DOJ Issues Updated Merger Remedies Guide

On June 20, 2011, the Antitrust Division of the Department of Justice (the Division) issued an updated version of the Antitrust Division's Policy Guide to Merger Remedies (the Guide).[1] The goal of the Guide is both to guide staff and to provide transparency to merging parties as to the analysis the Division uses in approaching merger remedies. For the most part, the Guide reflects what the Division has been doing for some time. Based on our recent experience negotiating remedies with the Division in connection with General Electric's sale of a majority interest in NBC Universal to Comcast, Unilever's acquisition of Alberto Culver, and Graftech's acquisition of Seadrift, we believe the Guide accurately reflects the fact-specific and flexible approach the Division takes in negotiating merger remedies.

The Guide begins by noting that: "The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market." The Guide makes clear that "[a]ny remedy assessment is fact-intensive" and requires determining what competitive harm exists and how the proposed relief will remedy that harm. Finally, "[t]he Division's central goal is preserving competition, not determining outcomes or picking winners and losers."

For the most part, the Guide's treatment of the structural remedies that will be accepted when combinations of competitors or potential competitors (so-called "horizontal" transactions) raise competitive concerns is not substantially changed from the prior version of the Guide. However, the revised Guide also discusses in detail what types of conduct remedies may be appropriate in "vertical" cases, i.e., those in which the combination of a supplier and purchaser raises concerns about foreclosure of upstream or downstream competitors. The press release accompanying the Guide also notes that the Guide "highlights the role of the Antitrust Division's recently created Office of the General Counsel, which will be principally responsible for enforcing division consent decrees."[2]

1 Antitrust Division Policy Guide to Merger Remedies, U.S. Department of Justice Antitrust Division, June 2011, *available at*: http://www.justice.gov/atr/public/guidelines/272350.pdf.

2 Press release, issued June 17, 2011, *available at*: http://www.justice.gov/opa/pr/2011/June/11-at-788.html.

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The Guide indicates that in some instances a combination of structural and conduct remedies might be employed, but largely discusses the use of structural remedies to address horizontal concerns and the use of conduct remedies to solve vertical concerns. The Division indicates it will work with international and state antitrust authorities to craft remedies that are effective across jurisdictions. The Guide also notes that for firms in regulated industries, the Division will consider the appropriate remedy with that back-drop in mind, and will collaborate with the regulatory body.

Structural Remedies

Structural remedies are those involving the sale of physical assets or licensing of intellectual property rights. A structural remedy "must include all the assets, physical and intangible, necessary for the purchaser to compete effectively with the merged entity." The Division often requires divestiture of an existing business entity to accomplish this goal, however, it may be possible to craft a solution that involves divesting only those assets that would enable another company to become a credible competitor. Sometimes the assets a company needs to be an effective competitor are less than those of an on-going business, i.e., when the acquiror already has certain necessary assets or such assets are available from third parties.

In some cases, the Guide notes, the Division may need to consider divestiture of more than an existing business entity, such as where divestiture of a world-wide business is necessary to preserve competition in the US, or where a "full line" of products is necessary to compete.

As to intangible assets, the Guide indicates that the circumstances will dictate whether sale or licensing of such rights is required and whether it is appropriate for the merged firm to retain rights to the intangible assets. The Guide notes that risks are presented if the merged firm retains rights under divested intangible assets (e.g., the right to continue to practice a patent), such as the possibility of limiting the ability of the acquiror of the divested assets to differentiate its product and compete effectively with the merged firm. Where, however, the merged firm needs rights to the intangible property to achieve demonstrated efficiencies and the rights may not be obtainable post-divestiture, the merging firm may be permitted to divest only a nonexclusive license. The Guide also indicates it may require licensing to multiple firms, but cites only one old example and our experience is that such a requirement is not typical.

Conduct Remedies

The Guide discusses conduct remedies as a method for dealing with vertical mergers, suggesting—as has been the Department of Justice's practice—that it is rare, if ever, that conduct remedies will be appropriate to resolve concerns arising from horizontal transactions. The Guide discusses the most common types of conduct relief:

- Firewall provisions ensure that certain information is limited within a firm to certain individuals and not available to others within the firm.
- Non-discrimination provisions provide that the merged firm must deal with others on equal terms. They may be accompanied by arbitration provisions to allow resolution of any disputes as to whether equal terms have been provided.
- Mandatory licensing provisions may address concerns that a company will be denied access by the merged firm to an important input.
- Transparency provisions require the merged firm to make certain information available to a regulatory body so that the merged firm cannot engage in regulatory evasion.
- Anti-retaliation provisions dictate that the merged firm cannot retaliate against companies that do business with the merged firms' competitors.
- Prohibitions on certain contracting practices such as restrictive or exclusive contracts can aid in ensuring that firms are not foreclosed access to vital inputs.
- Other types of conduct remedies can include notice of otherwise nonreportable transactions, supply contracts, and restrictions on reacquisition of scarce personnel/assets.

Practical Considerations in Implementing Effective Remedies

The Guide explains that the timing of a proposed remedy may affect the parameters of the remedy. The standard remedy sets forth certain assets to be divested and a time period in which they must be divested, typically 60 to 90 days. Further, the Division typically wants to be assured there is at least one acceptable buyer. However, when there is doubt as to whether a buyer will come forward, the Division might require a “crown jewel” provision, which requires the merged firm to divest a larger set of assets if necessary to find an acceptable buyer. The Guide indicates that in some cases using an upfront buyer may be appropriate, though stops short of suggesting that there are situations in which it will *require* an upfront buyer. (The Guide thus perpetuates the divergence in approach with the Federal Trade Commission (FTC), which more often than not requires that a buyer be identified before the transaction closes.) In some cases where a buyer can be identified, a “fix-it-first” remedy may work if such a transaction can be closed simultaneously with the main transaction and not require ongoing monitoring. Such a “fix-it-first” solution may obviate the need for a consent decree.

In all these circumstances, the Division must approve any proposed purchaser to make sure it has the ability and incentive to compete effectively. To do so, it will look at the purchase price for the divested assets to make sure it is neither so low as to suggest the acquiror will simply liquidate the assets, nor so high as to suggest the acquiror will not be able to invest appropriately or is paying a premium for the acquisition of market power. The Division will appoint a selling trustee to complete the sale if necessary. And, in some cases, it may appoint a monitoring trustee to ensure the merged firms’ compliance with the consent, particularly if there are conduct provisions.

Standard Consent Provisions

There are a number of standard consent provisions that parties should expect to see in virtually all instances:

- Hold separate provisions to ensure that the assets to be divested are maintained as separate, distinct, and able to be sold. In some cases the hold separate provisions may be accompanied by an operating trustee to make sure the assets are appropriately managed.
- A prohibition on seller financing of the sale of the divestiture assets to avoid entanglements and other problems.
- Regular reporting requirements which allow the Division to investigate any possible violation of the decree.

Enforcement

The Division has placed “the evaluation of and oversight over all Division remedies” in the Office of the General Counsel so the Division can “efficiently develop and disseminate remedy best practices and conduct ex post reviews of remedy effectiveness.” This is similar to the model of the FTC, which has a separate Compliance Division that is involved in negotiating and enforcing FTC consent decrees. The Guide concludes by noting that violations of a consent decree are punishable by both civil and criminal contempt, which may be used along with a court order compelling compliance with the judgment, where interpretations of a consent are disputed.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or either of the following attorneys:

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