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ANTITRUST TRADE AND PRACTICE

Expert Analysis

# Perspectives on the DOJ's Merger Remedies Guidance

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On Sept. 3, the Antitrust Division of the Department of Justice (DOJ) released the Merger Remedies Manual (the manual), which provides guidance on how the agency currently intends to approach the structure and implementation of remedies in merger cases. See Antitrust Div., U. S. Department of Justice, "Merger Remedies Manual" (2020). Assistant Attorney General Makan Delrahim, the head of the Antitrust Division, said that the new manual reflects the DOJ's "renewed focus on enforcing obligations in consent decrees and reaffirms the Division's commitment to effective structural relief." Press Release, Office of Pub. Affairs, Department of Justice, "Justice Department Issues Modernized Merger Remedies Manual" Sept. 3, 2020). The manual is the first updating of the policy in nearly a decade—the DOJ last issued guidance on merger remedies during the Obama administration with the publication of the 2011 Policy Guide on Merger Remedies (the 2011 Policy Guide). See Antitrust Div., U. S. Department of Justice, "Antitrust Division Policy Guide to Merger Remedies" (2011). The 2011 Policy Guide was later withdrawn by Delrahim in 2018 in light of a broader initiative to shorten the duration of merger reviews. See Makan Delrahim, Assistant Atttorny Gen., Antitrust Div., U.S. Dep't of Justice, "It Takes Two: Modernizing the Merger Review Process," Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium, at 11-12 (Sept. 25, 2018). The manual replaces the now withdrawn 2004 Policy Guide to Merger Remedies (the 2004 Policy Guide). See Antitrust Div., U. S. Department of Justice, "Antitrust Division Policy Guide to Merger Remedies" (2004).

A key feature of the manual is the stated strong preference for structural remedies over behavioral remedies, which Delrahim has openly criticized in the past. Additionally, the principles in the manual apply equally to both horizontal and vertical mergers, which is in accord with the 2004 Policy Guide but departs from the withdrawn, Obama-era 2011 Policy Guide. The 2011 Policy Guide distinguished between remedies for vertical and horizontal mergers and emphasized the suitability of conduct remedies for mergers raising vertical concerns. The manual also provides new guidance on the process and suitability of "fix-it-first" remedies, consent decree terms, evaluation of pre-approved buyers, including private equity and investment fund buyers, remedies for consummated deals, and red flags to look out for in proposed remedies.

## Strong Preference For Structural Remedies

The crux of the new guidance appears to be the emphasis on the "strong preference" in favor of structural remedies over behavioral ones. As described in the manual, "structural remedies are clean and certain, effective, and avoid ongoing government entanglement in the market." In this respect, the manual echoes Delrahim's publicly-declared sentiments on the topic. For example, in November 2017, a few months after his Senate confirmation, he voiced concerns about the effectiveness of behavioral remedies

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and announced an expectation that the DOJ would "cut back on the number of long-term consent decrees … [and] return to the preferred focus on structural relief." Makan Delrahim, Assistant Att'y Gen., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017). Delrahim has further described behavioral conditions as "fundamentally regulatory, imposing government supervision on what should be free markets," citing this aspect, in part, for the preference for structural remedies. Makan Delrahim, Assistant Att'y Gen., Remarks Delivered at the New York State Bar Association (Jan. 25, 2018). In contrast, the Obama-era 2011 Policy Guide was more favorably disposed to considering the use of conduct remedies, dubbing them a "valuable tool for the Division."

Despite the stated strong preference, the manual does outline a narrow set of circumstances where a conduct remedy may be appropriate to facilitate structural relief, such as agreements to transfer personnel or limited-duration supply agreements. Under such circumstances, the manual introduces stricter language than the 2004 Policy Guide, which were a key issue in the AT&T-Time Warner litigation, where the DOJ rejected the parties' proposed standalone conduct remedy and filed suit to enjoin the vertical merger. See Trial Brief for the United States at 61-67, *US v. AT&T,* 310 F.Supp.3d 161 (2018) (No. 17-2511 (RJL)); Press Release, Office of Pub. Affairs, Dep't of Justice, "Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner" (Nov. 20, 2017). The manual directs that standalone conduct commitments are only appropriate where the parties can prove that: "(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 2004 Policy Guide was less stringent—standalone conduct remedies were deemed appropriate "when a full-stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would similarly eliminate such efficiencies or is simply infeasible."

