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DOJ Issues New Merger Remedies Manual, Emphasizes Structural Remedy Preference

September 16, 2020

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On September 3, 2020, the U.S. Department of Justice Antitrust Division released a revised [Merger Remedies Manual](#) (“Manual”), providing a modernized framework to structure and implement remedies in merger cases where DOJ determines that the transaction would harm competition.

DOJ last updated its merger remedy guidance in 2011, with guidelines that endorsed so-called “conduct” or “behavioral” remedies as an acceptable solution to harm caused by certain mergers. But in 2018, Assistant Attorney General Makan Delrahim, who heads DOJ’s Antitrust Division, announced the withdrawal of those guidelines and the reinstatement of DOJ’s 2004 Policy Guide to Merger Remedies, which lean more heavily in favor of structural remedies. i.e., divestitures. AAG Delrahim explained at the time that the Antitrust Division would be reviewing its entire approach to merger remedies. The newly issued Manual is the culmination of that process. According to AAG Delrahim, the updated Manual “reaffirms the Division’s commitment to effective structural relief” and reflects DOJ’s “renewed focus on enforcing obligations in consent decrees.”

The Manual sets out several key principles, including: (i) remedies must preserve competition and completely address the identified problem, but be no more intrusive than necessary to cure the competitive harm; (ii) remedies should protect competition in the market as a whole, not specific competitors; (iii) remedies should not create ongoing government regulation of the market; (iv) the risk of a failed remedy should fall on the merging parties, not consumers; and (v) the remedy must be enforceable.

The Manual emphasizes that structural remedies are strongly preferred in both horizontal merger cases (merger of direct competitors) and vertical merger cases (merger of parties at different levels of a supply chain). Structural remedies offer a cleaner solution because they generally involve the sale of a business or assets to a third party, whereas conduct remedies typically involve ongoing government oversight that effectively regulates the merged firm’s post-merger business conduct or pricing activity. Structural remedies are also permanent and therefore offer more certainty compared to a behavioral remedy that temporarily regulates conduct to try and counter the persistent harm resulting from a loss in competition. The Manual does note that there may be instances where a conduct fix would be permitted, either together with a structural remedy or on its own, however these are considered “inappropriate except in very narrow circumstances.”

More specifically for structural fixes, the Manual stresses DOJ's preference for the divestiture of a standalone, existing business. Ongoing interaction between the merged firm and divestiture buyer post-closing is disfavored, as are divestiture proposals that present significant regulatory or logistical hurdles for the divestiture buyer. The Manual also notes DOJ's preference for so-called "upfront buyers," where a divestiture buyer must be identified by the merging parties and approved by DOJ before DOJ will enter into a consent decree allowing the merger to close. Whether or not an upfront buyer is required, the Antitrust Division will want to confirm that divestiture to the proposed purchaser will not itself cause competitive harm, and that the purchaser has the appropriate experience and incentive to compete, in addition to the financial capability to support the divested business. According to DOJ, purchasers that are funded by private equity will be evaluated using the same criteria for judging strategic buyers. Interestingly, the Manual goes on to state that in some cases, private equity purchasers may even be preferred depending on investment strategy and financing flexibility.

The Manual also addresses remedies for transactions that are challenged post-consummation. While noting that the legal analysis of the competitive effects of a consummated deal does not differ significantly from that for a deal that has not yet closed, the Manual acknowledges that remedying a consummated transaction may pose unique issues, for example, where the buyer has already integrated the acquired business. In some cases, unwinding the transaction in its entirety may be necessary to effectively restore competition in the relevant market.

Additionally, the Manual renews the Antitrust Division's commitment to rigorous enforcement of its consent decrees that resolve contested mergers. It describes several now-standard consent decree provisions designed to improve the effectiveness of consent decrees and DOJ's ability to enforce them. The Manual also highlights the Antitrust Division's new Office of Decree Enforcement and Compliance ("ODEC"), which was recently formed as part of the reorganization of the Antitrust Division's civil program. ODEC is charged with overseeing the Antitrust Division's decree compliance efforts and developing and disseminating remedy best practices across the Antitrust Division, as well as conducting ex post reviews of remedy effectiveness.

Conclusion

The new Manual reflects current DOJ policy in the area of merger remedies to resolve antitrust concerns and provides greater clarity and predictability regarding the remedy process, including insight into what types of remedies DOJ would likely find unacceptable. The Manual is very useful for parties to a transaction that will be reviewed by DOJ and may present competitive issues that could require a remedy. Its guidance can be helpful both early on when evaluating antitrust risk before entering into a transaction and later in the process during remedy negotiations with the Antitrust Division.

The Manual makes clear that structural remedies are strongly preferred by DOJ, even in vertical merger cases that historically were often resolved with conduct fixes. It remains to be seen if this will lead to some divergence from the Federal Trade Commission's approach to remedies for vertical merger cases, in which a majority of FTC Commissioners have [recently demonstrated](#) a continued willingness to allow conduct remedies.