Proskauer

DOJ Merger Policy Guide Shines New Light on Conduct Remedies

June 29, 2011

Antitrust enforcement is now front and center. In the two plus years since Christine Varney was appointed as President Obama's choice to head, the Antitrust Division's policies have changed, investigations have come to fruition, and enforcement has increased across the board. Indeed, just last week Varney declared victory, stating that she had "fulfilled and more" her "promise" to ensure more "vigorous enforcement of the antitrust law."

In her latest move, the Division has now issued a newly revised merger remedy policy. This policy replaces the one developed under the prior administration in 2004, and gives businesses and practitioners a view into the types of remedies the current administration is likely, and not likely, to accept.

A brainchild of Varney, the revised policy furthers her commitment to step up antitrust enforcement in an important way. Somewhat paradoxically, they do not necessarily call for harsher remedies; rather, they do the opposite. By expanding the types of remedies the Division will consider, the Division avoids the need to choose between draconian remedies and no remedy at all. Ultimately, this increases the Division's freedom to pursue enforcement action in a wider variety of cases.

In tone, the new policy expresses significantly less concern about the impact of overbroad remedies on the merging parties or on competition in general. Gone is the directive to Staff to refrain from entertaining a remedy proposal until after becoming satisfied that the merger would, in fact, be anticompetitive. Also missing is the directive to ensure that the proposed remedy "be no more intrusive on market structure and conduct than necessary to cure the competitive harm." While the statement is still true, the conscious decision to strike it is telling.

Also telling: the new policy suggests that the goal of a remedy may not just be to *restore* competition, but also to "*enhance* consumer welfare," which is arguably beyond the scope of the agency's actual authority. This directive contrasts with the prior policy caution that "the purpose of a remedy is *not* to enhance premerger competition." Similarly, whereas the old policy made clear that the "*only* appropriate goal" of a merger remedy is "restoring competition, rather than punishing the merging firm," the new policy parts ways, noting that the Division may seek disgorgement in appropriate cases to prevent the parties from "retain[ing] their unlawful profits."[1]

Another significant change is the Division's rejection of the prior administration's so-called Crown Jewel policy. Crown Jewel provisions incent parties to quickly divest the agreed set of assets by requiring them to divest more desirable and marketable assets if they are unable to sell the primary divestiture package within the agreed timeframe. The provision also helps ensure that there will be an effective divestiture in the event the primary asset package cannot be sold. The crown jewel may be a package of assets that includes more than the original package of assets to be divested, or a different package of assets.

Despite the obvious power of Crown Jewel provisions to spur action, they were "strongly disfavored" under the prior policy. In the prior administration's view, Crown Jewel provisions risked forcing divestiture of assets, not to restore competition, but to "punish" merging firms who move too slowly. The new policy rather identifies a number of situations in which a "crown jewel provision may be necessary . . . to . . . effectively preserve competition."[2]

The new policy also excises the numerous statements that suggest concern for the welfare of the merging parties. The old policy, for example, repeatedly stated that an otherwise unacceptable remedy might be permitted if "blocking the deal entirely would likely sacrifice merger-specific efficiencies worth preserving." That suggestion has now been omitted. Likewise, the current policy no longer disfavors mandatory royalty-free licensing provisions.

By far the biggest change in the revised policy is the emphasis on conduct remedies, as opposed to structural remedies. Structural remedies, such as divestitures, directly increase the number of competitors in the market or reduce the parties' market shares. Conduct remedies, on the other hand, impose obligations on the parties to behave in a certain way. This can include prohibiting discrimination, providing competitors access to intellectual property, or erecting firewalls to protect competitively sensitive information.

The prior policy expressed a strong preference for structural remedies, claiming that conduct remedies were too "difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent." The current policy dismisses these concerns. The Division now views "[c]onduct remedies [as] a valuable tool" and an "effective method for dealing with competition concerns raised by vertical mergers" and some "horizontal mergers."

Undeterred by the threat of administrative complexity, the new policy relies on general assurances that Staff will be vigilant, and especially "clear and careful" in drafting the consent order. The new policy also shifts responsibility for policing conduct remedies by requiring the use of arbitration provisions to give aggrieved competitors or other third parties a mechanism to enforce compliance.

