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Learning From DOJ's Parker Hannifin Merger Challenge

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On Sept. 26, the U.S. Department of Justice filed a lawsuit challenging Parker Hannifin Corporation's consummated acquisition of Clarcor Inc., a transaction that was reported to the DOJ and the Federal Trade Commission under the Hart-Scott-Rodino Act and for which the HSR waiting period had expired.

The complaint alleges that the merger substantially lessened competition and created a monopoly in markets for aviation fuel filtration products in the United States, and seeks divestiture of either Parker's or Clarcor's aviation fuel filtration assets.

From the DOJ's complaint and press release, Parker's press release, and remarks attributed to a DOJ official, we know that:

- The $4.3 billion acquisition was announced on Dec. 1, 2016, and closed on Feb. 28, 2017;
- The parties made HSR filings, and the 30-day HSR waiting period expired on Jan. 17, 2017, with no second request having been issued;
- The DOJ opened an investigation post-closing after receiving a complaint from a customer;
- The combined annual revenue of the businesses of the parties in the markets at issue is less than $20 million;
- There was documentary evidence Parker was aware that it was acquiring its only U.S. competitor for important aviation fuel filtration products: An internal email weeks before the transaction was announced identifying "the notable area of overlap" between the merging parties in "ground aviation fuel filtration," asking whether Parker should be "forthcoming" about this "aviation antitrust potential" and stating that Parker was "preparing for the possibility that we may have to divest [Clarcor's] aviation ground fuel filtration" business; and

- Parker did not agree to hold separate the fuel filtration businesses at issue and maintain their independent viability pending the outcome of the investigation and litigation, and the parties dispute the extent of Parker's cooperation with the investigation.[1]

The Bazaarvoice case[2] and other recent merger challenges make clear that the antitrust agencies will not hesitate to investigate and challenge consummated transactions that do not trigger HSR notification.[3] Parker Hannifin serves as an important reminder that the agencies can — and in some limited instances will — challenge consummated transactions that were reported to them under HSR.

Expiration of the HSR waiting period allows a transaction to go forward, but does not provide any immunity from subsequent antitrust challenge. In particular, the antitrust enforcement agencies will always listen to complaints from customers and will not hesitate to investigate whenever they deem it appropriate.

Although a post-HSR challenge is unusual, it is not unprecedented. In some of these challenges, the agencies concluded that an HSR filing was defective and effectively void, because of failure to submit so-called 4(c) documents that contain internal competitive analysis of the transaction. In these instances, the agencies not only challenged the transaction on the merits but also sought and obtained civil penalties for an HSR violation.[4]

In other instances of post-HSR challenges, there was no indication of an HSR violation. Chicago Bridge & Iron involved a transaction that was reported under HSR. After expiration of the 30-day HSR waiting period but before consummation, the FTC notified the parties that it had significant antitrust concerns about the transaction and was conducting an investigation. The parties moved forward and consummated the transaction, and the FTC later challenged the transaction administratively. The FTC's subsequent divestiture order was upheld on appeal.[5]

Parker and Clarcor appear to have complied with the HSR notification and waiting requirements, in that the DOJ has not alleged an HSR violation. While the publicly available information does not indicate whether Parker's damaging internal email described above was submitted as an Item 4(c) document, it appears likely that (1) it was not submitted and (2) was not required to have been submitted.

If the DOJ had that email as part of the HSR filing, it would almost definitely have opened an investigation during the HSR waiting period, and there is no indication that it did so.[6]

Item 4(c) of the HSR Form requires parties to:

Provide all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

The damaging email — although analyzing the acquisition with respect to competition — may have fallen outside the scope of Item 4(c) because of it not having been prepared by or for any "officer."

