

CLIENT ALERT

DOJ Seeks Divestiture in HSR-Cleared, Consummated Merger

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Just last week, the DOJ challenged a \$4 billion transaction that had cleared review under the Hart-Scott-Rodino (HSR) Act without a second request and was consummated seven months before the DOJ's suit was filed. The DOJ made no allegations in its complaint that the parties' HSR compliance was deficient. Indeed, the DOJ failed even to acknowledge in its complaint or its press release that it had reviewed the transaction under the HSR Act and allowed the waiting period to expire without issuing a second request.

The parties will surely raise as a significant issue in resisting the DOJ's request for a divestiture order their compliance with the HSR Act and reliance on HSR "clearance" in closing the transaction and integrating the acquired company. More facts will likely emerge as the unusual litigation continues regarding when the DOJ contacted the companies post-closing with questions regarding the transaction and why those questions arose after the HSR waiting period had expired and the transaction was closed.

The DOJ expressly noted in its press release that "[d]uring the pendency of the department's investigation [presumably after the HSR waiting period had expired and the transaction closed], Parker-Hannifin failed to provide significant document or data productions in response to the department's requests. In addition, the company has not agreed to enter into a satisfactory agreement to hold separate the fuel filtration businesses at issue and to maintain their independent viability pending the outcome of the investigation and, now, this litigation." The DOJ thus attempted to send a signal to the business community: Cooperate with our investigations, or we will seek our remedies in court.

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Although the DOJ's post-HSR challenge is very rare, it emphasizes that transactions that receive HSR clearance, and especially those that do not meet the HSR notification thresholds, remain subject to antitrust challenge. Buyers, in particular, should consider carefully the antitrust risks associated with transactions, as that risk does not expire at closing.

Basic Facts:

- On December 1, 2016, Parker-Hannifin Corporation announced a proposed acquisition of CLARCOR Inc. for \$4.3 billion.
- In addition to other lines of business, both companies supply aviation fuel filtration systems and related equipment to U.S. customers.
- The parties filed pre-merger notification forms pursuant to the HSR Act, and the HSR Act initial waiting period expired on January 17, 2017, three days before President Trump's inauguration.
- The deal closed on February 28, 2017.
- On September 26, 2017, the DOJ filed suit in the U.S. District Court for the District of Delaware seeking the divestiture of the overlapping aviation fuel filtration assets of either Parker-Hannifin or CLARCOR.
- The DOJ complaint asserts that, prior to the merger, Parker-Hannifin and CLARCOR were the only two meaningful suppliers of aviation fuel filtration systems and filter elements to U.S. buyers, and thus the transaction created an effective monopoly in violation of Section 7 of the Clayton Act.
- Little public information is currently available about what led the DOJ to challenge a consummated merger eight months after the parties' HSR initial waiting period had expired.
- Neither the press release nor the complaint acknowledges that the parties to the transaction complied with the HSR Act and that the HSR waiting period expired without the issuance of a second request. Nor has the DOJ implied that the parties failed to comply with HSR requirements, such as production of Item 4 documents, and the complaint alleges no violation of the HSR Act.
- Some press outlets have reported that post-closing customer complaints may have led to the DOJ's investigation, but this has not been confirmed by the DOJ, and there have been no public comments by the parties.

Lessons:

- While the federal antitrust agencies have a track record of challenging *non-HSR reportable* transactions post-closing, challenges to closed transactions that previously cleared HSR review are exceedingly rare. Most post-HSR-clearance challenges, especially in the absence of significant post-closing anticompetitive conduct by the

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merged entity, have focused on alleged violations of the HSR Act (failure to comply with the HSR notification rules or forms of “gun-jumping”) instead of substantive violations of Section 7 of the Clayton Act.

- The DOJ’s lawsuit is an important reminder that what is often called HSR “clearance” – a grant of early termination, expiration of the initial 30-day HSR waiting period, or conclusion of a second request without agency action – does not confer antitrust immunity. The agencies remain empowered to investigate the competitive effects of a transaction, and to challenge the transaction, after HSR “clearance”, as do private parties.
- While there is no sign that the DOJ’s action signals an intent to revisit HSR-cleared transactions more broadly, the DOJ’s willingness to challenge transactions that have been reviewed under the HSR Act makes the substantive antitrust analysis particularly important for buyers. The outcome of the case – and any further DOJ explanation of the circumstances leading to the challenge – may shed light on the likelihood that the future will bring more post-HSR merger challenges.
- We would expect the merger parties to raise their compliance with the HSR framework and their post-closing integration of assets in reliance on HSR “clearance” as important equitable factors that weigh against the issuance of a divestiture order.
- The DOJ will seek in-court compliance with its requests that do not receive voluntary compliance. Here, the DOJ’s press release states that Parker-Hannifin “fail[ed] to provide significant document or data productions in response to the department’s requests.” Parker-Hannifin also declined to agree to a hold separate order pending the investigation. We will learn as the litigation proceeds the extent of Parker-Hannifin’s resistance to the DOJ’s requests and the justification for that resistance.
- Finally, the DOJ’s action against Parker-Hannifin signals that the DOJ, under new leadership, will continue to investigate and challenge mergers based on concerns of anti-competitive impact in niche markets.

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