

DOJ Issues Updated Merger Remedies Manual, Emphasizing a Strong Preference for Structural Remedies

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On September 3, 2020, the U.S. Department of Justice released its updated Merger Remedies Manual (the “Manual”). The Manual emphasizes the DOJ’s strong preference for “structural” remedies (i.e., divestitures) over “behavioral” or “conduct” remedies to address potential competitive harms that result from either horizontal or vertical mergers. In addition, the Manual stresses the DOJ’s commitment to strict implementation of and compliance with agreed-upon remedies. This follows last month’s announcement by the DOJ regarding the establishment of the Office of Decree Enforcement and Compliance.

In 2018, Assistant Attorney General Makan Delrahim signaled the DOJ’s preference for structural remedies when he announced the withdrawal of the 2011 Policy Guide to Merger Remedies (the “2011 Guide”), which were considered more permissive toward conduct remedies. Since that time, the 2004 Policy Guide to Merger Remedies (the “2004 Guide”) has been the effective policy of the DOJ. The Manual updates and includes a number of changes to the 2004 Guide, strengthening the DOJ’s preference for structural remedies, including in the context of vertical mergers.

The Manual also includes a statement of the key principles that will guide the DOJ when considering merger remedies. These include the goals that remedies must preserve competition; they should not create ongoing government regulation of the market, and they should be enforceable. Moreover, temporary relief should not be used to remedy persistent competitive harm; any remedy should preserve competition, and the risk of a failed remedy should fall on the parties, not on consumers.

Finally, the Federal Trade Commission, which shares responsibility for enforcing the antitrust laws with the DOJ, has been somewhat more muted in its preference for structural remedies. While public statements by the FTC officials suggest a preference for structural fixes, in practice, the FTC has been willing to agree to behavioral remedies in a number of vertical mergers in recent years (e.g., Broadcom/Brocade, Northrop Grumman/Orbital, Staples/Essendant). In particular, each of these matters involved the use of a firewall to prevent the exchange of competitively sensitive information. In contrast, the Manual views firewalls with suspicion, noting that no matter how well crafted, the risk of collaboration in spite of the firewall is great.

Discussion

Key Elements in the Merger Remedies Manual

Structural Remedies Must Be Comprehensive: The Manual states that a structural remedy requires the clear identification of all the assets a divestiture buyer needs to compete effectively. The Manual emphasizes the DOJ’s preference for the divestiture of a standalone business rather than an asset package. It also states that even the divestiture of a standalone business may not be sufficient in certain circumstances (e.g., where the divestiture buyer needs a “full line” of products, or the divestiture buyer needs assets outside of the U.S., in order to compete effectively). Parties should expect that the DOJ will continue to require robust divestiture packages that fully address the alleged competitive harm.

Preference for Structural Remedies for Horizontal and Vertical Mergers: The Manual states that the DOJ's preference is for structural remedies in both horizontal *and* vertical merger cases. This position on vertical merger remedies is not unprecedented (e.g., the DOJ required structural fixes to address vertical concerns in Bayer/Monsanto), but the Manual now sets forth a clear policy preference for structural remedies even in vertical mergers. As noted above, the FTC has accepted behavioral remedies in a number of recent vertical merger cases. The Manual's position is a clear departure from the 2011 Guide, which indicated a more flexible approach to vertical merger remedies and was employed practically by the DOJ for a number of behavioral remedies during the Obama administration (e.g., Google/ITA Software). Just as AAG Delrahim withdrew the 2011 Guide, it is not uncommon for changes in political administration to be accompanied by the withdrawal or issuance of enforcement guidance.

Limited Circumstances Where Standalone Conduct Remedies May Be Appropriate:

Complementing the DOJ's strong preference for structural remedies, the Manual sets forth strict requirements that must be met before standalone conduct remedies would be considered appropriate. The parties bear the burden of proving that (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm; and (4) the remedy can be enforced effectively. Taken together with the strengthened policy preference for structural relief, this likely creates a high bar for parties advocating for standalone conduct remedies.

