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ALERT MEMORANDUM

DOJ Antitrust Division Issues Revised Merger Remedies Manual, Reorganizes

September 8, 2020

On September 3, 2020, the Antitrust Division of the DOJ issued a revised Policy Guide to Merger Remedies, following shortly after it announced a reorganization of its civil enforcement to create an Office of Decree Enforcement and Compliance.

The Policy Guide to Merger Remedies largely codifies a trend towards strengthening of the Division's preference for structural remedies—such as divestitures—over conduct remedies—such as firewalls. This revision now expressly states that "[s]tructural remedies are strongly preferred in horizontal *and vertical merger* cases because they are clean and certain, effective, and avoid ongoing government entanglement in the market" (emphasis added), responding to a perception within the bar that vertical mergers (involving firms at different levels of the distribution chain that do not compete directly) are more amenable to conduct-only remedies. The Policy Guide also lays out conditions when the Division may accept a conduct-only remedy: (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.

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Notwithstanding the Division's stated preference for structural remedies in vertical mergers, we still expect that vertical mergers will more often meet the Division's criteria for conduct remedies than will horizontal ones. For example, a vertical merger may raise concerns about the misuse of confidential information that might be resolved by creating a firewall between divisions, or a vertical merger may raise concerns about the firm disadvantaging companies that compete at another level that might be resolved by pricing to an externally verifiable benchmark. The Policy Guide also expresses a view that conduct remedies should not interfere in the normal price setting or competitive process, noting that they "substitute central decision making for the free market" and "may…prevent a firm from responding efficiently to changing market conditions." Statements like these reflect a view from the current Division leadership that some past conduct remedies in vertical merger cases may not have been necessary and may have interfered with competition. However, whether the new Policy Guide will actually be reflected in decisions may be difficult to judge, as vertical mergers are subject to enforcement actions far less frequently than horizontal mergers.

Separately, on August 20, 2020, the Antitrust Division announced that it was conducting an internal reorganization. The principal changes are the following:

1. Creation of a new Office of Decree Enforcement and Compliance.
2. Creation of a new Civil Conduct Task Force to focus on non-merger conduct cases.
3. The current Technology and Financial Services section will focus on technology markets only.
4. The current Telecommunications and Broadband section will add media and entertainment markets to its responsibilities.
5. The current Media, Entertainment, and Professional Services section will no longer have responsibility for media and entertainment markets and will add responsibility for Financial Services, Fintech, and Banking.

Although not the stated aim of the reorganization, the changes shift the Division's structure to more closely approximate the organization of the FTC, which has separate Compliance and Anticompetitive Practices Divisions. Unlike the Compliance Division of the FTC, we understand that the primary litigating sections will retain responsibility for negotiating remedies, and that the Division's Office of Decree Enforcement and Compliance will be lightly staffed and focus primarily on enforcement of decrees after the fact. The new Civil Conduct Task Force may also lead to an uptick in non-merger enforcement, which some critics had suggested was deprioritized by more urgent merger matters being handled by the same units in DOJ. The FTC, which has separate conduct and merger units, has brought the majority of US government civil non-merger enforcement actions (though DOJ, of course, handles all criminal matters). Having a unit focused on civil conduct cases may lead to more of those cases being investigated and, ultimately, pursued.

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