New DOJ Merger Remedies Manual: Preference for Structural Remedies and Private Equity Buyers

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On September 3, 2020, the Department of Justice's Antitrust Division (the DOJ) issued its new Merger Remedies Manual (the Manual), which provides the framework the DOJ will utilize going forward to implement relief in mergers reviewed by its attorneys and economists.[1] The DOJ has updated its remedies guidance several times in the past two decades with at times significant variation between administrations. The new Manual updates the 2004 Policy Guide to Merger Remedies, which the DOJ updated in 2018, after withdrawing the 2011 Obama-era Policy Guide to Merger Remedies.[2]

The new guidance confirms the DOJ's preference for structural relief, which has been a focus for Assistant Attorney General Makan Delrahim, and also provides additional clarity on the DOJ's approach to fix-it-first remedies and evaluating potential buyers. Perhaps most significantly, the Manual notes that "in some cases a private equity purchaser may be [a] preferred" purchaser of divestiture assets due to its financial flexibility,[3] which seemingly reverses past DOJ skepticism of such purchasers and the strong anti-PE buyer sentiment expressed by at least some of the commissioners at the Federal Trade Commission (the FTC). In announcing the new remedies framework, Mr. Delrahim notes that the Manual "reaffirms the DOJ's commitment to effective structural relief" and will "provide greater transparency and predictability" regarding its approach to remedying a proposed merger's competitive harm.[4]

Key Principles

As a starting point, the Manual lays out six key principles that apply to the DOJ's evaluation and implementation of all merger remedies:

- 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 Parties, Not on Consumers
- The Remedy Must Be Enforceable

Taken together, these principles reflect some important trends in the DOJ's analysis of merger remedies. First, the principles apply to both horizontal and vertical mergers equally. While this is a continuation of the 2004 Policy Guide, it is a departure from the 2011 remedy manual, which had addressed how remedies could differ in horizontal versus vertical transactions and stated a greater acceptance of nonstructural/conduct fixes in vertical deals. Second, the principles reiterate the DOJ's current preference for *structural* remedies (*i.e.*, the sales of businesses or assets of the merger firm), as opposed to those focused on the *conduct* of the merged firm (*i.e.*, restrictions on the merged firm's post-merger business practices). Indeed, the Manual notes critically that

[1] U.S. Dep't of Just. Antitrust Div., Merger Remedies Manual (Sept. 2020). The updated DOJ Merger Remedies Manual and framework described therein do not impact the FTC's approach to merger remedies, which is described in its Negotiating Merger Remedies Statement. See Richard Feinstein, Director, FTC Bureau of Competition, Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission (Jan. 2012).

[2] *See* Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., It Takes Two: Modernizing the Merger Review Process, Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium 12 (Sept. 25, 2018).

[3] Merger Remedies Manual, *supra*, at 24.

[4] Press Release, Dep't of Just. Off. of Pub. Affairs, Justice Department Issues Modernized Merger Remedies Manual (Sept. 3, 2020).

"[c]onduct remedies substitute central decision making for the free market."[5] Third, the last principle — that the remedy must be enforceable — reflects the DOJ's renewed focus on ensuring it has the necessary tools to enforce consent decrees already in effect. This appears to further the same goal underlying Mr. Delrahim's changes to divestiture consent decrees, which beef up the DOJ's ability to enforce them,[6] and the DOJ's recent announcement that it intends to create the Office of Decree Enforcement and Compliance, which will focus on enforcing judgments and consent decrees in civil matters.[7]

Model Remedy

The Manual reiterates several of the DOJ's longstanding principles concerning how structural remedies should be fashioned in the merger context. These include:

