

DOJ Challenges Consummated Deal Months After HSR Waiting Period Expires

PENpoints

The expiration of the HSR waiting period does not immunize a transaction from antitrust scrutiny, even after the deal closes.

In most private equity transactions, the filing of a notice under the Hart-Scott-Rodino Act (HSR Act) results either in early termination or expiration of the HSR Act's 30-day waiting period. A recent case filed by the Antitrust Division of the Department of Justice (DOJ) serves as a reminder to private equity sponsors that there is no legal bar to a governmental challenge to a transaction after expiration of the HSR waiting period, and after the deal closes.

On September 26, 2017, the DOJ filed a federal antitrust suit seeking to partially unwind the merger of Parker Hannifin Corp. and Clarcor Inc., alleging that the merger resulted in a monopoly in a specific product area.

The timing of the complaint is highly unusual, as it was filed several months after the expiration of the statutory waiting period under the HSR Act and after the merger had closed. It is unclear whether the DOJ conducted any meaningful investigation during the HSR Act waiting period, but the timing strongly suggests any investigation was brief, and the concerns outlined in the complaint were not apparent until after closing.

While they have the power to do so, as a matter of policy and practice the DOJ and the FTC virtually never challenge consummated mergers where the parties have observed the statutory waiting period under the HSR Act. One of the primary goals of the HSR Act is to enable the agencies to assess whether a merger may harm competition and, if so, to seek an injunction or agreed remedies *before* the merger closes.

The rare examples of government enforcement actions after the expiration of the HSR waiting period generally involve "bad" facts, such as a merger to monopoly or significant increase in market concentration. However, the prior examples tended to have resulted from the parties either having submitted an allegedly deficient HSR filing, engaged in some type of alleged misconduct that limited the government's investigation, or closed over government objections.

That does not seem to be the case for Parker Hannifin/Clarcor. The DOJ has not yet alleged that the parties' HSR filings were deficient or that the parties breached a commitment to the DOJ not to close. However, the DOJ has stated publicly that (1) it received a number of post-closing complaints from customers, (2) Parker Hannifin failed to provide sufficient information in response to DOJ post-closing information requests, and (3) Parker Hannifin's internal documents made clear that they were aware of the antitrust issue but failed to raise it with the DOJ. As summarized by a DOJ official, "[t]he takeaway should be that if there's some really clear and obvious overlap it may behoove counsel to raise that."

Parker Hannifin/Clarcor thus provides a clear reminder that the expiration of the waiting period does not immunize a transaction from antitrust scrutiny, particularly if there is a direct overlap in a small but highly concentrated product area that the DOJ or FTC did not uncover (for whatever reason) during the waiting period. Such facts may arise in, e.g., an add-on acquisition or a portfolio company sale resulting a monopoly in a particular market, no matter how small.

Moreover, the complaint demonstrates that choosing not to cooperate with a post-closing investigation may leave the DOJ or FTC with no choice but to pursue litigation. In post-closing investigations, the DOJ and FTC commonly ask merging parties to hold separate the business lines and/or assets under investigation (i.e., stop integrating), with the goal of preserving the competitive status quo to facilitate carving out a divestiture package if necessary. While agreeing to a hold-separate will reduce or delay the realization of synergies, and/or may be impractical, refusal to do so may force the DOJ's hand.

INSIDE KIRKLANDPEN

<i>PEN</i> briefs	2
<i>Upcoming Events</i>	2

Absent contractual provisions to the contrary, the risk of a post-closing investigation falls on the buyer. But, just as the FTC almost never challenges mergers where the HSR waiting period has expired, in all but the rarest situations purchase agreements do not address post-closing antitrust risks, particularly when the transaction requires notification under the HSR Act. A private equity buyer therefore should carefully balance the

risks and opportunities of voluntarily bringing obvious competitive overlaps to the government's attention, being mindful of the pre-closing antitrust efforts standard in the underlying purchase agreement. While voluntary disclosure may not expedite government review, it can significantly reduce the risk of a post-closing investigation.