## Pre-Approved Buyers

In addressing upfront (pre-approved) buyers, the manual includes new language which emphasizes the importance of identifying such buyers when the DOJ "determines that there are likely to be few acceptable and interested buyers who will effectively preserve competition in the relevant market post-divestiture." The manual provides four examples of such scenarios: (1) where assets for divestiture are comprised of less than a standalone, ongoing business; (2) the assets are susceptible to deterioration while the proposed divestiture is still pending, and a hold separate order cannot lessen or cure this risk; (3) the assets are primarily IP or other "limited" assets; and (4) the business the parties seek to divest is so specialized that there are "likely to be few acceptable buyers." The manual does outline limited circumstances where identification of an upfront buyer may not be necessary, including where the package of assets is such that it will interest buyer(s) that would preserve competition and there are likely to be a "sufficient" amount of buyers.

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As in the 2004 Policy Guide, the DOJ reiterated the three requirements for approval of a divestiture buyer: (1) the divestiture must not cause competitive harm; (2) the DOJ must be certain that the buyer will have the incentive to use the assets to compete in the relevant market; and (3) the DOJ will evaluate the fitness of the buyer to ensure that it has the experience, acumen and financial capabilities to compete effectively on a long-term basis.

In perhaps one of the more significant aspects of the manual, the new guidance states a preference for private equity purchasers in some circumstances, contrary to recent statements from and practices by the antitrust agencies. The manual cites a U.S. Federal Trade Commission (FTC) study of merger remedies that found in some cases that private funding "was important to the success of the remedy because the purchaser had flexibility in investment strategy, was committed to the divestiture, and was willing to invest more when necessary." The manual further points to the private buyer practice of partnering with individuals and entities with relevant experience to supplement capabilities, and noted the potential relevance of these partnerships in evaluating "fitness" under the third step for agency approval of buyers, outlined above.

This preference for private equity purchasers is interesting in light of Democratic FTC Commissioner Rohit Chopra's publicly expressed concerns about long term effects on competition of private equity activity in divestiture sales. See Rohit Chopra, Federal Trade Commissioner, Remarks as Prepared for the Hearings on Consumer Protection and Competition (Dec. 6, 2018). Chopra has associated private equity participation with "with higher levels of debt financing … [which] can increase the likelihood of insolvency" and "other behavior that can reduce long-term competition, including opportunistic asset sales." Statement of Commissioner Rohit Chopra, In the Matter of Linde AG, Praxair, Inc., and Linde PLC, Commission File No. 1710068, Oct. 22, 2018. In light of these considerations, Chopa urged enforcers to "carefully examine investors' unique incentives … [by] actively prob[ing] the entire circumstances of investor involvement in a merger transaction," including any investment thesis and strategy, past investment strategy, level of debt financing and exit plans.

In recent public statements on the manual, Delrahim pushed back on the concept that private equity buyers are more likely to pursue high margins in the short term, then seek to resell assets. See Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "Reflections": Looking Back and Looking Ahead on Recent Innovations in Merger Review at the Antitrust Division, Remarks as Prepared for Georgetown Law's Global Antitrust Enforcement Symposium (Oct. 6, 2020). Delrahim described a "shift" in private equity discipline towards "strategies that are consistent with the Division's conditions for approving divestiture buyers." Citing to academic articles broadly, Delrahim stated that, since the 1980s, "the model has evolved to one in which private equity investors hold companies for longer periods of time. They invest in them, improve their performance, add expert management teams, and operate them independently until they are spun off." Delrahim further emphasized that the DOJ will evaluate both strategic and private equity buyers under the same standards, and reiterated the potential benefits of private equity funding discussed in the manual. The dissonance between Delrahim's stance, as reflected in the manual, and Chopra's prior statements may reflect a broader agency divide on the role of private equity buyers in a divestiture setting.

> The manual indicates a potential shift in some aspects of the DOJ's approach to merger remedies going forward, but is otherwise in line with current DOJ practice.

### Fix-It-First Remedies

A "fix-it-first" remedy refers to situations in which the parties to a transaction propose a structural remedy to the DOJ before the agency investigation is completed. While the DOJ has previously accepted fix-it-first remedies, the guide clarifies that conduct remedies and hybrid remedies are not acceptable as fix-it-first solutions—the parties must proposed a structural remedy that does not require monitoring or involve post-merger entanglements between the buyer and seller.

