



BILLING CODE: 6750-01S

FEDERAL TRADE COMMISSION

[File No. 171 0058]

Tronox/Cristal USA; Analysis of Agreement Containing Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Agreement Containing Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders -- embodied in the consent agreement -- that would settle these allegations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: "Tronox/Cristal USA" on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D),

Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Joonsuk Lee (202-326-2823),
Bureau of Competition, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR § 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page for April 10, 2019, on the World Wide Web, at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Tronox/Cristal USA; File No. 1710085” on your comment. Your comment - including your name and your state - will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you prefer to file your comment on paper, write “Tronox/Cristal USA; File No. 1710085” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Website at <https://www.regulations.gov>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential” – as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Website – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from the FTC Website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) with Tronox Limited (“Tronox”), National Industrialization Company (“TASNEE”), National Titanium Dioxide Company Limited (“Cristal”), and Cristal USA Inc. The purpose of the Consent Agreement is to remedy the anticompetitive effects that would result from Tronox’s proposed acquisition of Cristal’s titanium dioxide (“TiO₂”) business.

On February 21, 2017, Tronox announced that it had entered into a definitive agreement to acquire all of Cristal’s TiO₂ business for \$1.67 billion and a 24 percent stake in the combined entity (“Acquisition”). The proposed Acquisition would combine two of the three largest producers of TiO₂ manufactured through the chloride process (“chloride TiO₂”) in the United States and Canada (“North America”). On December 5, 2017, the Commission issued an administrative Complaint challenging the proposed Acquisition and authorized staff to seek, if necessary, a preliminary injunction in federal district court. The Commission’s Complaint alleged that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the market for the sale of chloride TiO₂ to North American customers (“North American chloride TiO₂ market”). After extensive pre-trial discovery, the administrative trial before the Administrative Law Judge (“ALJ”) began on May 18, 2018 and was conducted over sixteen hearing days until June 22, 2018.

In July 2018, because Tronox could have closed the transaction before the ALJ could issue a decision, however, the Commission filed a federal complaint in the U.S.

District Court for the District of Columbia to seek a preliminary injunction. After a three-day hearing at the federal district court, Judge Trevor N. McFadden ruled for the Commission and issued an opinion and order granting the motion for a preliminary injunction on September 12, 2018. In his opinion, Judge McFadden found that the Commission established a strong presumption of anticompetitive effects in the market for chloride TiO₂ in North America and that the parties' rebuttal evidence did not overcome the presumption. After the completion of the federal court action, the ALJ issued an Initial Decision on December 7, 2018. Like the decision in the federal court, the ALJ found that the Acquisition may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The parties thereafter engaged with Commission staff in settlement discussions to resolve the Commission's concerns relating to lost competition in the North American chloride TiO₂ market.

To remedy the anticompetitive effects that would result from the proposed Acquisition in the North American chloride TiO₂ market, the proposed Decision and Order ("Order") contained in the Consent Agreement requires Tronox to divest Cristal's North American TiO₂ business to INEOS Enterprises ("Ineos") no later than 30 days from the close of the Acquisition. The divestiture package includes all of Cristal's North American TiO₂ production assets, including two chloride TiO₂ manufacturing plants located in Ashtabula, Ohio, a research, development, and administrative support facility near Baltimore, Maryland, necessary intellectual property associated with the manufacture and sale of chloride TiO₂ in and from North America, an option to acquire rights to use the licensed intellectual property to produce chloride TiO₂ products at a new

manufacturing facility outside North America, customer contracts in North America with respect to chloride TiO₂, the ability to hire all Cristal personnel necessary to operate the business, and access to various transitional services. In short, the Consent Agreement provides Ineos with everything it needs to compete effectively in the North American chloride TiO₂ market, along with the ability to produce globally in the future if the business opportunity arises.

The Commission has placed the Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and decide whether it should withdraw from the Consent Agreement, modify it, or make the Order final.

2. THE PARTIES

Tronox, a publicly traded company headquartered in Stamford, Connecticut, is one of the top three manufacturers of chloride TiO₂ in North America. Tronox operates one TiO₂ pigment manufacturing plant in Hamilton, Mississippi, and two other plants in Botlek, the Netherlands, and Kwinana, Australia. Tronox's three plants produce chloride TiO₂ exclusively.

Cristal, headquartered in Jeddah, Saudi Arabia, is a corporation majority-owned by National Industrialization Company ("TASNEE"), a limited company, headquartered in Riyadh, Saudi Arabia. Cristal's primary U.S. subsidiary is Cristal USA Inc., a corporation with its executive offices and principal place of business located in Glen Burnie, Maryland. Cristal, through various subsidiaries, owns and operates chloride TiO₂ manufacturing plants in Ashtabula, Ohio, the United Kingdom, Australia, and Saudi

Arabia. Cristal also produces sulfate TiO₂ at plants in Brazil, China, and France. All of Cristal's TiO₂ production in North America is chloride TiO₂.

