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Chicago Bridge & Iron Co.: Post-Closing Challenges - It Ain't (Always) Over When It's Over

It has always been clear that expiration of the Hart-Scott-Rodino waiting period in merger reviews does not provide parties absolute certainty that their transaction will not be challenged post-closing. This, however, has been dramatically underscored by a recent order from a Federal Trade Commission Administrative Law Judge requiring the unwinding of a transaction that had closed over two years ago. In *Chicago Bridge & Iron Co.* (CB&I), Judge D. Michael Chappell held, after a three-month administrative trial, that CB&I's February 2001 acquisition of assets from Pitt-Des Moines, Inc. would substantially lessen competition in certain markets. As a remedy, he ordered CB&I to divest the acquired assets within 180 days of the final order to a buyer approved by the FTC.

CB&I has announced that it will appeal the Administrative Law Judge's decision to the full Commission, and if necessary, to the United States Court of Appeals. A final decision in this case, therefore, may not be reached for two years or more, and CB&I may never have to divest the acquired assets. While the appeal is pending, however, CB&I will have to operate under the threat that it might someday have to complete the ordered divestiture. Although CB&I is an unusual case in several respects, it reinforces that antitrust agency review of transactions does not always end with termination of the Hart-Scott-Rodino waiting period or at closing.

The parties in *CB&I* filed a pre-merger notification under the Hart-Scott-Rodino Antitrust Improvements Act in September 2000. The FTC staff allowed the initial thirty-day waiting period to expire without issuing a Second Request, thereby permitting the parties to close the deal. In a highly unusual twist, however, the staff apparently did not determine that the transaction raised substantial antitrust concerns until after the waiting period expired and only then began to investigate in earnest. Although the parties knew about this ongoing investigation and the possibility that the Commission might ultimately challenge the transaction, they nevertheless closed it in February 2001. In October 2001, the FTC issued an administrative complaint alleging that the transaction gave the combined firm a monopoly or near-monopoly in markets for thermal vacuum chambers and a dominant market position for two types of storage tanks for liquid gases.

The Hart-Scott-Rodino Scheme and Post-closing Investigations

Before Congress enacted the HSR Act in 1976, the FTC and Department of Justice were rarely able to investigate transactions before deals closed. By providing for pre-closing notification and review of substantial transactions, the HSR Act addressed two related problems that had bedeviled post-closing reviews. First, by the time the agencies could investigate an anticompetitive deal, litigate the matter, and obtain an order invalidating the transaction, it was often too late to remedy the competitive harm effectively. Typically, several years had passed since closing, and the parties had closed plants, eliminated brands, terminated employees, or taken other actions making it difficult or impossible to "unscramble the eggs" and restore competition lost through the transaction. Second, merging parties lacked a structured process to obtain pre-closing review of their transaction. Accordingly, for transactions likely to attract antitrust scrutiny, parties usually had to proceed at their own peril. They faced possible post-closing investigations that could drag on for years, potentially resulting in litigation and an order requiring unwinding long after closing.

The HSR Act has been a great success in giving the Government means to stop or obtain modifications of transactions that threaten competition before they close and while effective remedies are still practicable. It has also benefited merging parties by introducing a fixed timetable for investigations and greatly reducing uncertainty: once the agency has declined to challenge a transaction or has agreed with the parties on remedies to address competitive concerns, the parties are able to close, *relatively* secure in the knowledge that antitrust inquiry is behind them.

Although the HSR Act has meant that the overwhelming majority of transactions the agencies ever challenge are challenged before closing, all parties contemplating mergers need to understand that — as *CB&I shows* — that is not invariably the case. The Act does not grant any immunity from post-closing investigations or challenges. There is, moreover, no statute of limitations for government challenges under Section 7 of the Clayton Act or other antitrust statutes governing mergers.[1] Additionally, completed transactions are always subject to litigations brought by state attorneys general or certain private parties, which are not party to the HSR process.