The manual also provides more guidance on *when* the parties need to present their proposal. The manual recommends that the parties present a fix-it-first remedy as soon as possible, as it "may be inappropriate if it is presented … after the Division has determined that it has a substantial basis for filing a complaint challenging the transaction." The DOJ states it is unlikely to accept a proposed remedy in lieu of filing a consent judgment at this stage. The manual further mandates giving the agency "a reasonable period of time and information needed to evaluate [a proposed remedy]." For remedies proposed after the DOJ has filed a complaint in federal court, the manual expressly states that the DOJ "reserves its right to seek to bifurcate the proceeding into a liability phase and a remedy phase."

In recent commentary on the manual, Delrahim clarified that that the Tunney Act, applicable to consent decrees, would not apply to accepted fix-it-first remedies, although the DOJ "may ask the parties to sign a 'pocket decree' that [the DOJ] can file if necessary." Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "Reflections": Looking Back and Looking Ahead on Recent Innovations in Merger Review at the Antitrust Division, Remarks as Prepared for Georgetown Law's Global Antitrust Enforcement Symposium (Oct. 6, 2020).

### Consent Decree Terms

The manual introduces new guidance with respect to consent decree terms, while reiterating some of the DOJ's prior positions, such as the necessity of hold separate and asset preservation provisions and the appointment of a selling trustee to ensure sale of the assets. For example, the manual recommends a divestiture buyer sign

the consent decree where it creates commitments for the buyer. The manual also highlights new provisions to include in consent decrees, such as the "prior notice provisions" under which the DOJ may ask for a report of non-reportable transactions which may be required where there are competitors to the merging parties whose acquisition would not be a reportable transaction, and "market conditions indicate that there is reason to believe their acquisition may be competitively significant in the wake of the transaction." The manual further mandates new standard provisions to include in all consent decrees that would lower to a preponderance of the evidence the standard of evidentiary proof for proving a violation and the appropriateness of any remedy, allow the agency to apply for a one-time extension of the term if the court finds a party has violated the decree, and require the parties to reimburse the DOJ if the latter is successful in an enforcement action.

The recently established Office of Decree Enforcement and Compliance, headed by Lawrence Reicher, is responsible for evaluating and overseeing all remedies—both structural and behavioral. See generally Office of Decree Enforcement and Compliance, U.S. Dep't of Justice (Aug. 21, 2020). Reicher recently helped direct the DOJ's review of close to 1,300 outstanding judgments from cases dating back to the 1890s. Matthew Perlman, "DOJ Issues New Guidance On Merger Fixes," Law360 (Sept. 3, 2020).

## Other Changes

*Red Flags for Remedies*

The manual identifies five red flags that increase the risk that a remedy will not preserve competition: (1) the divestiture of less than a standalone business, noting that the DOJ prefers divestitures of an entire business to ensure a viable entity is given all of the physical and intangible assets that make a business successful (personnel, customer lists, information systems, management infrastructure, etc.); (2) "mixing and matching" of assets between the parties to form the divestiture asset; (3) retention of critical intangible assets by the merged entity; (4) the existence of ongoing entanglements between the merged entity and the purchase of the divested asset; and (5) the existence of substantial regulatory or logistical hurdles for the purchaser to deploy the divested assets.

*Remedies for Consummated Transactions*

The manual includes new guidance on remedies for consummated transactions, recognizing that these scenarios "may pose unique issues." The manual recognizes the difficulty of proposing remedies, especially where the merging parties have already integrated assets, but states that, in some circumstances, unwinding or divestiture of more than the acquired assets may be necessary to restore competition. The manual does, however, identify limited circumstances where divestiture of less than the acquired assets may be approved, in particular, where the assets are necessary and sufficient for smaller competitors or market entrants to compete effectively to restore competition.

## Potential Implications

The manual indicates a potential shift in some aspects of the DOJ's approach to merger remedies going forward, but is otherwise in line with current DOJ practice. For example, the agency continues to be unlikely to accept conduct-only remedies, especially where there is a standalone business that can be readily divested. The DOJ may also prove more amenable to private equity and investment fund buyers than the FTC, although this may not be the case in the long-term, and these entities are subject to the same level of intense scrutiny as other buyers. Additionally, transacting parties may more readily consider and formulate fix-it-first remedies as part of the deal itself, in order to expedite presentation to the DOJ and avoid the agency's rejection of the proposed remedy on the grounds of insufficient review time. Finally, the transacting parties may engage in more significant negotiations with the DOJ on the substance of any consent decree as a result of the more demanding terms outlined in the manual.

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