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New DOJ Merger Remedies Manual Cites Strong Preference for Structural Remedies - New Openness to Private Equity Buyers

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The United States Department of Justice released its revised Merger Remedies Manual on September 3, 2020, providing "Antitrust Division attorneys and economists with a framework for fashioning and implementing appropriate relief . . . in merger cases." The Manual is the Agency's guidebook for fashioning and implementing remedies after it has concluded that a proposed merger may substantially lessen competition.

The revision is the culmination of a process initiated by antitrust chief Makan Delrahim in 2018, when the division withdrew its 2011 Policy Guide to Merger Remedies and announced that the 2004 Guide to Merger Remedies would be in effect pending the release of an updated policy. According to Mr. Delrahim, the revisions reflect the Antitrust Division's "renewed focus on enforcing obligations in consent decrees and reaffirms the Division's commitment to effective structural relief." Principally, merger remedies must be structured and implemented to preserve competition on an ongoing basis; not create ongoing government regulation of the market; and must be enforceable. To that end, the Manual stresses that structural remedies, most notably divestiture, are strongly preferred in both horizontal and vertical mergers because they are "clean and certain, effective, and avoid ongoing government regulation of the market." For a divestiture to be effective, it must include all assets necessary for the purchaser to be an effective, long-term competitor. Divestiture of an existing stand-alone business is preferred, and indeed divesting even more than a stand-alone business may be necessary to preserve competitive levels. Alternatively, divesting only some assets of a business is likely to be viewed with skepticism.

With respect to transactions challenged post-consummation (typically transactions that were not subject to HSR reporting), the Manual notes that remedying a consummated transaction may pose unique issues, for instance where the parties may have already integrated the assets. In some such cases, unwinding the transaction may be necessary, while in others, divestiture of more or less than the acquired assets may be required, along with transitional assistance.

Conduct remedies are most likely to be employed as an adjunct to a divestiture where they facilitate the structural relief. One example of appropriate conduct relief may be a short-term supply agreement, for instance where a purchaser firm is unable to manufacture the product for a transitional period. Typically this is due to things like plant reconfigurations, or delay caused by the transfer of licenses. Under such circumstances, a short-term supply agreement in conjunction with a divestiture may help prevent the temporary loss of a competitor from the market.

A company's undertaking to modify its behavior on an ongoing basis as the stand-alone or primary remedy (Stand-Alone Conduct Relief), will likely be acceptable only where a structural remedy is not possible and where the conduct remedy can be effectively enforced. Even then, for such Stand-Alone Conduct Relief to be accepted it must completely cure the competitive harm, and also generate significant efficiencies that cannot be achieved without the merger. While the long-standing policy and preference of the Agency has been for structural remedies, the new guidance advances that preference, especially with respect to vertical mergers – where the majority of conduct remedies had previously been seen and where structural remedies are often more challenging to implement while preserving the business rationale for the merger.

The new guidance also provides that the Antitrust Division will use the same criteria to evaluate both strategic purchasers and purchasers funded by private equity buyers. Private equity divestiture buyers have not always received a warm reception from the Division (or at the FTC for that matter, where such buyers' incentives to ensure a long-term competitive market have been called into question). The Manual also restates the preference for upfront buyers, especially in asset acquisitions of less than a stand-alone business, or where there are likely to be few acceptable and interested buyers.

The Manual also reflects a renewed focus on enforcing consent decree obligations. For a consent decree to be effective, it must bind the entities against which enforcement may be sought and must provide a means for the Division to monitor and investigate compliance. The Manual notes that the Division is committed to providing substantial resources towards the enforcement of consent decrees, highlighting the role of the new Office of Decree Enforcement and Compliance, which will oversee DOJ's consent decree compliance efforts. If a consent decree has been violated, the Division has the ability to bring civil and criminal contempt proceedings.

While the revised guidance reinforce that, historically and now, structural remedies provide the best opportunity to enter into a consent decree with the agency, they do leave opportunity for more limited asset divestitures under the right circumstances. Parties undertaking mergers that may potentially require a remedy to gain antitrust clearance should be thinking early on about what a divestiture package may look like, who the potential acceptable divestiture buyers might be, and how to present the remedy to the agency in the best possible light.

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