- **Any Divestiture Must Include All Assets Necessary for the Purchaser To Be Successful:** The DOJ reiterates that any divestiture must include all assets, tangible (*e.g.*, supplies, factories and customer lists) and intangible (*e.g.*, patents, copyrights and trademarks) that a competitor will need in order to be a successful long-term competitor in the relevant market. This includes ensuring that the purchaser of the divested business has both the ability and incentive to preserve the competition that would have otherwise been lost as a result of the merger. As we have seen in recent settlements, the DOJ also may require divestitures beyond the overlapping products to achieve this goal.
- **Divestiture of a Standalone Business Is Preferred:** The Manual explains that standalone businesses are preferred because they have demonstrated prior success competing effectively. If divesting a standalone business is not an option, the DOJ will carefully scrutinize a proposed divestiture of a carve-out business of one of the merging parties. Generally, the DOJ disfavors assembling assets from both merging parties ("mix and match" asset packages) to address remedy concerns.
- **Permitting the Merged Firm To Retain Access to Intangible Assets Is Disfavored:** Because the use of intangible assets by one firm does not preclude their use by another, merging parties may wish to retain the same access to particular intangible assets as the purchaser of the divested assets. However, the Manual notes this scenario also presents a competitive risk because it could make it more difficult for the divestiture purchaser to differentiate its products from those made by the merged party. "Moreover, where multiple firms have rights to the same trademark or copyright, *none* may have the proper incentive to promote and maintain the quality and reputation of the brand." [8]The DOJ has refused to allow such nonexclusive licenses in the past, even when there is a good argument that allowing the merged company to use the assets would be pro-competitive.

Conduct Remedies

Although the Manual indicates a strong preference for structural remedies, it does describe limited instances in which a conduct remedy may be appropriate. First, conduct remedies may be useful to facilitate effective structural relief. For example, the Manual indicates that temporary supply agreements, transitional services agreements, and temporary limits on a merged firm's ability to hire employees from the divested business may all be useful provisions in an otherwise structural remedy. However, the DOJ generally disfavors what it sees as entanglements between the parties and potential restrictions on the merged firm's ability or incentive to compete directly against the divested business, even if temporary.

Second, the Manual indicates that conduct remedies may be appropriate as a *standalone* fix only if the following circumstances are met: (1) the transaction generates significant efficiencies unable to be achieved absent the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm; and (4) the conduct remedy can be enforced effectively. With regard to situations in which a structural remedy is not possible, the Manual offers a hypothetical in which the only potential structural remedy is one that would result in the loss of "pre-existing internal efficiencies," such as a firm that uses the same distribution system for two products, only one of which would need to be divested.[9] In such a situation, the divestiture would require eliminating efficiencies that had already been previously achieved. Finally, the Manual notes that conduct remedies may be easier to enforce in markets in which "regulatory oversight is already employed and data on the merged firm's conduct would be collected regularly and audited in any event."[10]

[5] Merger Remedies Manual, *supra*, at 4.

[6] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Improving the Antitrust Consensus, Remarks Presented at the New York State Bar Association Antitrust Section (Jan. 25, 2018).

[7] See Press Release, U.S. Dep't of Just. Off. of Pub. Affairs, Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division's Civil Enforcement Program (Aug. 20, 2020).

[8] Merger Remedies Manual, *supra*, at 13.

[9] *Id.* at 16.

[10] *Id.* at 17.

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Fix-It-First Remedies

Generally, remedies take shape after the DOJ has indicated to the merging parties that it has concerns about the proposed transaction and would otherwise seek to challenge the deal.[11] In some instances, however, parties approach the DOJ before it completes its investigation with a proposed solution — a fix-it-first remedy — through which the parties remedy the transaction on their own before closing and thereby circumvent the typical consent decree process.[12] The typical fix-it-first remedy would be divesting the overlapping business so that the DOJ is then reviewing a "clean" deal with no antitrust issues. Parties often prefer the fix-it-first route, if they know the transaction is going to require a remedy, because they can have more control over the divestiture process, escape the ongoing compliance obligations in a consent decree, and avoid the potentially significant delays from a DOJ investigation and settlement process.[13]

Previously, there has been some confusion around when the parties can propose a fix-it-first remedy. The Manual suggests that merging parties wishing to use a fix-it-first remedy should complete the divestiture and present it to DOJ staff as early as possible in the review process, because a "fix-it-first remedy may be inappropriate if it is presented to the [DOJ] after the [DOJ] has determined that it has a *substantial basis* for filing a complaint challenging the transaction."[14] Similarly, the Manual indicates that parties who propose such a remedy should be prepared to give the DOJ "a reasonable period of time and information" to evaluate it.[15] However, the DOJ is not required in its prosecutorial discretion to accept a fix-it-first remedy, even if it is presented prior to the DOJ deciding to file a complaint. Moreover, as the Manual explains, the DOJ is unlikely to accept a fix-it-first solution that requires the merged parties to have ongoing obligations to the divestiture purchaser after the transaction is consummated. For example, a supply or transition services agreement, however temporary, could turn an otherwise acceptable fix-it-first structural remedy into one requiring a consent decree.

