Christine A. Varney
+1-212-474-1140
cvarney@cravath.com

Julie A. North
+1-212-474-1752
jnorth@cravath.com

Margaret Segall D'Amico
+1-212-474-1231
mdamico@cravath.com

DOJ Challenges Parker-Hannifin's Acquisition of CLARCOR

October 6, 2017

On September 26, 2017, the Department of Justice Antitrust Division ("DOJ") sued Parker-Hannifin Corp. and CLARCOR Inc., alleging that Parker-Hannifin's $4.3 billion acquisition of CLARCOR seven months earlier created an unlawful monopoly for aviation fuel filtration systems and filter elements and seeking a court order to partially unwind the deal. While the parties had gone through the Hart-Scott-Rodino ("HSR") notification process and the requisite waiting period had expired, it was not until some point after the expiration of the waiting period that DOJ learned of the overlap in fuel filtration products. DOJ's lawsuit is a clear reminder that HSR clearance does not shield a transaction from later antitrust scrutiny and challenge, even for a very small part of the business and even after the transaction has closed. This action by DOJ is a reminder that there are no "*de minimis* exceptions" to Clayton Act Section 7's prohibitions, and that parties to a merger need to think carefully about whether to present any clear and potentially problematic overlaps up front in the merger review process, particularly where they anticipate potential customer complaints.

Parker-Hannifin's acquisition of CLARCOR was announced on December 1, 2016. The 30-day HSR waiting period expired on January 17, 2017, and the transaction closed on February 28, 2017. Parker-Hannifin manufactures filtration systems as well as motion and control technologies for the mobile, industrial and aerospace markets. CLARCOR manufactured and sold filtration products. The companies extolled the deal as creating a comprehensive portfolio of filtration products and technologies, offering customers a single streamlined source for all their purification and separation needs, as well as strengthening Parker-Hannifin's U.S. presence for recurring sales in the aftermarket.[1]

Both entities manufactured aviation fuel filtration systems prior to their merger. Fuel filtration systems remove contaminants and water from fuel, which might otherwise cause plane engines to stall. The U.S. airline industry and the U.S. military have adopted standards to govern fuel filtration products, and U.S. airlines require their contracted refueling agents to use qualified aviation fuel filtration products, which means the aviation fuel filtration manufacturers must demonstrate that their products meet the Energy Institute's ("EI") rigorous specifications.[2] Prior to the merger, Parker-Hannifin and CLARCOR were the only suppliers of EI-qualified aviation fuel filtration systems and filter elements to U.S. customers. The primary customers of EI-qualified aviation fuel filtration systems and filter elements include commercial airline ground fueling agents, fixed-based operators at airports, airport fuel storage operators, and manufacturers of fueling equipment. The Department of Defense also requires that fuel filtration suppliers meet EI specifications.[3]

---

[1] News Release, "Parker Hannifin Completes CLARCOR Acquisition", dated February 28, 2017, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=97464&p=irol-newsArticle&ID=2250363.

[2] Complaint at 2, United States v. Parker-Hannifin and CLARCOR, 17-cv-1354 (D. Del. Sept. 26, 2017).

[3] Complaint at 6.

According to Patricia Brink, Director of Civil Enforcement at DOJ, following the expiration of the HSR waiting period, DOJ received a customer complaint as to the overlap between the merging parties' manufacture of aviation fuel filtration systems.[4] As DOJ alleged in its civil complaint, Parker-Hannifin's acquisition of its only U.S. competitor in aviation fuel filtration systems and filter elements eliminated all head-to-head competition between the only two domestic manufacturers of these products, effectively creating a monopoly in the United States in this product area.[5] The companies' combined annual revenue attributable to these aviation fuel filtration systems is less than $20 million—a relatively small portion of the parties' combined 2016 revenues of $13 billion.[6]

