GIBSON DUNN

September 21, 2020

# ANTITRUST MERGER ENFORCEMENT UPDATE: DOJ ANTITRUST RELEASES NEW GUIDELINES FOR MERGER REMEDIES

***U.S. and EU Enforcers to Renew Focus on "Below the Radar" Transactions***

To Our Clients and Friends:

On September 3, 2020, the Antitrust Division of the U.S. Department of Justice (the "Division") released a new Merger Remedies Manual (the "Manual"). The Division traditionally reviews mergers involving airlines, health insurance, finance, publishing, media, beer, telecommunications, and other industries. In 2018, Assistant Attorney General Makan Delrahim formally withdrew the 2011 Policy Guide to Merger Remedies ("2011 Guide"), relying instead on the Policy Guide to Merger Remedies published in 2004 ("2004 Guide"), while the Division reconsidered its remedy policies.[1] This new Manual is the culmination of that process.

The Manual, which only governs DOJ procedures and not those of the Federal Trade Commission,[2] expresses a strong preference for structural relief—including for vertical transactions (i.e., transactions involving parties that operate at different levels of a supply chain, such as a merger between a manufacturer and a distributor). The Manual also addresses new topics such as structuring remedies in the context of consummated mergers and coordination with global enforcers and regulatory agencies. Lastly, the Manual describes certain provisions the Division will require in consent decrees to ensure effective enforcement.

In addition, FTC Chairman Simons and European Commissioner Vestager recently made comments signaling increased scrutiny of deals that do not meet the HSR or EU thresholds. These comments indicate that both the FTC and the EC will be more aggressive in using their existing authority to investigate smaller acquisitions that might involve future competitors.

## New DOJ Merger Remedy Manual Issued

The Division's new Manual includes a number of important revisions, although some reflect existing practice as opposed to new policy.

***Strong Preference for Structural Relief for Horizontal and Vertical Concerns.*** Signaling a clear break from the DOJ's 2011 Guide[3] and the FTC's merger remedies policy,[4] which allow for non-structural "conduct" or "behavioral" remedies in vertical merger cases, the Manual expresses a "strong[] prefer[ence]" for structural remedies in *both* horizontal *and vertical* merger cases: "[a]lmost all merger remedies are structural," and that conduct remedies are only appropriate in "limited circumstances."[5] The Manual acknowledges that short-term conduct remedies may be needed to facilitate structural relief,[6] but states that a stand-alone conduct remedy is only appropriate where: "(1) the 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."[7]

***Characteristics of Potentially Ineffective Divestitures.*** The Manual outlines characteristics of divestitures that may be ineffective in preserving competition, including where the divestiture is of less than an existing standalone business; where it combines previously independent capital; where the merged firm retains rights to critical intangible assets; where ongoing entanglements remain between the firms; and where there are substantial regulatory or logistical hurdles.[8] However, while the 2004 Guide "strongly disfavored" so-called "crown jewel provisions" that require certain valuable assets be included in the divestiture package if the parties are unable to sell the initially agreed-upon assets within a certain time.[9] The new Manual does not comment on such provisions. The FTC merger remedies policy, in contrast, expressly allows for the use of "crown jewel" provisions and the FTC has a record of approving such provisions.[10]

Under existing policy, the Division will appoint a "divestiture trustee" in the event the parties are unable to find a buyer and sell the divested assets by the agreed-upon deadline, which is in most cases 90 days after the entry of a hold separate order. With this change in the Division's policy, Division might be more willing to consider crown jewel provisions as an alternative to divestiture trustees. While a crown jewel might place additional risk on the merging parties because it requires them to sell valuable assets, in some cases a crown jewel enables the Division to accept a divestiture remedy that it would otherwise be unwilling to agree to—giving merging parties another option for settling merger cases without litigation. Crown jewel provisions might be an attractive alternative resolution for the Division and the merging parties in cases where there is heightened risk that the parties will be unable to find an acceptable buyer for the divested assets within an acceptable timeframe.

***Private Equity Firms as Divestiture Buyers.*** The Division has as long-standing preference for identifying an upfront divestiture buyer, and the Manual notes that "identification of an upfront buyer is particularly important in cases where the Division determines that there are likely to be few acceptable and interested buyers."[11] In the past, however, the Division has not indicated a preference for any particular type of otherwise qualified buyer for the to-be-divested assets. In a departure from this practice, the Division's Manual remarks that, in some cases, a private equity purchaser "may be preferred," recognizing that private equity purchasers may have "flexibility in investment strategy," be "committed to the divestiture," and be "willing to invest more when necessary."[12] The Division cites an FTC study in support of its favorable view of private equity purchasers, although the FTC has not expressed a similar preference in its remedies guide.

