Published on *The National Law Review* https://natlawreview.com

Justice Department Revises Merger Remedies Guidelines

Article By:

Joel Mitnick

Ngoc Pham Hulbig

What happened?

On September 3, 2020, the Department of Justice ("DOJ") issued a revised Merger Remedies Manual, which sets forth the Division's framework for implementing remedies to resolve antitrust concerns in merger cases. The new manual updates DOJ's guidelines for merger remedies for the first time in nearly a decade and reaffirms the Division's strong preference for structural relief. The Division's 2004 Policy Guide to Merger Remedies noted that "structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market." DOJ eliminated the absolute preference for structural rather than conduct remedies when it issued its 2011 Policy Guidelines to Merger Remedies, noting that different types of mergers present "different competitive issues and, as a result, different remedial challenges." However, the Division withdrew the 2011 guidelines in 2018 and reinstated the 2004 guidelines, indicating a return to its preference for structural remedies. The new 2020 guidelines firmly codify that preference with even stricter language in some cases.

"The modernized Merger Remedies Manual reflects our renewed focus on enforcing obligations in consent decrees and reaffirms the Division's commitment to effective structural relief," said DOJ Assistant Attorney General Makan Delrahim. "It will provide greater transparency and predictability regarding the Division's approach to remedying a proposed merger's competitive harm."

Why does this matter?

The Merger Remedies Manual outlines how DOJ will structure and implement relief to resolve antitrust concerns and preserve competition in merger cases. In both horizontal and vertical merger cases, "[a]lmost all remedies are structural" because structural remedies are "clean and certain, effective, and avoid ongoing government entanglement in the market." In limited circumstances, conduct remedies may be appropriate: (1) to facilitate structural relief; or (2) if there are significant efficiencies that would be lost through a structural divestiture, if the conduct remedy would completely cure the competitive harm, and if it can be enforced effectively. The Manual uses language even stricter than the 2004 Policy Guide to state that stand-alone conduct remedies are appropriate only when the parties prove: "(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."

The Manual includes new sections explaining the Division's approach to consummated transactions and upfront buyers and lays out certain "red flags" that DOJ has observed increase the risk of a remedy ineffectively preserving competition. The Manual also reflects important principles implemented in recent Antitrust Division consent decrees, such as when it may be appropriate to name the divestiture buyer as a party to the consent decree or when it may be appropriate to require the divestiture of assets beyond the overlapping relevant markets.

The updated manual emphasizes that in all of DOJ's merger cases, both horizontal and vertical:

- Remedies must preserve competition.
- Remedies should not create ongoing government regulation of the market.
- Temporary relief should not be used to remedy persistent competitive harm.
- The remedy should preserve competition, not protect competitors.
- The risk of a failed remedy should fall on the merging parties, not on consumers.
- The remedy must be enforceable.

The Merger Remedies Manual also underscores the Division's commitment to ensuring full implementation and compliance with consent decree obligations and highlights the role of the newly-created Office of Decree Enforcement and Compliance to oversee the Division's decree compliance efforts.

What happens next?

With regard to merger remedies, parties should continue to expect from DOJ a strong preference for structural remedies that are clean, certain and enforceable. While the Federal Trade Commission ("FTC") has not yet adopted DOJ's new Merger Remedies Manual, former FTC Director of the Bureau of Competition Bruce Hoffman has stated publicly that the FTC will be skeptical of conduct remedies, even in vertical merger cases. There may be limited circumstances where conduct remedies are appropriate, but parties face an uphill battle against the agencies' historical belief that nonstructural remedies are more difficult to implement, costly to monitor and enforce, and easier to circumvent.

With regard to DOJ policy for merger review in general, under Assistant Attorney General Delrahim, DOJ has consistently reevaluated its approach to reviewing mergers. In 2018, the Division withdrew the 2011 Policy Guides to Merger Remedies and reinstated the 2004 Policy Guide to Merger Remedies pending a review of the Division's approach to merger remedies. A culmination of that process, the 2020 Merger Remedies Manual comes after DOJ and the FTC jointly issued revised Vertical Merger Guidelines earlier this year and less than a week after DOJ stated that it is considering whether to revise its 1995 Banking Guidelines or how it analyzes bank mergers. Parties can expect the DOJ to continue to reevaluate and fine-tune its analysis with regard to different types of mergers.

National Law Review, Volume X, Number 252