

# Private Equity and Antitrust: A New Landscape

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**I**N 2015, MERGER AND ACQUISITION activity hit record numbers. While that record-setting pace slowed during the first half of 2016, private equity transactions did not, as PE investors had “more than enough capital to fuel typical investment cycles for some time.”<sup>1</sup> And while the year’s end will bring more clarity on how deal flow charted during the second half of 2016, experts anticipate that PE deal flow will spike during the period.<sup>2</sup>

At the same time, PE firms (and their advisors) are increasingly beginning to understand that antitrust is no longer a subject that can be taken for granted. To be sure, for decades very few PE deals—typically “financial” deals with no competitive consequence—raised antitrust concerns. But this, too, has changed. Not only are PE firms engaged in more “strategic” deals than ever—which can be subject to review by the Federal Trade Commission or the Department of Justice—the agencies are also increasingly concerned over partial acquisitions and overlapping minority interests in competitors.<sup>3</sup> When the risk of private litigation (e.g., over “club deals”) is added, PE firms are well advised to make antitrust a standard gating issue for all transactions.

In this article, we provide an overview of antitrust issues that PE firms have faced, including majority acquisitions, “club” bidding, minority investments and interlocking directorates. We then provide some practical tips on how to keep PE firms out of hot water in today’s antitrust environment.<sup>4</sup>

## Relevant Statutes

There are two antitrust statutes under which private equity firms’ conduct can be challenged—the Clayton Act and the Sherman Act. Section 7 of the Clayton Act prohibits any acquisition that may substantially lessen competition in a relevant market, while Section 8 prohibits the same individuals from serving as board members for two competing firms (i.e., “interlocking directorates”). Section 1 of the Sherman

Act prohibits agreements between or among competitors (including, of course, competing firms fully or partially owned by PE firms) that unreasonably restrain trade. For PE firms, all of these provisions are in play.

## Clayton Act Section 7: Full Acquisitions

While less frequent than partial acquisitions of new companies, there are situations where a PE firm wishes to fully combine two of its majority-owned portfolio companies. The starting point for antitrust analysis in such situations is the Supreme Court’s decision in *Copperweld Corp. v. Independence Tube Corp.*<sup>5</sup> In *Copperweld*, the Court held that a firm is incapable of conspiring with its wholly owned subsidiary because, for purposes of the antitrust laws, the two companies should be treated as a “single entity.”<sup>6</sup> Shortly thereafter, courts began to recognize that—under *Copperweld*—two firms that were wholly owned by the same company (so-called sister companies) likewise should be viewed as a single entity.<sup>7</sup> An interesting question, however, is, how should a firm’s *majority-owned* subsidiaries—or in the private equity context, how should a fund’s *majority-owned* portfolio companies—be viewed under the antitrust laws and the agencies’ Horizontal Merger Guidelines?<sup>8</sup> While one might reasonably presume that the merging of a PE’s majority-owned companies should be an antitrust non-event, the DOJ’s recent investigations into two transactions show that it is not so simple.

The issue arose in the 2015 merger of Ainsworth Lumber Co. Ltd. and Norbord Inc., both of which were majority-owned, but not wholly owned, by Brookfield Asset Management (BAM). Specifically, at the time of the transaction, BAM owned 50.53 percent of Norbord and 54.4 percent of Ainsworth, and both companies produced oriented strand board (OSB). The parties argued that because BAM had legal control—through these ownership positions—over both Ainsworth and Norbord, all three companies should be treated as a single entity and thus be shielded from challenges under the antitrust laws, including Section 7.

The issue was particularly hot because, less than a year earlier, the DOJ had threatened to block Louisiana-Pacific Corp.’s (LP) acquisition of Ainsworth (the LP deal)—a threat that caused LP to abandon the transaction.<sup>9</sup> According to the DOJ, the LP deal would have harmed competition in geo-

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graphic markets defined as the “Upper Midwest” and the “Pacific Northwest” because LP and Ainsworth were two of only three principal producers of OSB in the region (i.e., in the DOJ’s view, the deal was a “3-to-2” merger with serious structural concerns that made it presumptively anticompetitive).<sup>10</sup> Critically, the other OSB producer that created the problem for the DOJ was Norbord, even though it and Ainsworth were majority-owned by the same private equity firm. Hence, in the subsequent proposed transaction—where Norbord rather than LP would acquire its sister company, Ainsworth—the natural assumption was that the DOJ would maintain that this was a 3-to-2 merger that eliminated one of three OSB competitors in the region, presumably raising the same antitrust concerns as the abandoned LP/Ainsworth transaction.

