

US merger review set for procedural overhaul at DOJ; FTC also aims to streamline review

25 Sep 18

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IN BRIEF

The US Department of Justice announced an overhaul of its merger procedures to streamline the agency's review process. The head of the DOJ's antitrust division said the agency will aim to resolve merger investigations, including current ones, within six months from filing. Its sister agency, the Federal Trade Commission, also pledged to expedite merger reviews with a new tracking system.

The US Department of Justice on Tuesday announced an overhaul of its merger procedures to streamline the agency's review process.

The head of the DOJ's antitrust division said the agency will aim to resolve merger investigations, including current ones, within six months from filing when the parties expeditiously cooperate throughout the process. "I think [the changes] will preserve our resources and might actually allow us to better review problematic deals sooner. The goal is to do that," said Assistant Attorney General Makan Delrahim at a conference* in Washington, DC. "Parties will know where we stand earlier in the process, and the division will know where to focus its resources," he said.

Changes to the merger procedures include a new policy to encourage initial, introductory meeting with the parties and a reformed timing agreement designed to limit both the number of depositions and the number of custodians of confidential company information involved.

Delrahim said that the changes in time limits and procedures apply to transactions that are coming in now, but said that not every investigation can be resolved in six months.

"It shows a good faith effort to put certain limits. Sometimes we may need less, sometimes more," Delrahim said. He said the staff can always seek more information or a broader second request.

"I don't anticipate we will be unilaterally disarming in any way," he said. "I think it will be a more efficient process."

He said the parties may prefer a longer investigation in some cases, or they may wish to extend the timing for various reasons. "If the goal of the business community is a shorter review, however, we share that goal and are committed to working towards it," he said.

"Delay is a form of uncertainty and risk, and we should seek to remove it from the merger-review process whenever possible," he said.

But shortening any investigation does require cooperation from the parties to a merger, he said. "Parties shouldn't hide their eight ball."

Merger reviews have been taking longer in recent years, Delrahim said. He cited a 65 percent increase in the average review time — from 7.1 months in 2013 to 10.8 months in 2017. The amount of data available in the electronic age, the international scope of transactions and the fact that the agency has been requiring upfront buyers more often adds time to the reviews.

"[O]ur job is to get the right result in an efficient manner, which often means reaching consent agreements with parties to remedy fully the sources of anticompetitive harm," he said. "Only when that is not possible should we litigate."

The antitrust division will increase the transparency of the merger review process and periodically release statistics that show, on average, how long the division is taking to review mergers.

"Specifically, we will release the average duration of second request investigations and the average length of time from the opening of a preliminary investigation to the early termination or closing of the investigation, including investigations that did not result in the issuance of second requests," he said.

— Modernizing merger review —

The antitrust division front office will be open to an initial, introductory meeting with key executives from relevant businesses who could explain the deal's rationale and any other facts that are important to the division's analysis.

Delrahim said that the agency will get economists and experts involved in those early meetings to help identify what type of data they need to expedite and streamline the process. The agency is seeking to have its information technology systems handle data expeditiously, he said.

The agency will publish a model voluntary request letter for information submitted in the initial review period to give the parties a head start in identifying the kind of information they should look for, and for them to submit information to the agency as early as possible in the process.

The division is also encouraging the parties to pull and refile their paperwork under the Hart-Scott-Rodino Act when the division cannot resolve all the concerns within the initial 30-day waiting period.

DOJ will publish a model timing agreement to facilitate reaching agreements with parties to a deal, and it will reform it to narrow potential areas of disagreement. Some of the changes include seeking documents from fewer custodians (20 custodians per party); taking fewer depositions (12 per party), and setting a 60-day limit from compliance to a decision — though an extension can be authorized.

In turn, the division expects faster production of documents; earlier production of data; a longer post-compliance discovery period; and no more gamesmanship involving the privilege log, which lists the information for which confidential treatment is being sought.

The division will take steps to ensure that third parties comply with civil investigative demands in a timely manner, he said, and it will seek ways to improve coordination with foreign enforcers in parallel investigations.

"To facilitate the process, when facing parallel investigations, parties should consider aligning time periods with other jurisdictions if possible, and where appropriate ask us to help with that," Delrahim said.

Delrahim also announced that DOJ has withdrawn from the 2011 Policy Guide to Merger Remedies. The 2004 guidelines will be in effect until an updated policy is released. "It's more consistent with the practice we have. ... It provides just more transparency and actual guidance to the community of what our priorities are with respect to remedies," he said.

Delrahim said that DOJ didn't discuss these changes directly with the Federal Trade Commission. He said some of the principles are specific to the DOJ's objectives, and the agencies have different internal review processes. "There is no sunlight between the two agencies and how the two approach [cases] or what kind of resources and efficiencies we should all try to achieve," Delrahim said.

— FTC tracking —

Joseph Simons, chairman of the FTC, said that he had just heard the changes proposed by the antitrust division, but that the FTC also has a goal to reduce the time it takes on merger investigations.

The FTC is going to introduce a tracking system with data it has on file that aims to be more complete than some tracking systems in the private sector, such as Dechert's DAMITT tracking system. It will also include other factors that affect the review process, Simons said.

"For example, if the parties are off trying to get clear over in Europe before engaging with us at all, we want to know that to understand what was causing the delay and other things as well," he said.

The data will be used for case studies in an effort to learn from transactions that went smoothly, efficiently and quickly — or from transactions that went less smoothly.

"The goal is definitely to reduce the time it's taking for these merger investigations," Simons said.

"If what the DAMITT data showed was really indicative of what is going on, you've got a situation where the merger investigations were taking 6 months years ago, and now they are taking 12 months. ... So from a standpoint of someone running one of these organizations, you are using up to twice as much resources from one case than you did a few years ago, and that is clearly not ideal."

** "12th Annual Global Antitrust Enforcement Symposium." Georgetown University Law Center. Washington, DC. Sept. 25, 2018.*