In practice, however, until *CB&I*, the agencies had never actually challenged a reportable transaction after closing, absent allegations that the parties had failed to comply with the HSR Act's requirements. It is, however, not unheard of for them to make inquiry if there are indications that a transaction (especially a recently-completed one) may have led to the exercise of market power. (The risk of such an investigation increases substantially if customers complain or there are other suggestions that the deal has facilitated the exercise of market power.) More commonly, the agencies investigate and sometimes challenge completed mergers that were not reportable because they were under the filing threshold or a type of deal that the HSR Act does not reach (*e.g.*, certain joint ventures and partnerships).[2] Indeed, there has been increased focus on investigations of non-reportable transactions since Congress raised the size of transaction threshold from $15 to $50 million, thereby excluding from pre-merger review many more transactions raising possible antitrust issues.

[1] Indeed, in an extreme case arising before the enactment of the H-S-R Act, *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), DoJ challenged an acquisition thirty years after consummation.

[2] *See, e.g., United States v. 3D Sys. Corp.*, 2002-2 Trade Cases 73,768 (D.D.C. June 6, 2001) (entering stipulated order for post-closing asset divestiture in non-reportable transaction); *MSC.Software Corp.*, Docket No. 9299 (October 29, 2001), available at http://www.ftc.gov/os/2002/11/mscdo.pdf, (final decision and order providing for post-closing divestiture in non-reportable transaction).

The agencies have also investigated completed transactions that were reported under the HSR Act, when the parties were alleged to have impeded the agency's investigation by failing to comply fully with the Act's requirements. In one such case, the FTC challenged the Hearst companies' acquisition of Medi-Span, an integrated drug information database business, and obtained a divestiture order almost four years after the acquisition had closed. The Commission claimed that the Hearst companies had failed to produce Item 4(c) documents with its premerger notification that would have alerted the Commission staff to competitive concerns.[3]

Implications of CB&I

CB&I might be seen to suggest that the agencies will begin more often to investigate and challenge completed transactions that were subject to the HSR review process, but that may well not prove the case. To be sure, when the FTC filed its complaint against CB&I, Joseph Simons, the Director of the FTC Bureau of Competition stated that the FTC's "actions here should make clear to companies and their antitrust counsel that we are quite prepared to bring action against consummated mergers. Antitrust counsel would be well advised to counsel their clients about the likely consequences of consummating transactions that raise substantial competitive issues, including bearing the risk of unscrambling the eggs, if necessary."[4] *CB&I* appears to be an extraordinary case, however. The FTC staff recognized that it had erred in closing its investigation shortly after declining to issue a Second Request, and the parties were on notice that the FTC was continuing its investigation well before the parties closed the transaction. Thus, unlike the usual case, the parties did not close their transaction in good faith reliance on the fact that the agency had completed its investigation.

Accordingly, we believe *CB&I* probably does not mean that the agencies will depart sharply from their general practice of investigating reportable transactions — if at all — before they close. For the agencies to do so would threaten to undermine the essential improvements in remedies and business predictability that the HSR Act brought to their merger enforcement programs. If, however, merging parties find themselves in the unusual circumstance of being free to close while on notice of an ongoing agency investigation, they are well advised to weigh carefully the benefits and risks of completing their transaction while the investigation is pending.

The most important lesson of *CB&I* is clear: the expiration of the HSR waiting period is not an absolute guarantee against a post-closing challenge. That is especially true if the parties are on notice before closing that the agency is continuing to investigate. We expect, however, that intensive post-closing investigations and challenges to reportable transactions will remain quite rare.

Please contact us if you would like a copy of the *CB&I* decision or further information about the case or would like information about any other issue of US or foreign antitrust or competition law.

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[3] *United States v. The Hearst Trust and The Hearst Corp.*, Civ. No. 01-2119 (D.D.C. Oct. 10, 2001); *FTC v. The Hearst Trust, The Hearst Corp. and First Data Bank, Inc.*, Civ. No. 01-00734 (D.D.C. Nov. 9, 2001). In addition to the divestiture order, the Commission also obtained disgorgement of profits that Hearst obtained post-merger and a multimillion-dollar fine for the HSR violation.

[4] FTC Press Release, "FTC Challenges Chicago Bridge's Acquisition of Pitt-Des Moines' Industrial and Water Storage Tanks Assets," (October 25, 2001), available at http://www.ftc.gov/opa/2001/10/chicagobridge.htm.