

DOJ Issues Merger Remedies Manual, Aims to Step Up Enforcement of Consent Decrees

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The US Department of Justice Antitrust Division issued a new Merger Remedies Manual on September 3 clarifying the analytical framework the Trump administration's DOJ is using to evaluate remedies that may address competitive harms stemming from proposed mergers and acquisitions, as well as consummated mergers.

In announcing the modernized manual, Assistant Attorney General Makan Delrahim said that the manual reflects the DOJ's "renewed focus on enforcing obligations in consent decrees and reaffirms the division's commitment to effective structural relief." The manual also "includes new sections explaining the approach that the division takes with consummated transactions."

Three points are particularly noteworthy in that the manual: (1) reinforces certain well-established principles regarding remedies to address horizontal mergers; (2) attempts to institutionalize Delrahim's opposition to the use of conduct remedies to address vertical mergers; and (3) reinforces efforts to ensure the effectiveness and compliance with consent agreements.

Reinforces established principles of merger remedies

Guiding principles. The new manual highlights key principles that guide the DOJ when structuring remedies:

1. The purpose of a remedy is to preserve competition at pre-merger levels
2. Remedies should not create ongoing government regulation of the market
3. Temporary relief should not be used to remedy persistent competitive harm
4. The remedy should preserve competition, not protect competitors
5. The risk of a failed remedy should fall on the merging parties, not on consumers
6. The remedy must be enforceable

The manual emphasizes that a divestiture must include the assets necessary to ensure that the divestiture buyer will be a viable, long-term competitor in the marketplace, as well as ensure that the buyer has the *incentive* to preserve competition.

The manual outlines "red flags" indicating that a remedy will not be acceptable, which include (1) divestiture of less than a standalone business; (2) mixing and matching of assets from merging parties; (3) allowing the parties to retain critical intangible assets that may make it more difficult for the divestiture buyer to differentiate its product or reduce its incentive to compete; (4) ongoing entanglements between the merging parties and the divestiture buyer that may leave the divestiture buyer dependent on the merged firm; and (5) substantial regulatory or logistical hurdles.

The manual also describes the criteria used to vet potential divestiture buyers, stating that a divestiture buyer will be approved only after the DOJ is satisfied that an acquisition by the buyer does not cause competitive harm, the purchaser has the incentive to use the assets to compete in the relevant market and that the purchaser has "managerial, operational, technical and financial capability."

Codifies DOJ's opposition to use of conduct remedies

During the Trump administration, the DOJ has expressed skepticism of conduct remedies. Indeed, in one of his first speeches as assistant attorney general in November 2017, Delrahim argued that “antitrust is law enforcement, it’s not regulation” and, while recognizing “at times antitrust enforcers have experimented with allowing illegal mergers to proceed subject to certain behavioral commitments,” he said “[t]hat approach is fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market,” foreshadowing the DOJ’s effort to enjoin the AT&T-Time Warner merger. The manual takes the position that structural remedies are the preferred approach in *both* horizontal and vertical mergers, given that they are “clean and certain, [and] effective.”

The new manual places the burden on merging parties to show that conduct relief is an appropriate remedy by establishing 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. Although the manual is critical of conduct remedies standing alone, they take the position that “tailored conduct relief may be useful ... to facilitate effective structural relief,” such as requiring a temporary supply agreement with a divestiture buyer and restrictions on the merged firm re-hiring employees transferred to the divestiture buyer.

DOJ and FTC step up efforts to ensure effectiveness, compliance with consent decrees

Issuance of the manual coincides with initiatives at the DOJ and the FTC to ensure compliance with, and enforceability of, consents. At the DOJ in 2017, Delrahim introduced four new terms into DOJ consent decrees: (1) lowering the standard to establish alleged violations from clear and convincing evidence to a preponderance of the evidence; (2) requiring defendants to compensate the government for attorney’s fees and costs in connection with monitoring and enforcement of consent decrees; (3) allowing the DOJ to extend the consent decree in the event of a violation; and (4) allowing the DOJ unilaterally to terminate the decree. These terms are memorialized in the new manual as “standard provisions.” In August 2020, Delrahim announced the creation of the Office of Decree Enforcement and Compliance to oversee review of decree compliance and investigate potential decree violations.

The FTC also completed a merger remedy retrospective in 2017 to review its approach to merger remedies. The study found that while FTC orders issued between 2006 and 2012 had generally succeeded, improvements could be made to the scope of divestiture packages and certain terms in consent orders. Since then, FTC officials have said that the agency would require the divestiture of on-market, rather than pipeline products, to resolve concerns raised by pharmaceutical mergers.

Key takeaways

The DOJ manual reinforces certain well-established principles regarding remedies to address horizontal mergers, including that the purpose of a remedy is to preserve competition at pre-merger levels and the remedy should preserve competition, not protect competitors. While the manual is issued by the DOJ alone, in this sense the manual reflects the practice at both the FTC and DOJ. Looking forward, it remains to be seen if the manual will institutionalize Delrahim’s resistance to the use of conduct remedies to address vertical mergers at the DOJ, and if it does, if that approach will be adopted at the FTC. One thing is certain – merging companies can expect both agencies to continue their efforts to ensure the effectiveness and compliance with consent agreements.

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