

Antitrust, Competition & Distribution Update

September 2020

Justice Department Issues First Update to Antitrust Merger Remedies Guidance in a Decade

Key Notes:

- The Antitrust Division released its first new merger remedy guidance since 2011.
- The guidance emphasizes the Division's preference for structural, no conduct remedies.
- The Division has created a new Office of Decree Enforcement and Compliance.

The Department of Justice's Antitrust Division (the "Division") issued a new policy guide last week for merger remedies, the first such update since 2011. The Merger Remedies Manual (the "Manual") outlines the methods by which the Antitrust Division will design and implement relief measures in cases of mergers and acquisitions that the Division has concluded may substantially lessen competition. Accordingly, the Manual does not analyze Division policy with respect to the identification of potentially problematic mergers, but instead analyzes how a merger violation will be resolved by the Division.

According to the Manual, the two fundamental guideposts that the Division will observe in its determinations as to appropriate remedies are (1) the remedy must be related to the competitive harm caused by the merger; and (2) there must be a logical nexus between the remedy and the violation; in other words, the remedy must fix the competitive harm caused by the merger. Additionally, the Division will be guided by the following principles in evaluating merger remedies:

- Remedies must preserve competition. In crafting a potential remedy, the Division will seek to identify the competitive harm that will likely be caused by a merger and how the proposed relief will effectively remedy that competitive harm. The Manual emphasizes that the Division's role is to protect competition and not to enhance it; therefore, the remedy must be narrowly tailored to ensure that it is no more intrusive than necessary to remedy the harm likely to be caused by the merger.
- Remedies should not create ongoing government regulation. Merger remedies take two general forms: structural or conduct based. Structural remedies will typically involve the sale of assets or lines of business by the merging companies. A conduct-based remedy, in contrast, involves injunctive provisions that regulate how a company may conduct its business post-merger. Because conduct-based remedies substitute government decision-making for that of the free market, the Division considers there to be a risk that the remedy may restrain procompetitive conduct. Moreover, the Division considers conduct remedies typically as more difficult to craft and enforce. For these reasons, according to the Manual, the Division will almost always favor structural remedies, except where conduct-based remedies are (1) needed to facilitate structural relief; or (2) there are significant efficiencies that would be lost through a structural remedy and the conduct remedy can be effectively enforced.
- Temporary relief should not be used to remedy persistent competitive harm. The Manual emphasizes that anticompetitive mergers create indefinite changes

in the structure of the market, so temporary relief from anticompetitive conduct, such as conduct-based remedies or regulation, are inadequate to remedy persistent harm.

- The remedy should protect competition, not competitors. The remedy chosen by the Division should not favor individual competitors or pick winners and losers but should instead be designed to ensure that competition is preserved.
- The risk of a failed remedy should fall on the parties, not consumers. Because the implementation of a remedy necessarily involves a violation of the *Clayton Act*, the risk of a failed remedy should be borne by the parties seeking to merge, not consumers. Any remedies should be designed to limit the risk of failure. In practice, this means that any remedy will need to be sufficiently robust to give the Division confidence that the merger will not harm competition.
- The remedy must be enforceable. The remedy must not be so vague that neither a party nor a judge can effectively discern its meaning. The remedy must have clear meaning and a party should understand that it will face consequences if it does not comply with the terms of the decree, the Manual cautions.

In addition, the Manual discusses the formation of the newly created Office of Decree Enforcement and Compliance. The Office, which reports to the Office of the Chief Legal Advisor, oversees, evaluates, and provides oversight for remedies sought in order to ensure that remedies are consistent and compliant with the guidance set out in the Manual. In addition to these compliance functions, the Office will also be tasked with ensuring that a decree, once entered, is fully implemented. This will include monitoring a sale, reviewing the sale process, evaluating the buyer, and ensuring that the divestiture will allow for vigorous competition.

For further information about antitrust compliance and enforcement in mergers and acquisitions, please contact a member of Thompson Hine's Antitrust, Competition & Distribution team.

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