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Private Equity Purchasers May Be “Preferred” Divestiture Acquirers under New Department of Justice Antitrust Division Merger Remedy Guidance

Today, the Antitrust Division of the U.S. Department of Justice (DOJ) [announced](#) that it is publishing a [Merger Remedies Manual](#). Significantly, the new manual recognizes that “in some cases a private equity purchaser may be [a] preferred” purchaser of divestiture assets. At the very least, according to the manual, the “Division will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms.”

To be sure, the Division will still evaluate proposed acquisitions of divestiture assets by private equity firms to ensure that the acquisition preserves competition. And of course a private equity acquirer will have to be careful to avoid running afoul of Section 8 of the Clayton Act which prohibits unlawful “interlocking directorates.” But one can easily envision situations in which divestiture to a private-equity-sponsored purchaser could facilitate the Division’s goals, and may indeed present a shorter path to resolution (for example when it is clear there are no competitive concerns vis-à-vis the acquirer’s existing portfolio companies, the sponsor can adequately capitalize the business and the business will have experienced managers). Presumably antitrust agencies recognize that private equity sponsors have the incentive and financial ability to acquire, further invest in, and grow these divestiture businesses, including through later add-on acquisitions, thus stimulating further competition over time.

Background

When the antitrust agencies identify competitive concerns with proposed transactions, deal parties will often attempt to negotiate an acceptable remedy with the agency in order to avoid having to litigate against the agency or having to abandon the transaction entirely.¹ In evaluating a remedy, the agencies’ overarching goal is to maintain competition in the relevant market. (The agencies may sometimes accept so-called “conduct remedies” placing restrictions on the merged firm’s behavior, but these remedies are particularly disfavored by the DOJ and the new manual notes that there are only limited circumstances when a conduct remedy is appropriate.) In light of the remedial goal of maintaining competition, the DOJ normally will seek the divestiture of a standalone business capable of competing in the market. As explained in the manual: “An existing business typically possesses not only all of the physical assets, but also the personnel,

¹ See, generally, William B. Michael & Daniel A. Crane, *Settling an Antitrust Case* in Settlement Agreements in Commercial Disputes (Richard A. Rosen ed. 2020); Charles F. (Rick) Rule, Andrew J. Forman & Daniel J. Howley, *Structural Remedies* in The Guide to Merger Remedies (3d ed.) (forthcoming).

customer lists, information systems, intangible assets, and management infrastructure for the efficient production and distribution of the relevant product, and it has already succeeded in competing in the market.”

Treatment of Private Equity Purchasers in DOJ Merger Remedies Manual

Some have expressed an antipathy to private equity divestiture buyers.² The new Antitrust Division manual makes clear, however, that private-equity-sponsored divestiture acquisitions will be evaluated on an equal footing with other potential acquirers, and may in certain situations be better suited to meet the Division’s criteria.

As in prior guidance, the Antitrust Division’s newly-released Merger Remedies Manual sets out three general criteria the Division will use in evaluating a proposed divestiture:

- the “divestiture of the assets to the proposed purchaser must not itself cause competitive harm”;
- “the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market”; and
- “the Division will evaluate the ‘fitness’ of the proposed purchaser to ensure that the purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term.”

According to the manual, “the Division will evaluate the purchaser strictly on its own merits” and “will not compare the relative fitness of multiple potential purchasers and direct a sale to the purchaser that it deems the fittest.” This is because “the appropriate remedial goal is to ensure that the selected purchaser will effectively preserve competition . . . , not that it will necessarily be the best possible competitor.”

Importantly, as stated in the newly-released manual: “The Division will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms.” Moreover, the manual explains that the Division may indeed prefer private equity purchasers in some situations. For example, according to the manual, “in some cases funding from private equity and other investment firms [is] important to the success of the remedy because the purchaser [has] flexibility in investment strategy, [is] committed to the divestiture, and [is] willing to invest more when necessary.”

² See, e.g., [Stmnt. of Comm’r Rohit Chopra](#), In the Matter of Sycamore Partners, Staples, and Essendant, FTC File No. 181-0180 (Jan. 28, 2019). The manual published today sets out the DOJ Antitrust Division’s approach. The FTC, as currently constituted, has not issued a similar document.

Significance

Each proposed merger remedy must be evaluated on its own merits and in light of the specific competitive concerns being addressed. Nevertheless, the Antitrust Division's explicit acknowledgement of the advantageous role that private equity purchasers can play in merger remedies is an important development. The new Merger Remedies Manual is a key tool for private equity sponsors and their advisors to use in evaluating opportunities for acquisitions arising out of M&A activity.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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