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Back to Article

Revised merger remedies guide reflects DOJ practice

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Janet McDavid and Charles Dickinson
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Following in the wake of several high-profile vertical mergers, the Antitrust Division of the U.S. Department of Justice updated its Policy Guide to Merger Remedies on June 17. The new policy guide, which replaces the division's 2004 guide, is intended to serve as a tool for Antitrust Division staff, merging parties and the bar seeking greater transparency into the division's current approach to merger remedies. While conduct remedies in vertical mergers have captured media attention of late, the new policy guide reinforces that remedies are always fact specific — they are designed to fit the alleged violation and flow from the theory of competitive harm.

Structural remedies, which generally involve the divestiture of certain assets (physical and intangible) or the divestiture/licensing of intellectual property rights, remain the division's preferred solution to competition concerns in horizontal merger matters. In fact, divestiture is the typical remedy in the vast majority of horizontal mergers in which the combination of assets would result in enhanced market power. The goal of divestiture is for the purchaser to be an effective competitor, so it is necessary that any divestiture includes all of the assets necessary for the purchaser to compete effectively with the merged entity. The division therefore prefers the divestiture of an existing business entity that has a demonstrated ability to compete in the relevant market. However, the division may also approve divestiture of less than an existing business (e.g., certain assets within a business) or insist on divestiture of more than an existing business, depending on the characteristics of the market and the purchaser.

In vertical transactions, the updated policy guide better reflects the division's recent willingness to craft innovative and comprehensive remedies, including conduct remedies in appropriate cases. Under the Bush administration, the division rarely challenged vertical mergers, so few mergers involved conduct remedies. But an "evolved" merger landscape has forced the division to alter its approach to remedies. Now, recognizing the potential efficiencies that can result from vertical mergers, the division seeks a wider variety of remedies when necessary to rebalance the competitive landscape.

When a vertical merger creates changed incentives or enhances the ability of the merged entity to impair the competition, the division will consider tailored behavioral remedies designed to prevent conduct that might harm consumers. As with all remedies, conduct relief is tailored to the particular competitive concern. To rebut the common critique that conduct remedies are easily evaded because the provisions are often vague or subject to multiple interpretations, the new policy guide stresses that clear and careful drafting will be especially important in creating effective conduct relief; the division has put its new general counsel in charge of enforcement.

With an increasing number of mergers posing complex vertical issues, crafting effective and enforceable remedies is ever more challenging. However, the new policy guide underscores that the division will not treat vertical mergers as too difficult to challenge or too dangerous to block outright when structural relief is not feasible, as is often the case in mergers between firms that do not operate in the same markets. In some situations, there is a middle road. The Antitrust Division made clear that the division is "prepared to clear a merger, block a merger or accept a remedy that maintains efficiencies as long as the result eliminates any competitive harm."

Like the updated Horizontal Merger Guidelines, released last August, the new policy guide is intended to better reflect actual practice of the division. When former Assistant Attorney General Christine Varney took over the Antitrust Division in April 2009, the division began to impose a variety of conduct remedies in several important mergers. The division has not hesitated to employ any form of relief to address competition concerns, even in some of its most high-profile cases.

In the 2010 merger of concert venue operator Live Nation Inc. and ticket seller Ticketmaster Entertainment Inc., the division expressed concern about Live Nation's ability to condition access to its venues and artists on the purchase of Ticketmaster's ticketing services. In the end, the division chose not to block the merger. That decision was not based on the lack of a clear structural remedy that could maintain the efficiencies of the vertical integration. Instead, the parties negotiated a creative remedies package that included a prohibition on retaliation against venues that use competing ticket sellers and a requirement that the merged entity provide its biggest rival, Anschutz Entertainment Group, with the right to use Ticketmaster's ticketing platform to sell tickets.

The creativity did not end with the Ticketmaster-Live Nation deal. Comcast Corp.'s joint venture with NBC Universal Inc. raised the prospect of Comcast refusing to provide access to NBC's programming to its cable and satellite competitors. Comcast would also be in a position to handicap the online-video-distribution industry, an emerging competitor to cable providers like Comcast, by withholding popular NBC programs. The consent decree includes nondiscrimination and mandatory licensing provisions, prohibitions on restrictive licensing practices and the divestiture of governance and voting rights in Hulu, the Web distributor in which NBC held an ownership stake.

Most recently, when Google Inc. announced its plans to acquire travel technology company ITA Software Inc., the division concluded that, as a leading player in the Internet search industry, Google had the incentive and ability to impair its rivals by removing access to a critical input in travel-search software. In taking the middle road and deciding not to block the merger, the division chose to harness the expected efficiencies from Google's search expertise applied in the travel-search industry, while simultaneously eliminating its ability to disadvantage competitors. The resulting consent decree requires Google to continue to improve ITA's proprietary software, license it to rivals and implement firewalls to prevent the sharing of competitively sensitive information between the ITA business and a new Google travel site that would compete with ITA's customers.

As if recent practice were not enough to show the division's newfound confidence in the ability of conduct remedies to effectively preserve competition, the new policy guide outlines a "panoply" of remedies available to address the unique competition concerns raised in vertical mergers. The most common conduct remedies include the following:

- Firewalls are designed to prevent the sharing of sensitive information within a vertically integrated firm when, for example, the downstream firm possesses confidential information about the upstream firm's rivals, or vice versa. Firewalls may require separating the sensitive information and monitoring to ensure compliance with the policy.

- Nondiscrimination provisions bar an upstream firm from denying equal access and terms to its downstream competitors. The division may insist on including an arbitration provision, so controversies can be resolved without the division's involvement.

- Mandatory licensing prevents the merged firm from withholding a key input necessary to preserve competition. The remedy may require parties to license technology on fair and reasonable terms, including mandatory arbitration clauses.

- Transparency provisions require the merged entity to regularly provide the division with information, such as prices.

- Anti-retaliation provisions prevent the merged entity from discriminating against customers for actions the merged entity does not like, e.g., contracting with its competitor.

- Prohibitions on certain contracting practices prevent the merged entity from entering into restrictive contracts if it controls a vital input.

- Other conduct remedies include requiring notice of nonreportable mergers, supply contracts, restriction on reacquisition of scarce personnel assets and arbitration provisions. Of course, many cases will require some combination of structural and behavioral relief.

Equally noteworthy is the division's new plan to monitor and enforce merger remedies. According to the new guide, no remedy is effective unless it can be enforced. To help ensure that parties comply with all remedies as they are designed, the division has placed evaluation and oversight responsibility in the newly created General Counsel's Office, directed by J. Robert Kramer II, the division's former director of operations. By concentrating enforcement in this office, the division hopes to ensure that remedies are strictly enforced. It also hopes to foster greater consistency in remedies. Previously, this key task was left to the individual enforcement sections that negotiated the remedy.

Finally, the General Counsel's Office will develop and disseminate remedy best practices and conduct ex post reviews of remedy effectiveness, such as provisions that allow the division to monitor compliance. The General Counsel's Office will now be charged with ensuring that consent decrees in the new merger landscape effectively eliminate the anti-competitive aspects of the transactions.

Janet McDavid is a partner, and Charles Dickinson is an associate, at Hogan Lovells in Washington. The firm represented ITA in the ITA/Google merger and Anschutz Entertainment Group in the Ticketmaster/Live Nation merger discussed in this piece.

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