

CLIENT ALERT

Antitrust Division Issues Updated Policy Guide to Merger Remedies

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On June 17, 2011, the Department of Justice Antitrust Division released an updated version of its Policy Guide to Merger Remedies, which was last issued in October 2004. The revised Policy Guide, which is intended as a tool for the Antitrust Division staff in analyzing proposed remedies to mergers and to provide transparency into the Division's approach, "reflects the changes in the merger landscape and the lessons the Division has learned." The new Policy Guide reflects the Division's use of extensive conduct-based remedies to resolve a series of vertical merger challenges in recent years, including *Ticketmaster-Live Nation*; *Comcast-NBC Universal*, and *Google-ITA*. With the expanded use of remedies requiring on-going supervision of the conduct of merging parties, often for many years after the transaction closes, the Division is also centralizing decree enforcement in its recently-created Office of General Counsel. While the Policy Guide identifies a range of remedies for both horizontal and vertical mergers, it also underscores that sometimes the only "remedy" is a challenge to the entire transaction. Merging parties should keep in mind that, despite the Division's increased flexibility for addressing vertical merger issues, not every case will be susceptible to a negotiated remedy.

In assessing remedies, the Division utilizes a fact-intensive approach that applies four key principles:

- First, an appropriate merger remedy must effectively preserve competition.
- Second, the Division will not be concerned with whether a remedy protects individual competitors.
- Third, a remedy needs to be based on a careful application of legal and economic principles to the particular facts of a specific case.
- Fourth, a remedy's provisions must be practically enforceable.

Key highlights to the Division's updated approach to merger remedies include:

Acceptability of Conduct Remedies for Vertical Mergers. In contrast to the 2004 guide, which stated that "conduct remedies are generally not favored," the updated Policy Guide expresses a change in direction, noting that "the Division will consider tailored conduct remedies designed to prevent conduct that might harm consumers while still allowing the efficiencies that may come from the merger to be realized." Competitive issues raised in horizontal mergers are typically resolved with structural remedies such as divestiture, though conduct remedies are sometimes employed in conjunction. Competitive issues raised by vertical transactions, in contrast, may be more effectively addressed through conduct remedies. The Policy Guide identifies firewalls, non-discrimination provisions, mandatory licensing, transparency provisions, and anti-retaliation provisions, as the most commonly-used conduct remedies, which are designed to counteract incentives changed by the transaction and eliminate the merged firm's ability to act on them. The Policy Guide offers the following illustrations of conduct-based remedies:

- **Firewalls:** In conditioning its approval of the merger of Ticketmaster, the dominant primary ticketing service provider in the U.S., and Live Nation, the country's largest concert promoter, the Division required firewalls prohibiting the merged firm from disclosing financial data obtained from the firm's ticketing business to employees involved in the day-to-day

operations of concert promotions and artist management. The firewall was designed to prevent the merged firm from abusing the confidential information it gained from its position in the primary ticketing market to impede competition among promoters and artist managers. The Division has also used firewalls in defense industry and other non-horizontal mergers "when both the loss of efficiencies from blocking the merger outright and the harm to competition from allowing the transaction to go unchallenged are high." In 2004, the Division noted the difficulties in monitoring and enforcing such provisions. The Division addresses these concerns in the new Policy Guide by placing oversight and enforcement with the recently created Office of the General Counsel.

- **Non-Discrimination:** The Division conditioned its approval of the joint venture between Comcast Corp and General Electric Co.'s subsidiary NBC Universal on a requirement that the joint venture license its broadcast, cable, and film content to online video distributors on terms comparable to those given multichannel video programming distributors, and to use fair licensing and pricing terms. As the revised Policy Guide explains, such terms are designed to protect downstream firms from discrimination in the form of lesser quality product, slower delivery times, reduced service, or unequal access to the upstream firm's products. The Division's willingness to embrace a non-discrimination commitment departs from prior FTC practice. In 1999, the FTC concluded that no conduct remedy could resolve the competitive concerns raised by the proposed acquisition of Ingram, the nation's largest wholesaler of books, by Barnes & Noble, the largest book retailer. The parties abandoned that transaction in the face of a threatened challenge.
- **Mandatory Licensing:** The Division conditioned Google's acquisition of ITA Software, Inc., on Google's commitment to license and improve ITA's software product, used by airlines, online travel agents, and online travel search sites to provide complex flight search functionality, for a five year period, and to negotiate new and existing contracts on commercially reasonable terms. The final judgment also provided for arbitration to resolve disputes over the fees for such licenses. The Division also incorporated arbitration procedures into the *Comcast-NBC Universal* decree.
- **Anti-Retaliation:** In addition to the anti-retaliation provisions in *Ticketmaster-Live Nation*, which forbid the merged firm from retaliating against any venue owner that chose to use another company's ticketing or promotional services, the Division included a similar provision in *Comcast-NBC Universal*. That settlement built in protection for online video distributors to ensure that Comcast would not deter video programmers and online video developers from contracting with each other. Specifically, Comcast was prohibited from retaliating against any broadcast network (or affiliate), cable programmer, production studio or content licensee for licensing content to a competing cable, satellite or telephone company or online video distributor.

Merger Enforcement Includes Blocking Transactions. The Policy Guide clarifies that "[s]uccessful merger enforcement is defined by obtaining effective remedies," which includes not only settling potential or contested litigation, but blocking transactions outright. Specifically, the Policy Guide notes 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."

Inclusion of an Upfront Buyer or "Crown Jewels" in Divestiture Implementation. With respect to the divestiture of assets less than an ongoing business, the Division may require either an upfront buyer or a "crown jewel" provision to ensure that the buyer will be an effective competitor. Upfront buyers provide added certainty about the transaction, and the Division recently required such a provision in the 2008 acquisition of Sierra Health Services by UnitedHealth Group, Inc. The Division also has adjusted its stance on crown jewels. In 2004, the Division stated that crown jewel provisions, which add specific, valuable assets to an initially identified divestiture package, were "strongly disfavored." In contrast, the new Policy Guide recognizes that the

merging parties and the Division may dispute which assets should be included in a divestiture package and, in those circumstances, the Division may use such a provision to increase the likelihood that an appropriate purchaser will emerge.

Compliance Enforcement by the Office of the General Counsel. The evaluation of and oversight over all Division remedies has been placed in the Antitrust Division's recently created Office of the General Counsel, headed by J. Robert Kramer. The General Counsel's Office oversees decree compliance, evaluates potential decree violations, and makes recommendations to the Assistant Attorney General with respect to enforcement.

A copy of the new Policy Guide can be found at: <http://www.justice.gov/atr/public/guidelines/272350.pdf>

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