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DOJ Antitrust Division Issues New Guidance on Merger Remedies

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On September 3, 2020, the U.S. Department of Justice's Antitrust Division ("DOJ") issued a new Merger Remedies Manual ("Manual").[1] This is the first merger remedies guidance from DOJ since it released the 2011 Policy Guide to Merger Remedies,[2] which it subsequently withdrew on September 25, 2018.[3] As a result of DOJ's repeal of the 2011 Guidelines, the 2004 Guidelines were reinstated and once again became effective.[4] The Manual describes the principles and framework DOJ uses to analyze, structure, implement, and enforce remedies in merger cases, and provides practitioners and the business community with greater transparency regarding DOJ's approach to remedies.[5] Although the Manual lays out useful high-level principles, the analysis of which remedies are likely to be accepted (or rejected) in a particular merger case remains a highly fact-specific exercise. Indeed, the Manual itself makes clear that DOJ will not use a cookie-cutter approach, and instead will only accept remedies that are closely tailored to the facts of the particular merger. As such, up-front analysis and careful consideration of remedy issues remains a vital step in the pre-signing antitrust analysis of transactions.

There were no major surprises in the new Manual. The principles and analysis described in the Manual generally are based on, and consistent with, well-understood and non-partisan views of career antitrust enforcers.

Notably, unlike with the 2020 Vertical Merger Guidelines, which were jointly released by DOJ and the Federal Trade Commission ("FTC"), this Manual was issued solely on behalf of DOJ. However, the FTC's separate public remedy guidance[6] is for the most part consistent with the principles outlined in the Manual. Although the Manual replaces DOJ's earlier guidance from 2004 and 2011, it generally does not reflect or reveal any material changes in DOJ's merger remedy practice or policy. Nevertheless, it is significant as the most recent – and perhaps most comprehensive – merger guidance from either of the federal antitrust agencies.

High-Level Overview of the Manual

The Manual provides detailed guidance on how DOJ views a variety of issues affecting merger remedies. ***First***, the Manual discusses the ***key criteria it will use to assess the sufficiency of proposed merger remedies***. These criteria include a strong preference for structural relief (*i.e.*, divestiture of businesses or assets) over behavioral relief (*i.e.*¸ regulation or prohibitions of certain post-merger conduct), as well as clear guidance on the preferred scope of assets to be divested in a merger remedy (*i.e.*, a preference to divest a stand-alone business rather than piecemeal assets).

Second, the Manual describes the ***procedures and timelines*** that apply to the merger remedy process. This discussion focuses on issues such as how quickly a remedy must be effectuated; when a so-called "fix-it-first" remedy may be acceptable, without the need for U.S. District Court approval through the Tunney Act process; and how DOJ will coordinate with other antitrust agencies (*e.g.*, state Attorneys General and foreign competition agencies) in the evaluation and implementation of merger remedies.

Third, the Manual describes ***enforcement principles*** and procedures for non-compliance with the consent decrees governing merger remedies. DOJ is committed to ensuring that merger remedies are fully implemented and strictly enforced, noting that "[e]ven the most appropriately tailored remedy is of little value if it is not enforced,"[7] and responsibility for overseeing and enforcing merger remedies falls to DOJ's newly-commissioned Chief Legal Advisor. If DOJ determines the merging parties or divestiture buyer has violated the terms of the consent decree, DOJ has the power and has demonstrated a willingness to pursue civil penalties (*i.e.*, fines, injunctive relief) or even criminal contempt charges (*i.e.*, fines or imprisonment) to enforce its merger remedies.

Key Takeaways

- ***Remedies Must <u>Preserve</u> Competition***. DOJ's guidance makes clear that the purpose of a merger remedy is to ***preserve***, not enhance, competition, which "requires replacing the competitive intensity that would be lost as a result of the merger."[8] DOJ distinguishes preserving competition from protecting competitors, stating that remedies and consent decrees are *not* designed to protect or favor particular competitors.[9] DOJ also notes that the divestiture buyer need not be the *best* possible competitor, so long as it "will effectively preserve competition according to the requirements in the consent decree."[10]
- ***Strong Preference for Structural Remedies***. As noted above, the Manual confirms DOJ's strong preference for structural remedies in both "horizontal" mergers (mergers of competing firms at the same stage of the supply chain) and "vertical" mergers (mergers that combine firms at different stages of the same supply chain), and that conduct remedies are disfavored and rarely appropriate.
  - The Manual states "[s]tructural remedies are strongly preferred in horizontal and vertical mergers because they are clean and certain, effective, and avoid ongoing government entanglement in the market."[11] Although behavioral remedies generally are disfavored, the Manual acknowledges that standalone conduct relief may be considered in a very specific set of circumstances, [12] and "[t]ailored conduct relief may be useful in certain circumstances to facilitate effective structural relief" (*e.g.*, temporary supply agreements that accompany a structural remedy).[13]
- ***Divestiture Remedies Must Include All Assets Required to Preserve Competition***. The Manual states that the divestiture "must include all assets necessary to ensure the efficient current and future production and distribution of the relevant product or service…"[14] The Manual reinforces that, in some cases, assets beyond the area of competitive overlap may be required to facilitate the remedy's success.[15] Divestiture of an existing standalone business is strongly preferred, although DOJ will consider asset carve-outs consisting of less than a standalone business in appropriate circumstances. Such asset carve-out proposals will be highly scrutinized to ensure that such a remedy sufficiently preserves competition.[16]
- ***The Manual Identifies Numerous "Red Flags" for Remedies***. DOJ identifies numerous factors that increase the risk that a remedy will fail to preserve competition. These factors provide DOJ with ample grounds and a broad basis for challenging proposed remedies. For example, as noted above, any remedy other than a divestiture of a standalone business will be highly scrutinized. Other "red flags" include: a divestiture that mixes and matches assets of both firms; allowing the merged firm to retain rights to critical IP or other intangible assets; ongoing entanglements between the merged firm and the divestiture buyer; and substantial regulatory or logistical hurdles.[17]

