

DOJ's Conduct Remedies: Lessons From North Of The Border

Law360, New York (September 19, 2011, 12:58 PM ET) -- In June 2011, the Antitrust Division of the U.S. Department of Justice issued an updated "Policy Guide to Merger Remedies" for the first time in seven years. These new guidelines reflect a significant new commitment by the DOJ to pursue formerly disfavored conduct remedies such as firewall, nondiscrimination, mandatory licensing, transparency, anti-retaliation and other commercial-behavior-controlling means of addressing competition concerns.

So while it once may have seemed that if a structural remedy were not available or would be ineffective in a particular merger then the DOJ would have to let that transaction proceed, the revised merger guidelines make it clear that the DOJ is ready and willing to use out-of-the-box alternatives to structural remedies to protect consumers from anti-competitive mergers. Accordingly, the DOJ explains in the revised guidelines that conduct remedies are "valuable tools" for the Antitrust Division, particularly well suited to those scenarios where a structural remedy would eliminate a merger's potential efficiencies, but, absent a remedy, the merger would harm competition.

Issues the DOJ may encounter as it implements this shift in policy and practice are somewhat unclear given the Antitrust Division's historical aversion to seeking and implementing conduct remedies in enforcing Section 7 of the Clayton Act. Fortunately, lessons about the administration and enforcement of such remedies in the modern commercial context can be gleaned from the Canadian Competition Bureau's recently published "Merger Remedies Study," which examines the effectiveness of merger remedies for restoring competition in Canada during the period of 1995 to 2005.

Among other areas of analysis, the study identifies factors likely to maximize the potential benefits of stand-alone and hybrid conduct remedies, as well as obstacles to administering and enforcing them. For example, the study concludes that where a merged firm agrees to a series of behavioral commitments, a failure to appoint a monitor detracts from the effectiveness of the remedy.

The DOJ merger guidelines anticipate this issue, providing at the very outset that "[t]o carry out [the Antitrust Division's] mission effectively and efficiently, the Division's Office of the General Counsel now has principal responsibility for enforcing Division decrees." The Office of General Counsel's authority to promulgate best practices directives and to oversee and enforce merger remedy compliance is set forth in greater detail later in the policy guide.

The Canadian study also highlights a number of practical issues relating to the implementation of conduct remedies, a review and understanding of which may benefit the DOJ as it transitions to this new era in antitrust enforcement. For example, subject to the qualification that conduct remedies necessarily vary according to the unique circumstance of the firms and transactions at issue, the Competition Bureau made the following conclusions:

1) Where there is imperfect information about the likelihood of future entry, the term of a standalone conduct remedy is critical, since it is often difficult to anticipate future conditions at the time a remedy is crafted. This may be an important consideration for DOJ, which justified some recent conduct remedies on the assumption that new entry would cure its competitive concerns. For example, in Google/ITA, the DOJ required licensing of flight-search software to competitors for five years, anticipating that an entrant could establish itself in that timeframe.

2) Where a remedy involves the imposition of a code of conduct on a merged firm, the failure to ensure that customers are notified of the terms of that code limits the effectiveness of the remedy. This observation may, of course, prove useful to the DOJ's oversight of the Ticketmaster/Live Nation settlement, which includes a meaningful bill of rights for Ticketmaster customers. Under the settlement, the merged Ticketmaster/Live Nation is forbidden from using competitors' ticketing or concert-promotion services, and is also required to provide departing clients with ticketing data. Obviously, customers need to be aware of their rights in order to take advantage of them.

3) In order to maximize the effectiveness of firewall provisions, stringent measures should be taken to prevent information-sharing between businesses to be held separate. Firewall provisions were included in, among other deals, the Google/ITA settlement and Ticketmaster/Live Nation.

Given the similarities in the commercial landscapes and merger laws of the United States and Canada, the insights of the Canadian Competition Bureau's Merger Remedy Study may well benefit the DOJ if it continues to pull conduct-remedy tools out of its antitrust-enforcement toolbox. Time will tell whether the Antitrust Division has similar experiences to its Canadian counterpart in its role as post-merger watchdog. Time may also tell us whether courts will endorse the Antitrust Division's use of conduct remedies, and whether private litigants in the rather rare cases seeking private enforcement of Section 7 will pursue conduct remedies as well.

--By K. Craig Wildfang and Lauren E. Schrero, Robins Kaplan Miller & Ciresi LLP

K. Craig Wildfang is a partner in Robins Kaplan Miller & Ciresi's Minneapolis office, in the firm's antitrust and business litigation groups. Lauren Schrero is an associate in the firm's Minneapolis office, in the firm's business litigation group.

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