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October 16, 2017

DOJ Sues to Unwind Consummated Parker-Hannifin/ CLARCOR Merger

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On September 26, 2017 the Department of Justice sued Parker-Hannifin Corporation and CLARCOR, Inc., challenging their already-consummated merger and seeking to unwind the transaction by forcing divestiture of an aviation fuel filtration business.[1] The DOJ alleges the tie-up of Parker-Hannifin and CLARCOR "combines the only two sources of qualified aviation fuel filtration products in the United States,"[2] and would thus substantially lessen competition in violation of Section 7 of the Clayton Act.

The timing of this challenge—***seven months after closing***—is what makes this case unusual. Because of its size, the deal was reportable under the Hart-Scott-Rodino (HSR) Act, and Parker-Hannifin confirmed that it did indeed submit HSR filings. The HSR waiting period expired on January 17, 2017 without DOJ issuing a second request for information.[3] Yet, seven months later, the DOJ seeks to unwind the transaction – seemingly having opened a post-closing investigation after being alerted ***by customers*** of competitive issues that went undetected during the HSR review period.

Notably, the DOJ ***did not*** allege that the parties' HSR Act filings or Item 4 document productions were deficient. The DOJ's complaint, however, cited to internal documents in which Parker-Hannifin executives considered whether to be "forthcoming" to DOJ about the aviation overlap and potential antitrust concerns raised by the transaction.[4] The complaint also quotes internal company emails discussing the parties' product overlaps and the potential need to divest CLARCOR's aviation fuel filtration business. These emails, the DOJ allege, evidence that "Parker-Hannifin was aware that it was acquiring its only U.S. competitor"[5] for these products. The DOJ also criticized the parties for failing to provide "significant document or data productions in response to the department's requests" and refusing to hold the assets separate once the DOJ opened its investigation.[6]

While rare, post-closure antitrust investigations can be and sometimes are opened even for HSR-reportable deals where the HSR waiting period expired without agency action. These investigations can be triggered by post-closing customer complaints, as is reportedly the case with Parker-Hannifin/ CLARCOR, or observations of post-merger anticompetitive effects, such as price increases or service level reductions. Indeed, the Horizontal Merger Guidelines provide that when evaluating a consummated merger, [e]vidence of observed post-merger price increases or other changes adverse to customers is given substantial weight."[7]

Key Takeaways

The DOJ challenge of the consummated Parker-Hannifin/CLARCOR transaction is a cautionary tale, and there are a number of lessons that can be drawn from this challenge. First and foremost, this case is a reminder that, while post-closing challenges of HSR-reportable transactions are exceedingly rare, they can and do happen. The antitrust agencies ***will investigate and challenge*** closed transactions if they believe the transaction substantially lessened competition in one or more relevant antitrust markets. Even if they failed to stop the transaction during an HSR review.

Indeed, the expiration of the waiting period under the HSR Act does not prevent a post-closure investigation and challenge. While many companies rest easy after expiration of the HSR Act waiting period, parties to a merger are well advised not to ignore the risk of post-closing antitrust scrutiny of potentially problematic deals. Companies should proceed cautiously after closing and be mindful of post-closing conduct that could subsequently be perceived as an anticompetitive effect of the transaction. Otherwise, parties may be subjected to another investigation by the U.S. antitrust agencies and even potentially be forced to unwind a closed transaction. Having to "unscramble" assets that have already been integrated wholly or in part makes compliance more burdensome, timely, and expensive and can leave the parties in a worse position than they were before the transaction.

In addition, this case is a reminder of the importance of all employees receiving antitrust counseling early in any transaction process – so they are aware of the risks associated with the creation of misleading or ambiguous documents dealing with the deal or competition. Lastly, we are unaware of any statute or case law that requires parties to affirmatively inform the agencies of antitrust issues in proposed transactions, and DOJ's criticism of the parties for not unilaterally raising such issues is extremely troubling. Unlike the system in the EU, parties in the US have no obligation to do so. Nevertheless, in unusual transactions, it may be worthwhile for the parties (especially the buyer, who may have transferred the purchase price and bought a lawsuit) to consider whether and how best to raise those issues proactively with the agencies.

1. *United States of America v. Parker-Hannifin Corp. and CLARCOR Inc.*, Case 1:17-cv-01354-UNA, September 26, 2017. Complaint can be found at: https://www.justice.gov/opa/press-release/file/999266/download.
2. *Id*.
3. Parker Hannifin Corporation press release, September 26, 2017. Available at: http://phx.corporate-ir.net/phoenix.zhtml?c=97464&p=irol-newsArticle&ID=2303027.
4. *United States of America v. Parker-Hannifin Corp. and CLARCOR Inc.*, Case 1:17-cv-01354-UNA, September 26, 2017.
5. *Id*.
6. Department of Justice Press Release, found at: https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s.
7. Horizontal Merger Guidelines 2.1.1.

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