CHALLENGES TO RECENT TRANSACTIONS ARE A REMINDER THAT ANTITRUST RISKS CAN REMAIN IF CLOSING HAS ALREADY OCCURRED (AND EVEN IF PRE-MERGER NOTIFICATION FILINGS WERE MADE)

Last week the U.S. Federal Trade Commission ("FTC") and Department of Justice ("DOJ") each separately challenged recently closed transactions that they claim would harm competition in the US. The DOJ filed suit in relation to TransDigm Group's recent acquisition of two businesses from Takata Corporation. The FTC issued an administrative complaint challenging Otto Bock's acquisition of FIH Group Holdings, the owner of Freedom Innovations. The latter transaction had closed approximately three months ago, while the former transaction has been closed since February. These actions come less than three months after the DOJ's lawsuit against Parker-Hannifin regarding its closed acquisition of CLARCOR Inc. The parties in the Parker-Hannifin deal had even made the requisite pre-merger notification filings and abided by the mandatory waiting period pursuant to the Hart-Scott-Rodino Act of 1976, as amended (the "HSR Act"). All three cases should remind companies that the US antitrust authorities can and will file suit to enjoin transactions they believe are anticompetitive, even if it requires unscrambling the proverbial egg.

On December 20th, the FTC announced that it had filed an administrative complaint challenging Otto Bock's acquisition of FIH Group Holdings. Otto Bock and FIH Group, through Freedom Innovations, are the top manufacturers of prosthetic knees equipped with microprocessors. According to the FTC, the merger will reduce competition and harm consumers that require these specific types of prosthetics; in particular noting that it typically takes firms at least two years to develop the relevant product. Otto Bock agreed to a Hold Separate and Asset Maintenance Agreement, pursuant to which Otto Bock must actively ensure the previous business of Freedom Innovations remains separately viable. The deal had closed in September, and the parties had allegedly begun integrating. It is not publicly known whether pre-merger notification filings were made pursuant to the HSR Act. The status of the

integration since closing and how this could have affected the FTC's reasoning, is not clear.

The following day the DOJ filed a civil antitrust lawsuit challenging TransDigm Group's acquisition of SCHROTH Safety Products GmbH and SCHROTH Safety Products LLC (together "SCHROTH") from Takata Corporation. Through its subsidiary AmSafe, TransDigm is the world's largest supplier of restraint systems, such as lap and shoulder belts, used on commercial aircraft. The DOJ alleges that SCHROTH was TransDigm's "most significant" competitor. In fact, the DOJ claims that in recent years SCHROTH's increased competition had led to lower prices and increased innovation. The complaint sites four specific relevant product markets affected by the transaction: two-point lapbelts used on commercial aircraft; three-point shoulder belts used on commercial aircraft; technical restraints used on commercial aircraft (often used by flight crews and pilots); and, inflatable restraint systems used on commercial aircraft.

Simultaneous with its complaint against TransDigm, the DOJ also filed a proposed settlement. Pursuant to the settlement TransDigm will be required to divest all of SCHROTH to Perusa Partners Fund 2, L.P. and SSP MET Beteilignungs GmbH & Co. KG, which will supposedly allow SCHROTH to operate as an independent competitor to TransDigm. TransDigm had closed the transaction in February. The transaction did not require pre-merger notification filings under the HSR Act.

Both challenges come just months after the DOJ filed suit against Parker-Hannifin regarding its acquisition of CLARCOR. In that matter the DOJ's complaint alleges that Parker-Hannifin had acquired its "only rival" for qualified aviation fuel filtration systems and elements. The parties had made pre-merger notification filings under the HSR Act and had waited the necessary period before closing the transaction without receiving any Requests for Additional Information and Documentary Materials (often referred to as a "Second Request"). It appears that, at some point thereafter, in response to customer complaints the DOJ began investigating. According to the complaint, during this investigation Parker-Hannifin failed to provide "significant" data or documents in response to requests and had failed to agree to hold CLARCOR's fuel filtration business separate. Nearly three months after the complaint, on December 18th, the DOJ announced that it had reached a settlement with Parker-Hannifin. The settlement will require Parker-Hannifin to divest the fuel filtration business it acquired from CLARCOR.

In the U.S., merger control is regulated by Section 7 of the Clayton Act, a statute that is separate from the statute mandating merger control filings for certain transactions (i.e., the HSR Act). The HSR Act requires certain transactions meeting the proscribed threshold to be filed with both the FTC and DOJ, unless an exemption applies. The HSR Act also sets forth the procedures for merger control review for transactions that are filed. But, it is Section 7 that prohibits mergers that substantially lessen competition and there are no thresholds that apply to Section 7. Thus, the DOJ and FTC can challenge any transaction under Section 7 regardless of the size of the transaction or whether the transaction has closed. Unlike in other jurisdictions, merger control concerns survive closing, even if the parties make pre-merger notification filings and the mandatory waiting period under the HSR Act expires or is terminated.

All three of these cases illustrate the willingness of the U.S. antitrust authorities to challenge closed transactions and transactions that have received clearance under the HSR Act. These cases also stand as an important reminder that companies engaged in strategic transactions need to be mindful of document creation even after closing.

CONTACTS

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell
@cliffordchance.com

Brian Concklin
Associate

T +1 202 912 5060
E brian.concklin
@cliffordchance.com