"Officer" of a corporation has been construed by the FTC Premerger Notification Office as being limited to individuals (1) whose positions are designated by the bylaws or articles of incorporation of the ultimate parent entity (UPE) of the filing party or of any entity under its HSR control or (2) who are

appointed by the board of the UPE of the filing party or any entity under its control.[7]

The damaging email was sent from the vice president of business development for Parker's filtration group to the president of the filtration group. The email may have fallen outside Item 4(c) because those individuals were not "officers" under that definition even though their titles of president and vice president might suggest otherwise.[8]

Parker-Clarcor thus appears to be a transaction in which there was a market with a significant competitive overlap (that the DOJ viewed as a two to one merger) that was not revealed in any way by the HSR filing. In such a situation, some key takeaways for HSR/antitrust counsel and their clients are:

- HSR is a notification and clearance process, not an approval process. In "Monopoly" parlance, it is an "Advance to Go" card, not a "Get Out of Jail Free" card.

- It is important for counsel to delve deeply and understand problematic competitive overlaps (even if small compared to the overall transaction) whether or not they would be revealed by an HSR filing.

- Client's employees should understand that anything they write (unless privileged) will ultimately be discoverable in an investigation by the antitrust agencies.

- It is important for counsel to know of any damaging documents, which can mean going beyond documents that turn up in a 4(c) search that is limited to officers and directors.

- If there is a competitively problematic overlap, it is important to consider whether any customers are likely to complain to the agencies (either during the HSR waiting period or later). The severity of the overlap (with a perceived merger to monopoly at the far end of the spectrum), the sophistication of customers, and any plans for price increases post-merger are factors to consider.

- Where a competitively problematic overlap that might not be revealed by an HSR filing is reasonably likely to come to the attention of the agencies post-closing, consideration should be given to proactively raising the overlap with the appropriate agency. Doing so may avoid a more costly post-closing divestiture, the entire cost of which would at that point be borne by the buyer.

- In the event of a post-closing investigation, cooperation with regard to the investigation and hold separate agreements may help reach a negotiated solution and avoid contentious litigation and adverse publicity.

Jack Sidorov is a senior counsel in the Washington, D.C., office of Lowenstein Sandler LLP. For more than 30 years, he was the U.S. Department of Justice Antitrust Division's primary expert on premerger notification law, procedures and policies under the Hart-Scott-Rodino Act.

DISCLOSURE: Jack Sidorov worked on the ADP and Hearst HSR enforcement cases that are mentioned in this article.

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[1] In what appears to be a departure from DOJ's usual practice of not having the press release go beyond the allegations of the complaint, DOJ's press release states that "[d]uring the pendency of the department's investigation, Parker-Hannifin failed to provide significant document or data productions in response to the department's requests." https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s . Parker maintains that it "has cooperated fully with the DOJ throughout this process and has been working diligently to respond to their post-closing inquiry." http://phx.corporate-ir.net/phoenix.zhtml?c=97464&p=irol-newsArticle&ID=2303027 .

[2] https://www.justice.gov/atr/case/us-v-bazaarvoice-inc .

[3] See generally https://www.justice.gov/atr/speech/non-reportable-transactions-and-antitrust-enforcement .

[4] Hearst (https://www.ftc.gov/enforcement/cases-proceedings/9910323a/hearst-trust-hearst-corporation-first-databank-inc; https://www.justice.gov/atr/case/us-v-hearst-trust-and-hearst-corp) ; ADP (https://www.ftc.gov/enforcement/cases-proceedings/9510113b/automatic-data-processing-inc; https://www.justice.gov/atr/case/us-v-automatic-data-processing-inc .

[5] https://www.ftc.gov/enforcement/cases-proceedings/0110015/chicago-bridge-iron-company-nv-chicago-bridge-iron-company . DOJ's challenge of Deere's proposed acquisition of Monsanto's Precision Planting business (https://www.justice.gov/atr/case/us-v-deere-company-et-al) was also brought after expiration of the HSR waiting period (but before consummation). The defendants claimed that DOJ opened a post-HSR investigation following a complaint by a competitor. The parties subsequently abandoned the transaction.

[6] It is also possible that the damaging email was submitted as a 4(c) document and that DOJ inquired about it during the HSR waiting period but was satisfied at that juncture with responses it received from Parker.

[7] ABA Section of Antitrust Law, Premerger Notification Practice Manual, 5th Edition (2015), Interpretation 176.

[8] One possibility is that the "Filtration Group" is not an "entity" within the meaning of the HSR Rules and that the Group President and Vice President are not positions designated by the bylaws or articles of Parker and were not appointed by the board of Parker.