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Antitrust Advisory: Fifth Circuit Affirms FTC Order to Divest Assets in Chicago Bridge & Iron

2/4/2008

On January 25, 2008, the U.S. Court of Appeals for the Fifth Circuit denied a petition by Chicago Bridge & Iron Company N.V. ("CBI") to review an administrative decision issued by the Federal Trade Commission ("FTC" or the "Commission").[1] The FTC's administrative decision held that CBI's acquisition of the Water Division and the Engineered Construction Division of Pitt-Des Moines, Inc. ("PDM") violated Section 7 of the Clayton Act and Section 5 of the FTC Act, and ordered divestiture. The Fifth Circuit's decision upholds the FTC's administrative decision, and effectively ends litigation in this long-fought case that was initially filed in October 2001.

Why This Case Is Important

The Fifth Circuit's decision stands as a conspicuous reminder that expiration of the 30-day waiting period under the Hart-Scott-Rodino Antitrust Improvements Act does not render the government powerless to act if it believes, even in hindsight, that a transaction raises competitive concerns. In this case, the FTC allowed the waiting period to expire without issuing a second request, permitting the parties to close the deal. The FTC staff subsequently determined that the transaction raised antitrust concerns, and then began to investigate. Both CBI and PDM were on notice that the FTC had commenced an investigation, but they opted to close the deal nonetheless.

Now after almost seven years of operating as a merged firm, CBI must reorganize its business pursuant to the Commission's original order. And the costs of "unscrambling the eggs," as the Commission put it, will likely be extensive. It is worthy to note that this case is unusual because the FTC rarely challenges mergers subsequent to the expiration of the 30-day waiting period. But where the parties are aware of an FTC investigation, they should carefully consider the decision to close regardless of whether the waiting period has expired.

Case History

CBI, a Dutch company based in Amsterdam, designs, engineers, fabricates and repairs field-erected liquid and gas storage facilities and steel plate structures. It is recognized as one of the world's leading global engineering and construction companies. PDM, based in Woodlands, Texas, was a diversified engineering and construction company specializing in the engineering and design, procurement, fabrication, erection and rehabilitation of steel products. Prior to the transaction, the two companies competed against each other as the leading producers of large, field-erected industrial, chemical, and water storage tanks, and other specialized steel-plate structures.

The FTC challenged CBI's acquisition of PDM's Water Division and Engineered Construction Division alleging that the transaction violated Section 7 of the Clayton Act and Section 5 of the FTC Act. Specifically, the FTC argued that the combination resulted in a complete monopoly in the markets for liquefied natural gas tanks and for thermal vacuum chambers. The FTC also alleged that the merged firm dominated the market for liquid oxygen/liquid nitrogen/liquid argon tanks and liquid petroleum gas tanks. After an administrative trial, an administrative law judge held that the acquisition substantially lessened competition and increased concentration in the relevant markets, and ordered CBI to divest all assets acquired in the transaction.

The case was subsequently reviewed by the full Commission. The Commission considered a number of factors in affirming the administrative law judge's decision. It noted that the two firms made the greatest number of sales in the relevant markets over the preceding decade; barriers to entry were high because firms required very specialized experience to enter the market and name recognition hindered other firms; and other firms had submitted bids since the acquisition, but the existence of other entities in the market had not diminished the market dominance of the merged firm. The Commission ultimately ordered the company to reorganize its business into two separate stand-alone subsidiaries, and to divest one of the subsidiaries within six months of the order. The Commission's plan, which differed from the administrative law judge's remedy, was designed to alleviate the anticompetitive effects of the merger more quickly than a simple divestiture of the acquired assets.

The Fifth Circuit's Decision

CBI then petitioned the Fifth Circuit to review the Commission's decision, arguing that the Commission:

- applied incorrect legal standards in shifting the burdens of proof and persuasion;
- applied incorrect legal standards related to the "actual and potential entry" defense;
- did not rely on substantial evidential support in finding that CBI failed to rebut the FTC's *prima facie* case; and
- abused its discretion in its remedial order.

The court rejected each of CBI's arguments. First, the court held that CBI offered "ineffectual evidence" that was insufficient to rebut the FTC's "stalwart" *prima facie* case. As a result, the Commission's decision not to switch the burden of production back to its own complaint counsel was proper.

Second, the court held that the legal standard used by the Commission to evaluate the potential entry defense was the same one proposed by CBI, and was, in fact, proper. The court further held that the Commission did address whether entry into the market was sufficient to constrain CBI pricing, in part, by using evidence of existing entry and evidence of the history of entry. These two sources helped to determine whether future entry would be able to counteract the merger's anticompetitive effects.

Third, the court held that the Commission had relied on substantial evidentiary support in holding that CBI failed to rebut the FTC's *prima facie* case. Specifically, the court held that the Herfindahl-Hirschman Index could be used as an indicator of probable future competitiveness and that the Commission was justified in discounting certain evidentiary items of limited probative value. Further, the court held that the Commission relied on substantial evidence that reputation, regulatory and technical expertise, and control over the specialized labor force all constituted significant barriers to entry.

Finally, the court held that the Commission did not abuse its discretion in mandating remedial provisions. Rather, the reorganization was consistent with, and relevant to, creating a viable competitor to the merged entity that could eliminate the anticompetitive effects of CBI's acquisition.

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[1] *Chicago Bridge & Iron Co. N.V. v. FTC*, No. 05-60192 (Jan. 25, 2008)

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Please feel free to contact us if you wish a copy of the decision or would care to discuss its implications for your business.

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