[11] The Manual notes that merging parties may still *unilaterally* decide to restructure their transaction to eliminate potential competitive harm. If the parties take action without consulting with the DOJ, and without any assurances that the restructured transaction would satisfy the DOJ's concerns, such a solution would not be considered a fix-it-first remedy, since "the [DOJ] did not 'accept' the fix." Merger Remedies Manual, *supra*, at 17 n.64.

[12] As the Manual explains, a "fix-it-first remedy does not trigger the Tunney Act process because the statute applies only to '[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws.'" Merger Remedies Manual, *supra*, at 17 n.65 (alteration in original) (citation omitted).

[13] 15 U.S.C. § 16(b).

[14] Merger Remedies Manual, *supra*, at 18 (emphasis added).

[15] *Id.*

Divestiture Buyers

In most cases, as the Manual explains, the DOJ will require the divestiture purchaser to be identified prior to agreeing to a consent decree. This is particularly important, the Manual notes, when there are likely to be very few acceptable buyers that can effectively preserve competition in the relevant market or when: (1) the assets being divested are less than a standalone business; (2) the assets are likely to deteriorate pending the divestiture; (3) the divestiture primarily consists of intellectual property or other limited assets; or (4) the business is very specialized.

The Manual goes on to identify three relevant factors that the DOJ will use in evaluating a proposed purchaser of any divestiture:

1. **Divestiture to Proposed Purchaser Should Not Cause Competitive Harm:** A Divestiture should not, for example, contribute to an existing firm's already significant market power, nor should it increase coordinated effects among a small set of competitors in a particular market. The typical example of this is when the divestiture purchaser already has a significant business that overlaps with the assets it is acquiring.
2. **Proposed Purchaser Must Have Incentive To Compete in Relevant Market:** The DOJ wants to ensure that the purchaser puts the divestiture assets to use in the relevant market and does not deploy them elsewhere. The Manual notes that robust business plans and prior efforts to enter the relevant market by the purchaser would be important considerations, as would the perceptions of suppliers and customers concerning the potential purchaser. The more "skin in the game" the purchaser will have, the more likely the DOJ will accept that purchaser.
3. **Purchaser Should Have Sufficient Acumen, Experience and Financial Capability To Compete:** The DOJ wants to ensure the proposed purchaser has experience in the relevant market and the financial resources to compete effectively going forward. The Manual notes that the DOJ will evaluate any potential purchaser on its own merits and will not engage in an exercise designed to determine the "best" potential purchaser.

Private Equity Buyers

In evaluating potential buyers to ensure they have sufficient experience and financial resources to compete going forward, the Manual explains that it will use the same criteria to evaluate both strategic purchasers and those funded by private equity or investment firms. In fact, the Manual notes that private equity buyers may be preferred because they may be more likely to have "flexibility in [their] investment strategy, ... commit[ment] to the divestiture, and ... willing[ness] to invest more when necessary."[16] This is in contrast to what appeared to be the thinking by some at both the DOJ and FTC — *i.e.*, skepticism around the long-term commitment of private equity buyers to the purchased business[17] and several recent failed remedies involving private equity.[18] As a result, private equity purchasers of divested assets may face a more difficult path at the FTC than at the DOJ, at least in the short term.