3. THE RELEVANT MARKET FOR CHLORIDE TiO₂ IN NORTH AMERICA

The relevant product market in which to assess the competitive effects of the proposed Acquisition is chloride TiO₂. TiO₂ is a white pigment used to provide opacity, whiteness, and brightness to a vast array of products, including paint, industrial coatings, plastics, paper, and other products. Chloride TiO₂ has distinct, superior characteristics that cannot be provided by any other type of TiO₂, including sulfate TiO₂. Most North American customers would not substitute sulfate TiO₂ for chloride TiO₂ in response to a small but significant increase in price.

The relevant geographic market is North America, defined as the United States and Canada. The North American market has competitive dynamics, including pricing and demand characteristics, that differ from other geographic regions and limit the ability of North American customers to engage in arbitrage across different geographic regions. Import duties, shipping and handling costs, and other logistical challenges would render such efforts uneconomical and impractical.

The market for chloride TiO₂ in North America is characterized by a limited number of suppliers. Tronox and Cristal are two of the three largest producers of chloride TiO₂ in North America and together with The Chemours Company, the top three TiO₂ companies control the vast majority of chloride TiO₂ sales to North American customers and more than 80 percent of overall North American chloride TiO₂ manufacturing capacity.

The proposed Acquisition would cause the already concentrated North American

chloride TiO₂ market to become even more concentrated, increasing the Herfindahl-Hirschman Index (“HHI”) by more than 700, resulting in a post-Acquisition HHI exceeding 3,000. This increase in concentration far exceeds the thresholds set out in the *Horizontal Merger Guidelines* for raising a presumption that the Acquisition would create or enhance market power.

4. EFFECTS OF THE ACQUISITION

As both the federal and administrative courts have already determined, absent a divestiture, the proposed Acquisition is likely to cause competitive harm in the North American chloride TiO₂ market. As stated in the Decision, for the sole purpose of settling this matter, Tronox and Cristal do not dispute that the likely effect of the proposed Acquisition, if consummated without a divestiture, may be substantially to lessen competition in the North American chloride TiO₂ market. Tronox and Cristal are two of the three largest producers of chloride TiO₂ in North America. The proposed Acquisition would have anticompetitive effects in two ways: (1) increasing the likelihood of anticompetitive coordination among the North American chloride TiO₂ companies; and (2) increasing Tronox’s incentive and ability to unilaterally curtail production of chloride TiO₂ in North America, which would lead to higher prices for chloride TiO₂ in North America.

5. ENTRY

Entry into the North American chloride TiO₂ market is neither likely nor timely to deter or counteract any anticompetitive effects of the proposed Acquisition. The chloride TiO₂ market is characterized by substantial barriers to entry. Market participants confirmed that building a new TiO₂ plant would take multiple years and a large capital

investment. Moreover, chloride plants rely on closely held proprietary technology. Expansion or repositioning by the remaining firms that would defeat anticompetitive effects is also unlikely in the already mature North American chloride TiO₂ market.

6. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement restores the competition that would have been lost from the proposed Acquisition by requiring Tronox to divest Cristal's North American TiO₂ business to Ineos, a multinational corporation comprised of chemical manufacturing businesses. The proposed divestiture package provides everything needed for Ineos to compete effectively in the North American chloride TiO₂ market.

Under the Order, Tronox is required to divest Cristal's North American TiO₂ business to Ineos no later than 30 days from the close of the Acquisition. The divestiture package consists of the following: two chloride TiO₂ manufacturing plants and all related facilities in Ashtabula, Ohio; other physical assets in North America, such as a research and development, and administrative support facility near Baltimore ("Baltimore Administration and Technical Center" or "BATC") and research and development equipment located at BATC; the ability to hire the relevant Cristal personnel located in North America, including all employees at the Ashtabula complex and almost all of the support personnel located at BATC; transfer or license of all intellectual property right necessary to manufacture chloride TiO₂ products at Ashtabula; an option, exercisable by Ineos during a ten-year period after closing, to acquire rights to use the licensed intellectual property to produce chloride TiO₂ products at a new manufacturing facility outside North America; and customer contracts related to Cristal's chloride TiO₂ sales in North America. The Order also provides that, during a discrete period, the Commission

has a limited ability to modify the lists of excluded assets and retained employees if needed for Ineos to run the business effectively.

The Order requires that, at the request of Ineos, Tronox must provide transition assistance for a period of at least two years, and imposes other terms designed to ensure the viability of the divested business. The Commission also requires the parties to maintain all of the assets in the ordinary course of business pending divestiture to Ineos, and is issuing a separate Order to Maintain Assets at the time it accepts the Consent Agreement for public comment.

A Monitor will oversee Tronox's compliance with the obligations set forth in the Order, the Order to Maintain Assets, and the divestiture agreements. If Tronox does not fully comply with the divestiture requirements of the Order, the Commission may appoint a Divestiture Trustee to divest Cristal's North American TiO₂ business and perform Tronox's other obligations consistent with the Order.

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

By direction of the Commission.

April J. Tabor,
Acting Secretary.

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