Insights: Alerts

Department of Justice Updates Merger Remedies Manual

SEPTEMBER 4, 2020 Written by Thomas J. Lang, Peter M. Boyle and Christina E. Fahmy

On September 3, 2020, the Department of Justice ("DOJ") released a revised Merger Remedies Manual reflecting the DOJ Antitrust Division's current policy framework for implementing remedies in merger cases where the parties seek to resolve the Antitrust Division's competitive concerns via a consent decree (settlement) that allows the merger to proceed with changes that preserve or restore competition.

Two years ago, the Antitrust Division withdrew its 2011 guidance on merger remedies and reinstated its 2004 Policy Guide to Merger Remedies while the Division undertook a review of its entire approach to merger remedies. The newly issued Merger Remedies Manual is the culmination of that recent review and reflects the Division's renewed commitment to structural relief rather than conduct remedies, and a sharpened focus on the enforcement of consent decrees resolving merger challenges.

The new manual confirms the strong DOJ preference for structural remedies in both horizontal and vertical merger cases in order to avoid the need for ongoing government oversight and regulation of the activity of individual businesses. Structural remedies are considered to be much cleaner, and more certain and effective at remedying expected competitive harm from a merger according to the new manual.

In addition, the new manual reinforces the Antitrust Division's efforts to effectively enforce its consent decrees resolving contested mergers. It emphasizes the role of the Division's new Office of Decree Enforcement and Compliance, and explains several typical consent decree provisions used to improve the effectiveness and enforceability of consent decrees.

The revised manual also adds new sections detailing the Division's current general approach to obtaining relief in consummated transactions, and the specific basis for its preference for "upfront buyers" for divestiture assets prior to entering into a consent decree.

Finally, the manual also introduces a new section outlining certain "red flag" characteristics that indicate an increased risk of a remedy that will not preserve competition. Examples of such characteristics provided in the manual include:

- Divestiture of less than a standalone business
- Mixing and matching divested assets of both firms
- Allowing the merged firm to retain rights to critical divested intangible assets
- Ongoing entanglements between the merged firm and divestiture purchaser
- Substantial regulatory or logistical hurdles for the divestiture purchaser

The revised manual is intended to reflect current agency policy and practice in the area of merger remedies.

Therefore, the manual will prove particularly helpful for merging parties (and their legal advisors) that do not have very recent experience negotiating merger remedies and consent decree provisions with the Antitrust Division.

Related People



Thomas J. Lang
t 202.508.5830
tlang@ktslaw.com



Peter M. Boyle
t 202.508.5831
pboyle@ktslaw.com



Christina E. Fahmy
t 202.508.5834
cfahmy@ktslaw.com