Decree Terms

In addressing consent decree terms, the Manual reiterates DOJ's longstanding preference for the inclusion of several provisions including: (1) hold separate and asset preservation requirements; (2) a divestiture trustee taking over the sale if the parties fail to complete divestitures by the set deadlines; (3) a prohibition on the merging parties reacquiring the divested assets; (4) a monitoring trustee for divestitures where the DOJ could use help in monitoring ongoing compliance; and (5) provisions designed to allow the DOJ to investigate the parties' compliance (*e.g.*, requiring the parties to submit written reports, allowing the DOJ to inspect and copy books and records, or requiring the parties to submit compliance reports).[19] The Manual also notes that any consent decree must bind all necessary entities, which can include the divestiture buyer if the consent decree creates ongoing obligations for the party. Requiring the divestiture buyer to sign the consent decree was very rare until recently, when the DOJ required it in Bayer's acquisition of Monsanto in 2018[20] and T-Mobile's acquisition of Sprint last year.[21]

In addition, the Manual highlights a few provisions that have become increasingly common in consent decrees in recent years. For example, the DOJ may require the merged firm to report otherwise nonreportable deals to the DOJ prior to consummation. Moreover, at Mr. Delrahim's direction the DOJ has added additional provisions in recent years designed to make it easier for the DOJ to enforce consent decree terms. Such provisions include: (1) providing an explicit right for the DOJ to extend the term of the consent decree if it finds a violation; (2) lowering the evidentiary standard by which the DOJ can prove a consent decree violation; and (3) requiring the parties to the consent decree to reimburse the DOJ for the costs it incurred with any successful enforcement efforts.

Key Takeaways

While the Manual reiterates a number of the DOJ's longstanding policies concerning merger remedies, it also provides some new guidance that may change how potential remedies are evaluated by the agency going forward. Companies with potential transactions in front of the DOJ should keep the following in mind:

- The parties should consider as early as possible the potential remedies and regulatory delays associated with a prospective deal so that they can address those issues in the purchase agreement and formulate the best antitrust strategy for the deal;
- For deals where closing quickly is at a real premium and remedies are likely, the parties may have to offer larger divestiture packages and frontload the divestiture process to expedite DOJ review;
- The DOJ is unlikely to accept a conduct-only remedy, particularly if there is a clear standalone business that can be divested to address the agency's competition concerns;
- Parties wishing to present a fix-it-first remedy should be prepared to show that it does not require ongoing obligations from the merging parties and should, at a minimum, present it to the agency as early in the review process as possible, and even consider incorporating it into the deal itself;
- Private equity buyers of divestiture assets should still expect close scrutiny of their suitability as a divestiture buyer, including experience in the relevant marketplace and commitment to the business, but may find less skepticism at the DOJ than at the FTC, at least in the short term; and
- Due to likely increased enforcement of consent decree deadlines and other obligations as well as increased penalties, merging parties should carefully consider during decree negotiations with the DOJ how realistic complying with the terms of the decree will be.

[16] Merger Remedies Manual, *supra*, at 24-25.

[17] *See, e.g.*, U.S. Fed. Trade Comm'n, Statement Of Comm'r Rohit Chopra, Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, FTC File No. P110014, 1 (July 8, 2020) (expressing concern about private equity firms' "buy-and-build" strategies that may allow them to "increase market power and reduce competition" through transactions that are not HSR reportable).

[18] *See* Press Release, U.S. Fed. Trade Comm'n, FTC Seeks Public Comment on Sycamore Partners II, L.P. Application for Approval to Sell 323 Family Dollar Stores to Dollar General (Apr. 5, 2017) (seeking public comment after private equity firm Sycamore Partners indicated it was no longer viable to operate the 323 Family Dollar stores it had purchased to resolve competition concerns related to Dollar Tree's acquisition of Family Dollar Stores, Inc.); Press Release, U.S. Fed. Trade Comm'n, FTC Seeks Public Comment on Franchise Services of North America's Application to Sell Assets Related to Simply Wheelz to Hertz and Avis Budget Group (Apr. 17, 2014) (seeking public comment on Franchise Services of North America, Inc.'s application to approve the sale of 22 former Advantage Rent-A-Car locations it had previously acquired as part of Hertz's acquisition of Dollar Thrifty Automobile Group, Inc.).

[19] Merger Remedies Manual, *supra*.

[20] Stipulation and Order, *United States v. Bayer AG*, No. 18-cv-01241 (D.D.C. 2018) (stipulating to the joinder of BASF, the divestiture buyer, as a party to the action).

[21] Stipulation and Order, *United States v. Deutsche Telekom AG*, No. 19-cv-02232 (D.D.C. 2019) (stipulating to the joinder of DISH, the divestiture buyer, as a party to the action).