During its investigation, DOJ found that a number of customers were concerned about the merger's impact on the fuel filtration system market and, notably, that Parker-Hannifin knew there was a potential antitrust issue with the overlap. DOJ's complaint quotes an internal Parker-Hannifin email "identifying 'the notable area of overlap' between the merging parties in 'ground aviation fuel filtration'", questioning "whether Parker-Hannifin should be 'forthcoming' about this 'aviation antitrust potential'" and noting "that Parker-Hannifin was 'preparing for the possibility that we may have to divest [CLARCOR's] aviation ground fuel filtration' business."[7]

According to Ms. Brink, DOJ's suit sends the message that HSR is a notification process but not a jurisdictional limitation on DOJ's ability to bring a Section 7 complaint, and that if there is a "clear and obvious overlap" between the two merging parties, "it may behoove counsel to raise it".[8] DOJ's September 26, 2017, press release implies that its lawsuit was necessitated by a lack of cooperation by the parties, stating 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."[9] Moreover, although the overlapping fuel filtration business was only a small part of the entire $4.3 billion transaction, DOJ stated in its press release that "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."[10]

DOJ's challenge of a consummated transaction that had received HSR clearance is rare. In a similar case in 2001, the Federal Trade Commission ("FTC") sued the Chicago Bridge & Iron Company ("CB&I") seeking a court order that the company divest certain assets associated with its acquisition of Pitt-Des Moines, Inc.[11] In that case, the parties reported the transaction and the HSR waiting period expired. The FTC then received customer complaints and issued the parties a voluntary Civil Investigative Demand. The parties closed the transaction, aware that the FTC believed the merger raised anticompetitive issues. On October 25, 2001, the FTC announced that it had unanimously voted to issue an administrative complaint challenging the transaction. The FTC later found that CB&I had violated antitrust laws by purchasing its rival's assets and ordered a divestiture. The FTC's decision and order were upheld on appeal in 2008.[12]

---

[4] Ms. Brink spoke at the Global Competition Review Live's 5th Annual New York Conference on September 28, 2017, at the offices of Cravath, Swaine & Moore LLP.

[5] Complaint at 1.

[6] News Release, "Parker Acknowledges DOJ Filing Regarding its U.S. Qualified Aviation Ground Fuel Filtration Business", dated September 26, 2017, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=97464&p=irol-newsArticle&ID=2303027.

[7] Complaint at 3.

[8] The HSR Act explicitly provides that the agencies' decision not to challenge following an HSR review is not a bar to a future Clayton Act case. 15 U.S.C. § 18a(i)(1).

[9] Press Release, "Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company's Acquisition of CLARCOR's Aviation Fuel Filtration Business", dated Sept. 26, 2017, *available at* https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s.

[10] *Id.*

[11] Complaint, In the Matter of Chicago Bridge & Iron Co. N.V., Chicago Bridge & Iron Co., and Pitt-Des Moines, Inc., Dkt. No. 9300 (FTC Oct. 25, 2001).

[12] Cases and Proceedings, In the Matter of Chicago Bridge & Iron Co. N.V., Chicago Bridge & Iron Co., and Pitt-Des Moines, Inc., last updated Nov. 28, 2008, *available at* https://www.ftc.gov/enforcement/cases-proceedings/0110015/chicago-bridge-iron-company-nv-chicago-bridge-iron-company.

DOJ's lawsuit is a reminder that the U.S. antitrust authorities will investigate consummated transactions that raise anticompetitive concerns, even if a transaction was reported and the HSR waiting period has expired. Parties should assess early on potentially problematic overlaps and carefully consider the reactions of key stakeholders, including customers and other affected third parties. It may be advisable in certain cases to raise potential issues with the agencies during the HSR waiting period, no matter how small the businesses in question may be, as it appears there is no *de minimis* exception. If a post-closing review or investigation should occur, cooperation with the agencies may help avoid or minimize further action. It is important for executives and other officers to understand that all discussion and document creation related to a transaction and the nature of competition—both before and after closing—are discoverable in an investigation and may later be part of the reviewing agency's record in the event of litigation.

New York
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
+1-212-474-1000

London
CityPoint
One Ropemaker Street
London EC2Y 9HR
+44-20-7453-1000

www.cravath.com