

Client Alert

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Justice Department Requires Divestiture in Consummated Merger

On January 2, the Antitrust Division of the US Department of Justice (DOJ) announced its first civil enforcement action of 2014 — a consummated merger challenge and settlement resulting from Heraeus Electro-Nite's (Heraeus's) \$42 million acquisition of Midwest Instrument Company Inc. (Minco). The enforcement action is the latest DOJ challenge to a merger not required to be reported to the US antitrust agencies under the Hart-Scott-Rodino Act.

The buyer, Heraeus, is the largest competitor in the US market for highly specialized instruments used by steelmakers to measure and monitor the temperature and chemical composition of molten steel. Heraeus once had an 85 percent market share but by the time it acquired Minco, Heraeus's share had dropped to 60 percent while Minco's share had grown to 35 percent.

As alleged in DOJ's complaint, Heraeus responded to this competitive threat by acquiring Minco in September 2012 to "restore its 'market leadership.'" Three months later, DOJ opened a merger investigation after receiving customer complaints about the transaction. By that time, Heraeus already had integrated Minco's assets, including by terminating certain supply contracts, closing production facilities and terminating employees using severance packages with two-year noncompete clauses.

DOJ's settlement includes a number of notable provisions. First, it identified a designated divestiture buyer — a feature increasingly found in DOJ's settlements. DOJ determined that an upfront buyer was particularly important in this case because Heraeus's integration of Minco's assets precluded divestiture of an entire business unit — which DOJ typically views as a more effective remedy.

Second, the settlement requires Heraeus to waive the two-year noncompetes it had imposed on the terminated sales and service employees. DOJ concluded that, at least in this instance, the noncompete provisions were overbroad and impeded entry and expansion of competitors. Third, to allow competitor entry, the settlement requires that Heraeus allow customers to continue to use Heraeus products to test and qualify competitors. Finally, the settlement requires that Heraeus provide notice of future acquisitions in the relevant market.

Each of these provisions reflects DOJ's heightened focus on tailored remedies in its merger challenges — a priority issue that DOJ's antitrust leader, Assistant Attorney General Bill Baer, emphasized in his only formal speech to date. In certain cases, this means that parties will need to be prepared to engage early with DOJ on potential merger remedies. The consummated merger challenge also demonstrates the need for parties to closely analyze antitrust risks associated with transactions, even where they do not require a Hart-Scott-Rodino antitrust filing.

Hunton & Williams LLP has significant experience representing companies on merger and other antitrust matters before competition enforcement agencies. The firm's global competition practice combines high-level government and private litigation experience. Lawyers in the group come from both of the US antitrust enforcement agencies and include a former deputy director of the US Federal Trade Commission's Bureau of Competition, a former deputy assistant attorney general and chief of staff of the DOJ Antitrust Division, a former counsel and chief of staff of the DOJ Antitrust Division, four former FTC

litigators and other attorneys from the FTC and DOJ. Working from offices in the United States and abroad, the group serves domestic and international companies in merger review, competition litigation, intellectual property matters, consumer protection and privacy, and criminal antitrust defense and related price-fixing litigation.

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