If you have any questions about the matters addressed in this *KirklandPEN*, please contact the following Kirkland authors or your regular Kirkland contact.

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PENbriefs

Sweden-Based Telecommunications Firm Pays Largest-Ever FCPA Penalty

Last month the U.S. Department of Justice and the Securities Exchange Commission settled a multi-year Foreign Corrupt Practices Act (FCPA) investigation into bribes paid in Uzbekistan by Sweden-based telecommunications firm Telia Company AB, under which Telia paid fines totaling \$965 million. The penalty is the highest ever paid under the FCPA. This case reflects a continuing commitment by the Trump administration to vigorous FCPA enforcement. To learn more, see our recent [Alert](#).

PENnotes

Kirkland Registered Adviser Seminar and CCO Summit

Boston, MA, October 12, 2017

Los Angeles, CA, October 17, 2017

Houston, TX, October 24, 2017

As the SEC continues its focus on private fund managers registered as investment advisers, firms must be familiar with the evolving regulatory environment. This seminar is designed specifically for private fund manager CCOs, general counsel and other senior executives. Seminar topics will include: market and fundraising developments; practical tips for private fund managers operating in today's regulated environment; SEC enforcement developments for private fund managers; and legislative and regulatory developments, among other topics. Click [here](#) for more information.

Kirkland Structuring and Negotiating LBOs Seminar

San Francisco, CA, October 12, 2017

Chicago, IL, October 17, 2017

New York, NY, October 24, 2017

This biennial seminar, chaired by Kirkland partner Jack Levin, will review the legal, tax, structuring and practical negotiating aspects of buyouts and other complex private equity deals. Topics covered will include structuring buyouts, utilizing rep and warranty insurance, negotiating acquisitions and related debt and equity financings, compensating key target executives through equity-based incentives and special issues in acquiring public companies. Click [here](#) for more information or to register.

PLI Tax Strategies for Corporate Acquisitions, Dispositions, Spin Offs, Joint Venture, Financings, Reorganizations & Restructurings 2017
New York, NY, October 18-20, 2017
Chicago, IL, November 15-17, 2017
Los Angeles, CA, December 6-8, 2017

This three-day program will focus on tax issues presented by the entire spectrum of modern major corporate transactions. Evolving techniques for structuring, financing, and refinancing corporate turnovers and other activities will be emphasized. Kirkland partners Jack Levin, Todd Maynes, Dean Shulman and Don Rocap will be panelists at the event. For more information or to register, click [here](#).

PLI Hot Topics in Mergers & Acquisitions 2017
Chicago, IL, October 20, 2017

An expert faculty of lawyers, general counsel, regulators and investment bankers will explore the state of M&A and trends for the year ahead. Kirkland partner Scott Falk is a co-chair of the event and will serve as a panelist on the “Current Landscape of the M&A Market.” Partner Sara Zabloutney will be a panelist on “Important Tax Issues in M&A.” Click [here](#) for more information.

9th Annual Women’s Alternative Investment Summit
New York, NY, November 2-3, 2017

The Women’s Alternative Investment Summit will bring together more than 400 senior-level women — fund managers, institutional investors, and advisers to the industry — across the broad spectrum of alternatives. Multisession tracks address the many asset classes, including private equity, venture capital, hedge funds, real estate, infrastructure and real assets investing. Kirkland partners Sarah Kirson and Erica Williams will moderate panels, and partner Linda Myers will participate in the keynote presentation and discussion. The Firm is also a platinum sponsor of the event. Click [here](#) for more information.

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Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis' nearly 400 private equity attorneys have handled leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 400 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in each of the last six years by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. Kirkland has been ranked as a Tier 1 law firm for Leveraged Buyouts and Private Equity for the past seven years in U.S. News and World Report, Best Lawyers' "Best Law Firms" rankings. In 2008-2017, Chambers and Partners named Kirkland the Leading Global-wide Private Equity Firm. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011-2016*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

The Lawyer magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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