***Consummated Mergers.*** For the first time, the Manual explicitly addresses remedies for transactions challenged post-consummation.[13] The Manual recognizes that consummated mergers "may pose unique issues," as the parties often have already integrated their assets, making it difficult to craft an effective divestiture that would eliminate anticompetitive effects. But the Manual reiterates that structural relief may be necessary in some circumstances to eliminate anticompetitive effects. For example, it may be necessary to unwind a merger and divest more or less than the acquired assets to effectively restore competition. The Division has advocated a similar point in prior proceedings, so this change does not mark a significant departure from existing Division practice.[14]

***Global Enforcement and Regulatory Collaboration.*** As antitrust merger enforcement and merger control has proliferated around the world, and is now a staple of antitrust enforcement in 120 countries and in state AG offices, mergers are commonly subject to multiple investigations by authorities in and outside the United States. The Manual includes new sections outlining the Division's practice of collaborating with foreign and state antitrust enforcers to minimize unnecessary jurisdictional conflict structure remedies that are effective across jurisdictions.[15] The Division will also work with regulatory agencies to avoid inconsistent requirements. While the Division will consider the impact of regulations on competitive dynamics, the Manual notes that the "existence of regulation typically does not eliminate the need for an antitrust remedy to preserve competition effectively."[16]

***Consent Decree Terms*.** The Manual also provides greater detail on consent decree terms that the Division likely will require in future settlements.[17] For example, the Manual recommends consent decrees explicitly provide for Division appointment of a selling trustee,[18] and that, in certain circumstances, a decree may require the merged firm to report otherwise non-reportable deals.[19] And the Manual details certain "standard provisions" that must be included in consent decrees to allow for effective enforcement, including (1) reducing DOJ's burden to establish violation of a consent decree from clear and convincing to preponderance of the evidence; (2) allowing the Division to apply for a one-time extension of the consent decree terms upon a court finding a violation; (3) allowing the Division to terminate the decree upon notice to the court and the parties; (4) allowing courts to enforce provisions that are stated specifically and in reasonable detail; and (5) requiring parties to provide reimbursement to the Division for costs incurred in connection with a successful enforcement effort.[20] While the Division has increasingly been including these provisions in their Final Judgments over the last couple of years, the Manual memorializes these requirements. As a whole, these new provisions will strengthen the Division's ability to police and seek fines for alleged consent decree violations.

***New Compliance Unit.*** Lastly, the Manual outlines the responsibilities of the newly created Office of Decree Enforcement and Compliance.[21] This Office is charged with ensuring rigorous enforcement of merger remedies, and it will evaluate and provide oversight over all remedies. While on its face this new office appears to mimic the FTC Bureau of Competition's Compliance Section, it will only monitor post-decree compliance, whereas the FTC's Compliance Section is an active participant in remedy negotiations. Whether this has a practical impact on DOJ merger remedies remains an open question.

**FTC Chair and EC Competition Commissioner Signal Increased Scrutiny of "Below the Radar" Transactions**

Also noteworthy are recent statements by FTC Chairman Joseph Simons and EU Commissioner for Competition Margrethe Vestager[22] promising stepped-up review and scrutiny of "non-reportable transactions"—that is, deals that fall below applicable merger reporting statutory thresholds.

Referring to so-called "killer acquisitions" in which transactions by established incumbents that take out a nascent or potentially disruptive competitor, Commissioner Vestager observed that "there are a handful of mergers each year that could seriously affect competition, but which we don't see because the companies' turnover doesn't meet thresholds" that would trigger a mandatory filing and review by the European Commission.[23] Commissioner Vestager promised to use an existing provision, Article 22 of the EU Merger Regulation, which allows the European Commission to review transactions that affect "trade between member States and [threaten] to significantly affect competition within the territory of the member State or States making the request." Originally designed as a catch-all referral mechanism for EU member states lacking a home-based merger control authority, Article 22 contains no minimum filing thresholds, giving the Commission a tool to immediately implement Commissioner Vestager's policy announcement.

