

Private Equity Buyers Recognized by DOJ as Preferred Purchasers in Antitrust Divestitures

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The Department of Justice (DOJ) has taken notice of the positive role that private equity can play to preserve competition, as reflected in its Merger Remedies Manual (the 2020 Merger Remedies Manual) released September 3, 2020.^[1] The goal of such divestitures is to ensure the businesses/assets remain competitive in a new independent player other than the merging parties in the underlying transaction.

Private equity purchasers have long been considered a good option for companies looking to divest because private equity firms often provide the expertise, resources, and the appetite for risk needed for a successful transaction, at times providing an opportunity for acquisition and growth where public companies cannot or will not act. The latest update of the DOJ guidance explicitly recognizes these factors when considering structural remedies to antitrust-related effects of proposed mergers and acquisitions.

Private equity investments already account for a substantial number of global investments, with no signs of slowing down. In the last quarter of 2019 alone, private equity groups worldwide accounted for \$103 billion in acquisitions.^[2] Between March and June of this year, in the midst of a global pandemic and economic slump, private equity groups with the highest deal counts announced deals worth a total of more than \$40 billion.^[3]

With the DOJ's "modernized" update of the 2020 Merger Remedies Manual,^[4] the DOJ states for the first time that private equity purchasers may be the "preferred" purchaser in some divestitures. The 2020 Merger Remedies Manual reaffirms DOJ's strong preference for structural remedies in horizontal and vertical deals where a merger can substantially lessen competition,^[5] and provides guidance for proposed purchasers. The fundamental tests described in the 2020 Merger Remedies Manual apply when the DOJ reviews the proposed divestiture:^[6]

1. Does divestiture of the asset to the proposed purchaser itself cause competitive harm?
2. Does the purchaser have the incentive to use divestiture assets to compete in the relevant market?
3. Does the proposed purchaser have sufficient acumen, experience, and financial capability to compete effectively in the market over the long term?

For private equity purchasers, the 2020 Merger Remedies Manual specifically highlights benefits of private equity when considering these tests. For example, the DOJ recognizes that the private equity purchasers "often partner

with individuals or entities with relevant experience.”^[2] In addition, the DOJ noted that a study by the Federal Trade Commission of merger remedies between 2006 and 2012 found private equity and other investment firms were not just preferable, but “important to the success” of the remedy because “the purchaser had flexibility in investment strategy, was committed to the divestiture, and was willing to invest more when necessary.”^[3]

Although these tests are not specific to private equity, the DOJ will necessarily consider evidence of the purchaser’s intention to compete in the market or whether assets are likely to be redeployed elsewhere.^[4] Partnerships between private equity and entities with expertise inform the DOJ’s evaluation of whether the purchaser can compete effectively in the market over the long term, on the one hand, and whether a link with competitors disincentivizes a private equity firm from competing, on the other. By focusing on these issues with the intent to preserve competition through divestiture, the 2020 Merger Remedies Manual’s fundamental tests also serve to protect against what some view as the risk of private equity.

Thus, private equity funds should not be scared off from divestitures that are undertaken to remedy company- or DOJ-identified potential anticompetitive effects of a deal. The DOJ has provided companies guiding principles that show that it considers private equity not just a viable option for an antitrust-related divestment, but sometimes a preferred one, where a private equity firm shows it has the financial capability, flexibility, and commitment to competing in the market. This update should provide comfort to both private equity investors and entities who are considering mergers or acquisitions in response to unprecedented market stimuli.

Winston & Strawn is a leading advisor to public and private companies and investment advisers on corporate transactions. Our attorneys have advised on M&A transactions of all sizes and degrees of complexity, and have represented an exceptionally diverse base of clients, both large and middle-market. Winston & Strawn’s antitrust/competition group routinely handles all aspects of the merger review and antitrust clearance process, from international filings on multi-billion-dollar mergers, to third-party complaints, to facilitating the purchase of assets to be divested. Our lawyers can handle every aspect of the competition law issues on the transaction, including not only the competition issues connected with regulatory clearances, but also antitrust advice for integration planning and antitrust risk allocation.

Any private equity fund or other investor that has questions about the 2020 Merger Remedies Manual, or about antitrust concerns or structural remedies during mergers and acquisitions in light of the guidance set forth in this update, should contact **Richard Falek** (rfalek@winston.com or 212-294-3314) or any member of your Winston deal team or antitrust team.

^[1] Dep’t of Justice, Merger Remedies Manual (published Sept. 3, 2020, effective Sept. 3, 2020) (“2020 Merger Remedies Manual”), available at <https://www.justice.gov/atr/page/file/1312416/download>.

Winston & Strawn’s article analyzing the 2020 Merger Remedies Manual, its guiding principles, and key takeaways, is available at <https://www.winston.com/en/competition-corner/dojs-merger-remedies-manual-reaffirms-the-agencys-preference-for-structural-remedies.html>.

^[2] Kaye Wiggins, *Private equity steps in where others fear to tread during pandemic*, Financial Times (June 18, 2020), <https://www.ft.com/content/912929f7-7366-45d0-90ce-4467b9fec7f0>.

^[3] *Id.*

^[4] Press Release, Dep’t of Justice, *Justice Department Issues Modernized Merger Remedies Manual* (Sept. 3, 2020).

^[5] 2020 Merger Remedies Manual, § III.B, p. 13.

^[6] 2020 Merger Remedies Manual, § IV.B, pp. 23-25.

^[7] 2020 Merger Remedies Manual, § IV.B, p. 25.

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