiture of a Previously Consummated Acquisition

On Thursday, January 2, 2014, the Antitrust Division of the US Department of Justice (DOJ) issued a complaint and accompanying settlement agreement in connection with the 2012 acquisition of Midwest Instrument Co. Inc. (Minco) by Heraeus Electro-Nite Co., LLC. Among its obligations under the settlement, Heraeus will divest two Minco facilities it acquired. This enforcement action, which alleges a violation of Section 7 of the Clayton Act, again demonstrates that the government can scrutinize a relatively small, consummated merger and will enforce the antitrust laws where it deems necessary.

Background

Before the 2012 acquisition, Heraeus and Minco were each other's principal competitors in selling sensors and instruments used by steel producers to measure and monitor the temperature and composition of molten steel. Their market shares were 60 and 35 percent, respectively. Because the \$42 million transaction was below the threshold that would have required premerger notification under the Hart-Scott-Rodino Act (HSR Act), the DOJ only learned of the acquisition after it was consummated. The settlement between Heraeus and the DOJ is now pending approval in the United States Federal District Court for the District of Columbia.

Terms of the Settlement

The DOJ's goal in post-transaction enforcement action – and, therefore in a settlement – is to recreate the competition lost as a result of the transaction. Because Minco has already been fully integrated into Heraeus' business, it is impossible to divest Minco as an ongoing business unit. Therefore, assuming the court approves the settlement, Heraeus will be required to take several actions designed to create a new competitor.

First, Heraeus will have to divest two US production facilities it acquired and integrated into its overall business more than a year ago. Second, it will be required to provide training and technical support to the new competitor under close regulatory oversight by the DOJ to ensure that the new competitor is effectively equipped to market and sell against Heraeus. Third, Heraeus will be required to waive its existing non-compete agreements with certain former employees. Finally, if Heraeus wishes to purchase any company in this market during the upcoming decade, it will be required to provide the DOJ detailed premerger notifications (and observe HSR-like waiting periods), without regard for whether the transaction would meet HSR filing requirements.

As part of the settlement process, Heraeus has already been required to identify and submit for DOJ approval a potential buyer for the divestiture assets. Keystone Sensors LLC, a company formed in May 2013 for the purpose of entering the US market for sensors and instruments for the steel industry, has been selected. Within 60 days of the court's approval of the settlement, Heraeus and Keystone will consummate the divestiture transaction.

Practical Considerations

Post-transaction antitrust enforcement action such as this likely imposes significant costs on the acquiring company and requires it to make otherwise undesirable – and perhaps otherwise unwarranted – changes to its business practices. In addition to likely being required to sell off some or all of the assets it purchased, the acquiror (or surviving company) will also be subjected to the legal costs and business distraction of responding to a government investigation. In addition, because divestiture sales are ordinarily completed under significant pressure, they often cannot be expected to bring full value. Finally, the post-settlement (or post-judgment, in a litigated resolution) remedies – such as the long-term reporting requirements and the waiver of non-compete provisions found in this settlement – impose continuing cost and burden on the company.

The key lesson to be learned from the DOJ's enforcement action is that it is always wise to conduct an antitrust analysis of any proposed transaction at an early stage – without regard for whether pre-merger notification is required – so that the company can make an informed judgment with respect to the proposed transaction's potential antitrust risk.

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