- ***Openness to Considering Fix-it-First Remedies in Appropriate Cases***. A fix-it-first remedy is a structural solution implemented by the parties that DOJ accepts before a merger is consummated.[18] The Manual indicates that the DOJ is generally willing to consider fix-it-first remedies, though the parties must give the DOJ adequate time and information to thoroughly review and evaluate the proposed remedy.[19] The Manual also cautions that a fix-it-first remedy will not be appropriate in certain circumstance, such as where a remedy requires "continuing, post-consummation obligations on the part of the merged firm"[20] and may be inappropriate if proposed too late in the process, such as after DOJ has determined that it has a substantial basis for filing a complaint.[21]
- ***Clear Preference for an Upfront Buyer***. Unlike DOJ's 2004 guidance, the Manual clearly indicates DOJ's preference for "upfront buyer" divestitures, where the divestiture buyer is fully vetted by DOJ and the divestiture is finalized *before* the merger under investigation is allowed to close. The Manual further states that upfront buyer divestitures are "[p]articularly important in cases where the [DOJ] determines that there are likely to be few acceptable and interested buyers who will effectively preserve competition in the relevant market post-divestiture."[22]
- ***Relatively Favorable View of Private Equity Buyers***. The Manual presents a relatively favorable view of private equity and investment firms as divestiture buyers, noting that a private equity purchaser may actually be favorable to a strategic purchaser in some circumstances.[23] Citing an FTC study, the Manual notes that private equity investors have "more flexibility in investment strategy," are "committed to a divestiture," and can be "willing to invest more if necessary."[24] This view appears to represent a split with some FTC Commissioners, who have stated they disfavor private equity and other investment buyers.[25] For example, Commissioner Chopra recently said that "[t]he FTC must halt these [private equity acquisitions in the health care section] acquisition strategies that result in higher costs and reduction in quality of care."[26]
- ***Willingness to Challenge Consummated Mergers***. The Manual reiterates that DOJ is willing to challenge both consummated and unconsummated mergers, but acknowledges that fashioning remedies in consummated merger cases poses unique issues.[27] In some cases, "unwinding the [consummated] transaction may be necessary to effectively restore competition in the relevant market," but in other cases, a divestiture of assets may be sufficient.[28] DOJ's focus on this issue serves as an important reminder that all strategic transactions, whether or not HSR reportable, must be assessed pre-signing for antitrust risk.
- ***Relatively Little Significance Given to Divestiture Purchase Price***. The Manual notes that: "[DOJ] will not consider the price of the divestiture assets unless it raises concerns about the effectiveness or viability of the purchaser."[29] There are exceptions to this general rule, however, such as "if the price and other evidence indicate the purchaser is unable or unwilling to compete in the relevant market."[30]
- ***Strong Aversion to Seller Financing.*** The Manual makes clear that DOJ strongly disfavors seller financing to a divestiture buyer for a number of reasons, including that seller financing may give the merged entity some control over the assets post-divestiture, and may skew competitive incentives and create ongoing entanglements between competitors. In addition, according to the Manual, the fact that a divestiture buyer requires seller financing may suggest that it is unable to obtain financing elsewhere, raising questions about the purchaser's viability.[31]

[1] U.S. Dep't of Justice, *Merger Remedies Manual* (September 2020), available at https://www.justice.gov/atr/page/file/1312416/download.

[2] U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (June 2011), available at https://www.justice.gov/atr/page/file/1098656/download.

[3] Statement of Assistant Attorney General Makan Delrahim, *It Takes Two: Modernizing the Merger Review Process* (September 25, 2018), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust.

[4] *Id.*

[5] U.S. Dep't of Justice, *Justice Department Issues Modernized Merger Remedies Manual: Merger Remedies Manual Reaffirms Antitrust Division's Commitment to Effective Structural Relief and Reflects Renewed Focus on Enforcing Consent Decree Obligations* (September 3, 2020), available at https://www.justice.gov/opa/pr/justice-department-issues-modernized-merger-remedies-manual.

[6] Fed. Trade Comm'n, *Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission* (January 2012), available at https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; Fed. Trade Comm'n, *Frequently Asked Questions About Merger Consent Order Provisions*, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq.

[7] U.S. Dep't of Justice, *Merger Remedies Manual* at 33.

[8] *Id.* at 3-4.

[9] *Id*. at 4-5.

[10] *Id*. at 24.

[11] *Id*. at 13.

[12] *Id*. at 16-17.

[13] *Id*. at 14.

[14] *Id.* at 6.

[15] *Id.* at 9.

[16] *Id.* at 10-11.

[17] *Id.* at 20-21.

[18] *Id.* at 17.

[19] *Id.* at 18.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 22.

[23] *Id.* at 24.

[24] Fed. Trade Comm'n, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (January 2017), available at https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; U.S. Dep't of Justice, *Merger Remedies Manual* (September 2020) at 24-25.

[25] Statement of Commissioner Rohit Chopra, *Regarding Private Equity Roll-ups and the Hart-Scott-Rodino Annual Report to Congress Commission File No. P110014* (July 8, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

[26] *Id.*

[27] U.S. Dep't of Justice, *Merger Remedies Manual* at 19.

[28] *Id.*

[29] *Id.* at 25.

[30] *Id.*

[31] *Id.* at 26.

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