September 08, 2020

DOJ Antitrust Division Issues New Manual on Merger Guidelines

On September 3, 2020, the U.S. Department of Justice's (DOJ) Antitrust Division (the Division) published the Merger Remedies Manual (the Manual), issuing new guidelines for remedying anticompetitive mergers. Specifically, the Manual sets out the Division's framework to structure and implement remedies that address potential anticompetitive effects of certain mergers on the market. These guidelines are the first revisions in nearly a decade to the Division's 2004 policy on merger remedies.

While the Manual generally follows the 2004 policy guidelines, it emphasizes a strong commitment to structural remedies and signals a shift away from permitting conduct-related remedies, regardless of whether the merger is horizontal or vertical. The Manual further establishes a renewed focus to enforce consent decree obligations. Merging companies should take note of these key changes to the Division's merger guidelines.

Commitment to Effective Structural Relief

Critically, the Manual stresses the Division's strong preference to use structural relief, like divestiture, over conduct-related relief, where a company agrees not to engage in certain conduct. While the Manual outlines instances where conduct agreements may be necessary, it makes clear that such circumstances are exceptionally narrow — i.e., where companies can prove that the deal creates benefits that cannot be achieved without a merger, a structural fix is not available, and/or the agreement completely cures any problems raised by the merger. Absent exceptional circumstances that may warrant conduct relief, the Division's Manual emphasizes its preference for structural relief in both horizontal and vertical cases as a clean and effective remedy that preserves competition and reduces the Division's enforcement burden.

The Manual instructs that merger divestitures should include all assets a buyer needs to be a long-term competitor. The sale of a stand-alone, existing business is recommended. The Manual directs the Division to critically and carefully scrutinize proposals to sell less than the entirety of an existing stand-alone business.

Renewed Focus on Enforcing Consent Decree Obligations

The Manual further describes how the Division will ensure consent decrees are fully implemented. It highlights standard consent decree provisions designed to improve the effectiveness of consent decrees and the Division's ability to enforce them. Such standard provisions include a hold separate and asset preservation provision, a selling trustee provision, and a provision setting out investigation of compliance and enforcement. Under certain circumstances, additional provisions may include a prior notice provision and a provision establishing a monitoring trustee.

The Manual also identifies the key role of the Division's newly created Office of Decree Enforcement Compliance. The Office of Decree Enforcement Compliance will be responsible for overseeing remedies to which companies agree during merger reviews. Division staff will monitor commitments made by companies, such as the submission of periodic reports, and evaluate the sufficiency of compliance. If staff conclude a party has violated a consent decree, the Division can, as it always has been able to do, implement a civil or criminal enforcement action, depending on the nature of the alleged violations.

Additional Guidelines

Additional guidelines set forth in the Manual apply to structuring and implementing remedies in all the Division's merger cases and reaffirm the Division's goals to preserve a competitive market:

- 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 and clear.

Merging companies should consult with antitrust counsel to ensure proposed remedies to preserve competition are consistent with the Division's new guidelines.

MEET THE AUTHORS

Susanne A. Johnson

Associate

+1 317 237 1465
Indianapolis
susanne.johnson@faegredrinker.com

Kathy L. Osborn

Partner

+1 317 237 8261
Indianapolis
kathy.osborn@faegredrinker.com

Services and Industries

Corporate Group

Litigation

Antitrust

Government & Regulatory Affairs

Mergers & Acquisitions