Characteristics That Increase the Risk a Remedy Will Not Preserve Competition: The Manual details a number of factors that may lead the DOJ to reject a remedy as inadequate, including the following: (1) divestiture of less than a standalone business; (2) mixing and matching assets of both firms; (3) allowing the merged firm to retain rights to critical intangible assets; (4) ongoing entanglements between the merged firm and the purchaser; and (5) substantial regulatory or logistical hurdles. Merging parties should be cognizant of these factors when framing potential remedies.

Same Criteria for Strategic and Private Equity Divestiture Buyers: The Manual restates the DOJ's preference for an upfront buyer. The approval of a proposed divestiture buyer must satisfy three tests. First, divestiture must not itself cause competitive harm. Second, the DOJ must be certain that the purchaser has the incentive to use the divested business to compete in the relevant market. Third, the divestiture buyer must have sufficient commercial and financial capability to compete effectively over the long term. Importantly, the Manual confirms that the DOJ will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other financial buyers. This signals that the DOJ does not have a bias towards strategic buyers, particularly in instances where the private equity purchaser may partner with entities with relevant experience. However, it remains to be seen whether the practical application of these criteria will differ as between strategic and private equity buyers.

Decree Must Bind the Entities Against Which Enforcement May Be Sought: Consistent with recent practice (e.g., Bayer/Monsanto), the Manual states that consent decrees must bind, not only the merging parties, but also the divestiture buyer or other third parties that are instrumental to the enforcement of the decree.

Decrees Must Include Standard Provisions That Allow For Effective Enforcement: The Manual sets out a number of standard provisions that a consent decree must include to ensure the enforceability of the decree. Most importantly, the Manual states that the DOJ will seek provisions stating that the DOJ need only prove a violation of the consent decree and the appropriateness of any remedy by a preponderance of the evidence standard, rather than the stricter “clear and convincing” evidence standard that would otherwise apply. The lower burden of proof likely makes it easier for the DOJ to bring enforcement actions under a consent decree. Other provisions that the DOJ will seek include allowing the DOJ to apply for an extension of the consent decree term and reimbursement of the DOJ’s costs incurred in connection with a successful enforcement effort for a violation of the decree. A number of these are reflective of changes to DOJ policy that were announced by AAG Delrahim in January 2018.¹

DOJ Bolsters Commitment to Enforcement with Dedicated Compliance Office: The Manual explains that the Office of Decree Enforcement and Compliance will directly oversee the litigation sections’ ongoing review of decree compliance and evaluation of potential decree violations. The Office will have the ability to make recommendations directly to the Assistant Attorney General. The Federal Trade Commission has long had a similar office within its Bureau of Competition.

Assessment of Post-Complaint Merger Remedies: The Manual also notes that where parties propose a remedy after a complaint challenging the transaction is filed, the DOJ may seek to have the court divide the proceeding into a liability phase and a remedy phase.

Practical Implications

Expectation of Continued Focus by DOJ on Assessing and Enforcing Consent Decrees

The Manual codifies many of the public statements that AAG Delrahim and other DOJ officials have made regarding merger remedies and their enforcement in recent years.

The Manual provides guidance regarding the types of remedies and remedy provisions the DOJ will likely find unacceptable. In addition, it provides an unambiguous statement that structural remedies are strongly preferred in the context of both horizontal and vertical mergers, and that conduct remedies are likely to be suitable only in limited circumstances. Given the FTC’s willingness to accept behavioral remedies in the context of some recent vertical mergers, it is an open question whether the FTC Commissioners also choose to issue updated merger remedy guidance in due course.

We can expect to see a renewed focus by the DOJ on assessing and enforcing consent decree compliance following the recent establishment of the dedicated Office of Decree Enforcement and Compliance.

As the Manual notes, tailoring the remedy to address the violation is the best way to ensure that the relief obtained cures the competitive harm. Each transaction raises its own unique characteristics. It will now be for the DOJ to give practical effect to the principles in the Manual.

¹ See Remarks of AAG Makan Delrahim, Improving the Antitrust Consensus, Remarks as Prepared for New York State Bar Association Antitrust Section (January 25, 2018), <https://www.justice.gov/opa/speech/file/1028896/download>

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