Likewise, the FTC has recently directed several large technology companies to provide information about acquisitions that were not reportable under the HSR Act to "better understand" some of these non-reported transactions, in particular, those of nascent or potential competitors.[24] Chairman Simons noted that "[o]ne potential outcome of this study is that we may decide to issue an additional special order requiring premerger filings for acquisitions by these companies at levels well below the normal statutory thresholds" and that the FTC would have "the option" to take an enforcement action "where warranted."[25] Following this statement, the FTC also announced that it has revamped its Bureau of Economics' Merger Retrospective Program to expand the Bureau's retrospective research efforts analyzing the effects of consummated mergers over the last 35 years.[26]

These actions followed Chairman Simons' February 2020 announcement of the FTC's investigation of the large technology companies.[27] A statement by Commissioners Christine Wilson and Rohit Chopra from February 2020 echoed Simons' sentiments, stating that the "Commission will benefit from a deeper understanding of the kinds of transactions – and the nature of their competitive impact – that were not reportable under the HSR requirements."[28]

Chairman Simons' and Commissioner Vestager's statements continue a recent pattern of enforcers signaling increased scrutiny of transactions that fall below applicable reporting thresholds—scrutiny that is designed to target acquisitions of potential or nascent rivals to the acquiring company. Transactions in the tech and pharma sectors where startups often generate little or no revenue, but might potentially pose a competitive threat in the future, could be subject to investigations under this new policy.

In the United States, parties may consummate a transaction only to later discover that the FTC has opened an antitrust investigation that casts doubt on the deal's ultimate prospects. In Europe, there will be an increased chance that a relatively small transaction may nevertheless be subjected to a more involved and burdensome EU-level review (as opposed to review at the member state level). This increased uncertainty will have a knock-on effect for transaction planning and documentation, which must account for expected regulatory filings and clearance timelines.

---

[1] U.S. Dep't. of Justice, Justice Department Issues Modernized Merger Remedies Manual (Sept. 3, 2020), *available at* https://www.justice.gov/atr/merger-enforcement.

[2] The Federal Trade Commission adopted its own guide to negotiating merger remedies in 2012 that remains in effect. Federal Trade Comm'n, Negotiating Merger Remedies (Jan. 2012), *available at* https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

[3] U.S. Dep't. of Justice, Antitrust Division Policy Guide to Merger Remedies – June 2011, https://www.justice.gov/atr/page/file/1098656/download.

[4] Federal Trade Comm'n, Negotiating Merger Remedies (Jan. 2012), *available at* https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

[5] U.S. Dep't. of Justice, Merger Remedies Manual (Sept. 2020), *available at* https://www.justice.gov/atr/page/file/1312691/download at 12 ("Manual"); *see also id.* at Part III.B ("Structural Relief Is the Appropriate Remedy for Both Horizontal and Vertical Mergers").

[6] *Id.* at Part III.B.1 ("Conduct Relief to Facilitate Structural Relief").

[7] *Id.* at Part III.B.2. ("Stand-Alone Conduct Relief").

[8] *Id.* at Part III.F ("Characteristics that Increase the Risk a Remedy Will Not Preserve Competition").

[9] 2004 Guide at Part IV.H ("Crown Jewel Provisions Are Strongly Disfavored").

[10] For example, the FTC's consent decree in connection with Pinnacle Entertainment's 2013 acquisition of Ameristar Casinos contained a "crown jewel" clause providing for a potential forced divestiture of Ameristar's St. Charles casino—a centerpiece of the transaction—if Pinnacle did not divest the Lumiere casino identified by the FTC as the source of competitive concern. *See* Federal Register Notice: Analysis of Agreement Containing Consent Orders to Aid Public Comment; Proposed Consent Agreement, August 19, 2013, https://www.ftc.gov/sites/default/files/documents/cases/2013/08/130819pinnaclefrn.pdf.

[11] Manual at Part IV.A ("Identifying a Buyer").

[12] *Id.* at Part IV.B ("The Division Must Approve the Proposed Purchaser").

[13] *Id.* at Part III.D ("Remedies for Transactions Challenged Post-Consummation").

[14] *See* Brief for the U.S. as Amicus Curiae in Support of Appellee Steves and Sons, Inc., *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 19-1397 (4th Cir. Aug. 23, 2019) (arguing that laches should not bar all private-party divestiture suits even after a merger has been consummated, as a party may be injured by a merger after it has been consummated, or the threat of antitrust injury may not materialize until post-closing).

[15] Manual at Part III.E ("Collaboration When Structuring a Remedy").

[16] *Id.*

[17] *Id.* at Part VI ("Decree Terms").

[18] *Id.* at Part VI.C ("Selling Trustee Provisions Must Be Included in Consent Decrees").

[19] *Id.* at Part VI.F ("Prior Notice Provisions May Be Appropriate").

