Wait, I Thought We Were Done? DOJ Challenges $4B Merger Months After HSR Filing and Expiration of the HSR Waiting Period

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Earlier this week, the Antitrust Division of the Department of Justice (DOJ) filed a lawsuit seeking to unwind Parker-Hannifin's $4.3 billion consummated acquisition of Clarcor.[1] This is a notable challenge for two reasons. First, it is the DOJ's first merger challenge under the Trump Administration. Second, and more importantly, the parties reported the transaction under the Hart-Scott-Rodino (HSR) Act; the HSR waiting period expired without a challenge; and the transaction closed–all more than seven months ago. While the antitrust agencies regularly investigate, and sometimes challenge, consummated non-HSR reportable transactions, enforcement against reported transactions after the waiting period has elapsed is exceedingly rare. The *Parker-Hannifin* complaint is a stark reminder that U.S. antitrust enforcers can, and will, investigate and challenge closed mergers–in rare circumstances, even after they had cleared the transaction.

Background on the Merger Review Process

The HSR Act[2] requires that the DOJ and Federal Trade Commission (FTC) be notified of acquisitions of assets or voting securities that meet certain thresholds. All such acquisitions valued at $80.8 million (a threshold that is adjusted annually for inflation) may, in principle, be reportable. If the HSR thresholds are met and no exemptions apply, the parties must report the transaction to the antitrust agencies and observe certain waiting periods before they can close the deal. In most cases, the initial waiting period after filing is 30 days; it may be extended through issuance of a request for additional information and documentary material (better known as a Second Request) or terminated early. However, the expiration of the HSR waiting period does not grant the parties immunity from antitrust scrutiny. The U.S. antitrust agencies continue to have jurisdiction to investigate and challenge a merger after its closing if they believe that the acquisition substantially lessens competition.

DOJ's Allegations in *Parker-Hannifin*

In December 2016, Parker-Hannifin submitted an HSR filing, reporting its intention to acquire

Clarcor. The HSR waiting period expired on January 17, 2017, and the parties closed the deal in February 2017.

Approximately seven months after the closing, the DOJ has asked a court to unwind the transaction by requiring the merged entity to divest assets in a product area where the two companies had a significant overlap: aviation fuel filtration services.

According to the DOJ's complaint, before the merger Parker-Hannifin and Clarcor were the only two suppliers of aviation fuel filtration products that met the required quality standards for U.S. airline and military customers. The complaint alleges that competition between the parties enabled customers to negotiate better pricing, and that the merger would eliminate that competition, allowing the merged entity to raise prices and reduce non-price competition and innovation.

The complaint also alleges that the parties failed to produce documents during the government's investigation–apparently the investigation that the DOJ instituted after closing. In addition, the DOJ alleges that Parker-Hannifin refused to agree to hold separate and operate independently the aviation fuel filtration businesses that are being investigated and litigated.

Although Parker-Hannifin/Clarcor is not the first HSR reportable transaction that the U.S. antitrust agencies have challenged after the waiting period expired, these challenges are exceedingly rare. For example, in 2001, the FTC issued an administrative complaint challenging Chicago Bridge & Iron Co.'s (CBI's) acquisition of assets from Pitt-Des Moines Inc. The parties had filed a premerger notification in September 2000, and the waiting period elapsed without a second request. However, after the deal closed, the FTC alleged that the consummated merger significantly reduced competition in markets involving the design and construction of specialty industrial storage tanks. The FTC requested that the merged entity divest certain assets and in 2003, an administrative law judge ordered the divestiture. In 2008, the Fifth Circuit upheld the ruling requiring CBI to divest certain assets.[3]

Implications

- The DOJ's attempt to block the Parker-Hannifin/Clarcor merger post-closing is a reminder to companies that U.S. antitrust agencies can investigate and challenge reported transactions where the HSR waiting period has elapsed.
- In rare circumstances, even for a reportable transaction, the parties could be forced to unscramble the eggs if the DOJ or FTC challenges the transaction post-consummation.
- In most cases, overlaps and other potential competitive issues are apparent from the HSR filing or from publicly available information. In matters where potentially problematic overlaps are not immediately apparent, however, buyers should consider whether to proactively raise such overlaps with agency staff, to obtain greater certainty against potential post-closing challenges. This requires a case-specific analysis, and often it will not be advisable to do so. One significant factor in this analysis is whether customers are likely to complain.
- Substantively, *Parker-Hannifin* provides no basis for predictions about the future direction of merger enforcement under the Trump Administration. On the facts as alleged, the

transaction is either a merger to monopoly (“2 to 1”), or possibly to duopoly (“3 to 2”), and therefore comfortably within traditional enforcement patterns.

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[1] The complaint can be found at: https://www.justice.gov/opa/press-release/file/999266/download.

[2] 15 U.S.C. §18a.

[3] The filings can be found at: https://www.ftc.gov/enforcement/cases-proceedings/0110015/chicago-bridge-iron-company-nv-chicago-bridge-iron-company.

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