The Division's new found keenness for conduct remedies – even in horizontal merger cases – was demonstrated recently in *U.S. v. Georges Foods, Inc.*, No. 5:11-cv-00043 (W.D. Va. 2011). In a transaction that was not subject to Hart-Scott-Rodino premeger review, the Division challenged Georges' consummated acquisition of Tyson Food's poultry processing plant, alleging that the horizontal merger created a duopoly in the relevant market. After months of litigation, the Division settled the case. No structural remedy or divestiture was required, as is typically required in consummated merger cases. Rather the parties merely agreed to make capital upgrades to the acquired plant and to increase its capacity. In essence, the merged firm simply agreed to be a good corporate citizen, a remedy unlike any that has gone before.

The primary thrust of the revised policy appears to be to advance the Division's renewed goal of focusing on vertical mergers, where conduct remedies are viewed as the most appropriate means to "effectively address anticompetitive issues." Driven in part by a recent uptick in vertical merger challenges, the new policy seeks to create an institutional framework for the crafting and enforcement of conduct remedies in these cases.[3]

While vertical mergers do not typically combine competitors in the traditional sense, the Division claims that they "can create changed incentives and enhance the ability of the merged firm to impair the competitive process"; for example, by increasing barriers to entry, facilitating collusion, or foreclosing competitors. Believing structural remedies to be ill-suited to these concerns, the new policy enumerates a "panoply of conduct remedies," including:

- Non-Discrimination Obligations – These provisions prevent the merged firm from favoring its affiliates over third-party competitors;

- Firewalls – These provisions prevent the merged firm taking information it receives from customers or suppliers and giving it to its affiliate with whom it competes;

- Mandatory Licensing Provisions – These provisions require the merged firm to give its competitors access to critical inputs or technology on fair and reasonable terms;

- Transparency Provisions – These provisions require the merged firm to make certain information available to regulatory authorities or competitors, in order to ensure that the merged firm does not impair rivals' opportunities.

- Prohibitions on Restrictive Contracting Practices – These provisions prevent the merged firm from entering into or enforcing exclusivity provisions, rights of first refusals, and non-compete clauses that may block competitors' access to vital inputs; and

- Other Forms of Support – These provisions require the merged firm to provide support to one or more competitors, such as supply agreements, transfer of relevant employees, and know-how.

* * *

These revisions make it clear that, under Christine Varney's leadership, the Division will continue to pursue more cases, more aggressively. Once challenged, however, the Division will be increasingly flexible in crafting a remedy that will preserve the competitive landscape.

For businesses and practitioners, the revised remedies policy means that the parties need to think creatively when faced with potentially problematic mergers, even mergers that might not have raised any concerns just a few years ago. In some cases, this may mean harsher remedies, especially as the new policy focuses less on the impact to the parties and more on the impact on the market. But by building a strong case, the parties may be able to avoid onerous – and value-destroying – structural relief, as was amply demonstrated in *George's Food,* where the practical realities of litigation forced the DOJ to accept mere capital improvement commitments as a remedy for the alleged creation of a duopoly.

Put simply, if proactively managed, the remedy process under the new policy may not necessarily be a difficult pill to swallow.

[1] Until this year, the Division had not sought disgorgement in any case, and its authority to do so was unclear. In *Keyspan*, however, the Division successfully obtained disgorgement after the court expressly ruled that such a remedy was within the Division's power. *U.S. v. Keyspan Corp.*, 2011 WL 338037 (S.D.N.Y. 2011).

[2] There are also a number of other changes to the policy that suggest a more aggressive approach to fashioning remedies in some areas. For example, the new policy stresses that there "may be circumstances when licensing [the parties'] intangible assets – perhaps even to 'all comers' – is necessary to effectively preserve competition."

[3] While the prior policy recognized that conduct remedies might be appropriate in vertical merger cases, the Division under the prior administration did not appear to believe that vertical mergers had the ability to substantially lessen competition. In fact, there were no vertical merger challenges during the prior administration. Varney, however, has made vertical mergers a cornerstone of her administration. Upon being appointed, Varney expressed "her hope" that the Antitrust Division would start "to explore vertical theories." Under her leadership, it has done just that, recently challenging four vertical mergers. Christine Varney, *Vigorous Enforcement in This Challenging Era* (May 11, 2009); *U.S. v. Comcast Corp.*, No. 1:11 cv-00106 (D.D.C. 2011); *U.S. v. Ticketmaster Entm't, Inc., 2010-2 Trade Cas. ¶ 77,113 (D.D.C. 2010)*; *U.S. v. GrafTech International Ltd and Seadrift Coke L.P.*, No. 1:10 cv-02039 (D.D.C. 2010); *U.S. v. Google Inc. and ITA Software, Inc.*, Case: 1:11-cv-00688 (D.D.C. 2011).

Related Professionals

- **John R. Ingrassia**
  Partner
- **Colin Kass**
  Partner