[20] *Id.* at Part VI.I ("Consent Decrees Must Include Standard Provisions Allowing Effective Enforcement").

[21] *Id.* at Part VII.A ("The Office of the Chief Legal Advisor Oversees Compliance and Enforcement").

[22] "The Future of EU Merger Control," International Bar Association Annual Conference (Sept. 11, 2020).

[23] *Id.*

[24] Prepared Remarks of Chairman Joseph Simons, *ICN 2020: Digital Showcase Introductory Remarks* (Sept. 14, 2020), here.

[25] *Id.*

[26] Press Release, *Overview of the Merger Retrospective Program in the Bureau of Economics*, FTC (Sept. 17, 2020), here.

[27] Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[28] Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, *Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders* (Feb. 11, 2020), here.

*The following Gibson Dunn lawyers prepared this client alert: Adam Di Vincenzo, Kristen Limarzi, Chris Wilson, Kaitlin Zumwalt and JeanAnn Tabbaa.*

*Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please feel free to contact the Gibson Dunn attorney with whom you usually work, the authors, or any member of the firm's Antitrust and Competition Practice Group:*

***Antitrust and Competition Group:***

***Washington, D.C.***
*Adam Di Vincenzo (+1 202-887-3704, adivincenzo@gibsondunn.com)*
*Scott D. Hammond (+1 202-887-3684, shammond@gibsondunn.com)*

*Kristen C. Limarzi (+1 202-887-3518, klimarzi@gibsondunn.com)*
*Joshua Lipton (+1 202-955-8226, jlipton@gibsondunn.com)*
*Richard G. Parker (+1 202-955-8503, rparker@gibsondunn.com)*
*Cynthia Richman (+1 202-955-8234, crichman@gibsondunn.com)*
*Jeremy Robison (+1 202-955-8518, wrobison@gibsondunn.com)*
*Andrew Cline (+1 202-887-3698, acline@gibsondunn.com)*
*Chris Wilson (+1 202-955-8520, cwilson@gibsondunn.com)*

***New York***
*Eric J. Stock (+1 212-351-2301, estock@gibsondunn.com)*
*Lawrence J. Zweifach (+1 212-351-2625, lzweifach@gibsondunn.com)*

***Los Angeles***
*Daniel G. Swanson (+1 213-229-7430, dswanson@gibsondunn.com)*
*Samuel G. Liversidge (+1 213-229-7420, sliversidge@gibsondunn.com)*
*Jay P. Srinivasan (+1 213-229-7296, jsrinivasan@gibsondunn.com)*
*Rod J. Stone (+1 213-229-7256, rstone@gibsondunn.com)*

***San Francisco***
*Rachel S. Brass (+1 415-393-8293, rbrass@gibsondunn.com)*

***Dallas***
*Veronica S. Lewis (+1 214-698-3320, vlewis@gibsondunn.com)*
*Mike Raiff (+1 214-698-3350, mraiff@gibsondunn.com)*
*Brian Robison (+1 214-698-3370, brobison@gibsondunn.com)*
*Robert C. Walters (+1 214-698-3114, rwalters@gibsondunn.com)*

***Brussels***
*Peter Alexiadis (+32 2 554 7200, palexiadis@gibsondunn.com)*
*Attila Borsos (+32 2 554 72 11, aborsos@gibsondunn.com)*
*Jens-Olrik Murach (+32 2 554 7240, jmurach@gibsondunn.com)*
*Christian Riis-Madsen (+32 2 554 72 05, criis@gibsondunn.com)*
*Lena Sandberg (+32 2 554 72 60, lsandberg@gibsondunn.com)*
*David Wood (+32 2 554 7210, dwood@gibsondunn.com)*

***Munich***
*Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)*
*Kai Gesing (+49 89 189 33 180, kgesing@gibsondunn.com)*

***London***
*Patrick Doris (+44 20 7071 4276, pdoris@gibsondunn.com)*
*Charles Falconer (+44 20 7071 4270, cfalconer@gibsondunn.com)*
*Ali Nikpay (+44 20 7071 4273, anikpay@gibsondunn.com)*
*Philip Rocher (+44 20 7071 4202, procher@gibsondunn.com)*
*Deirdre Taylor (+44 20 7071 4274, dtaylor2@gibsondunn.com)*

GIBSON DUNN

***Hong Kong***
*Kelly Austin (+852 2214 3788, kaustin@gibsondunn.com)*
*Sébastien Evrard (+852 2214 3798, sevrard@gibsondunn.com)*