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Litigation & Antitrust Practice Group

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DOJ Antitrust Division Issues Updated Merger Remedies Guide

On June 17, 2011, the Department of Justice (DOJ) released a revised Antitrust Division Policy Guide to Merger Remedies (Policy Guide), which the DOJ says “reflects the changes in the merger landscape and the lessons the division has learned.” The Policy Guide is the first direction from the DOJ regarding merger remedies since the guidelines were last revised in 2004. The DOJ explains that one reason for the revision is that “[s]ome have interpreted the division’s 2004 guidance on remedies to mean that if a structural remedy is not available in a particular merger matter, or would be ineffective, the division must let the transaction proceed. That interpretation does not accurately reflect the policy or practice of the Antitrust Division.” Rather, the DOJ’s practice is to “protect consumers from anticompetitive mergers” by effectively restoring competition through the use of structural, conduct, and/or hybrid merger remedies. The DOJ’s press release regarding the new Policy Guide is available [here](#). The Policy Guide is available [here](#).

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The Policy Guide covers proposed or consummated mergers. Unlike the 2004 guidelines, which state that structural remedies are preferred to conduct remedies, the 2011 Policy Guide does not give preference to any one type of remedy, and instead proposes that conduct remedies can be an effective method of addressing anticompetitive concerns. The Policy Guide stresses that an appropriate merger remedy will effectively preserve competition and will have a close, logical relationship to the alleged violation. In horizontal mergers, the most common merger remedies are, of course, structural. These types of remedies typically include all the physical (*e.g.*, factories) or intangible (*e.g.*, patents or rights) assets that are necessary for the third-party purchaser of the assets to compete effectively with the merged entity. In vertical merger matters, the DOJ indicates that it will pursue conduct remedies, and may also consider structural remedies, particularly when the vertical integration is a small part of a larger deal.

A conduct remedy proscribes certain aspects of the merged firm’s business conduct post-merger. Common conduct remedies include firewall, non-discrimination, mandatory licensing, transparency and anti-retaliation provisions. The Policy Guide states that conduct remedies should be specifically tailored to the particular competitive concerns raised by the merger, and must be clearly and carefully drafted so that the proscribed conduct is precise and unambiguous. The Policy Guide provides that conduct remedies are especially appropriate when a structural remedy would eliminate

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the merger's potential efficiencies but, absent a remedy, the merger would be anticompetitive. The DOJ may also pursue a hybrid of structural and conduct remedies for certain mergers.

The Policy Guide also reaffirms that, unlike the FTC, which is skeptical of fix-it-first remedies, the DOJ may accept a pre-consummation "fix-it-first remedy" that resolves the DOJ's concerns with the proposed merger without requiring litigation. A fix-it-first remedy usually involves sale of a subsidiary or division, or specific assets, from one or both of the merging parties to a third party. According to the Policy Guide, fix-it-first remedies are desirable because they effectively preserve marketplace competition more quickly than a consent decree, and provide the parties with flexibility in structuring an acceptable and appropriate divestiture. That said, the DOJ will not accept a fix-it-first remedy if it requires post-consummation obligations or monitoring. Because the DOJ carefully screens any proposed fix-it-first remedies, parties should provide a written agreement that specifies which assets will be sold, details any conditions of the sale, provides that the DOJ will be notified when the sale occurs, and states that the agreement constitutes the entire understanding concerning the divested assets.

Key Takeaways

- The Policy Guide stresses that merger remedies, whether divestitures or conduct provisions, "should focus on preserving competition, not protecting individual competitors. . . The division's central goal is preserving competition, not determining outcomes or picking winners and losers."
- The Policy Guide reflects the DOJ's shift in preference for structural remedies to embrace more comprehensive and inventive conduct and/or hybrid remedies in vertical mergers, which is more consistent with the view held by the DOJ during the 1990s.
- The Policy Guide highlights the role of the Antitrust Division's recently created General Counsel's Office in ensuring that companies are complying with consent decrees issued in merger cases, which makes it consistent with how the FTC is structured. According to the Guide, the office directly oversees the DOJ litigators' ongoing review process.
- The Policy Guide acknowledges that the merger landscape has changed in recent years, and reflects the increased complexity and globalization of merger deals by stressing the need to collaborate and communicate with other antitrust enforcement bodies.

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