In the subsequent investigation, the scope and history of *Copperweld* quickly became a major issue. In *Copperweld* (back in 1984), the DOJ filed an amicus brief in which it advanced a fairly simple position: firms that shared a common owner are a single entity for antitrust purposes so long as the common owner has *legal control* over both firms as a result of its ownership positions.<sup>11</sup> Indeed, the DOJ went further in its brief, explaining that this rule should apply even when the two commonly owned firms hold themselves out to the marketplace as independent competitors.<sup>12</sup>

Federal courts largely embraced this power-to-control test in the wake of *Copperweld*. The most directly on-point case is *Novatel Communications, Inc. v. Cellular Telephone Supply, Inc.*,<sup>13</sup> in which the court recognized that a company and its 51 percent-owned subsidiary deserved single-entity treatment under *Copperweld*. Essential to the court’s reasoning was that the parent corporation had legal control of its subsidiary and thus could direct its actions at any time: “The 51 percent ownership retained by Novatel–Canada assured it of full control over Carcom and assured it could intervene at any time that Carcom ceased to act in its best interests.”<sup>14</sup> The court’s conclusion was clear: if a parent has over 50 percent ownership in a subsidiary’s voting shares, then it has legal control over that subsidiary, and the two companies should be considered a single entity for antitrust purposes.<sup>15</sup>

Other courts, as well, have found that over 50 percent ownership is the proper threshold for single-entity status under *Copperweld*, effectively holding that the parent’s ownership interest gives it legal control over the subsidiaries.<sup>16</sup> For example, in *Bell Atlantic Business System Services v. Hitachi Data Systems Corp.*,<sup>17</sup> the court held that the parent’s legal control over its subsidiary eliminated the need for any factual inquiry before holding that the two companies were a single entity for antitrust purposes.<sup>18</sup> The court reasoned that because owning over 50 percent of a subsidiary’s voting shares gives the parent legal control over the subsidiary, *Copperweld*’s control test is satisfied, and single-entity status therefore should apply.

Yet for those practitioners who find themselves working through a *Copperweld* issue (for PE firms or others and in any

context), there are a few “outlier” decisions. For example, in *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*,<sup>19</sup> the District of Oregon adopted a de minimis standard that appears to flow from a misinterpretation of post-*Copperweld* case law. The *Aspen Title* court held that a parent and its two majority-owned subsidiaries (in which the parent owned 60 percent and 70 percent, respectively) should not be treated as a single entity.<sup>20</sup> But critical to that holding was the (questionable) reliance on *Sonitrol of Fresno, Inc. v. AT&T Co.*,<sup>21</sup> in which the court merely declined to extend *Copperweld* protection to AT&T and two corporations in which AT&T owned *minority* interests of 32.6 percent and 23.9 percent, respectively.<sup>22</sup> Further, the *Sonitrol* court noted that legal control of the subsidiaries “rested firmly in the hands of their board of directors,” not in the hands of AT&T.<sup>23</sup> In other words, the *Sonitrol* court itself recognized the legal control principle as the guiding factor; it just found that AT&T did not actually have legal control because it did not own a majority of the subsidiaries’ voting shares.

*Aspen Title* also is in conflict with *Bell Atlantic*, another district court case within the Ninth Circuit in which the court held that, because the parent had legal control over its subsidiary, it need not engage in a factual inquiry before holding that the two companies were a single entity for antitrust purposes.<sup>24</sup> Together, *Sonitrol* and *Bell Atlantic* make clear—even within the Ninth Circuit—that the proper test for single-entity status is whether the companies in question share a common majority owner. If they do, then *Copperweld* immunity should protect all three companies (the parent and its two majority-owned subsidiaries) from antitrust liability.

Ultimately, the DOJ did not challenge the Norbord/Ainsworth transaction, and while the parties cannot be sure that the *Copperweld* issue was dispositive, there is little doubt that it was an issue that would have been a tough one for the DOJ to litigate in a merger context. Indeed, the Hart-Scott-Rodino Act itself is interpreted as treating “control” similarly, providing that “control” is present in the cases of a 50 percent economic interest for noncorporate entities or a 50 percent ownership of the voting securities in a corporate entity (or the contractual right to appoint 50 percent of the corporate entity’s directors).<sup>25</sup>

In sum, a PE firm’s decision to merge majority-owned entities should not be a Section 7 problem, but practitioners need to know that the agencies may not view the *Copperweld* issue the same way, and the parties, therefore, should be prepared to address it.

**Club Bidding/Pooling Deals.** Another acquisition context that has received an enormous amount of attention is when private equity funds engage in some form of “pooling” or “club” deals—transactions in which multiple private equity funds collaborate with each other in some fashion in order to bid jointly for a target. Unlike the stock acquisition scenarios discussed above, club bidding issues typically arise before an acquisition—i.e., when the clubs or collaborations

first form for the purpose of making a joint bid—and thus fall under Section 1 of the Sherman Act.<sup>26</sup>

The DOJ opened an investigation into club bidding practices in 2006, but no formal decision resulted from that investigation. Presumably, the DOJ concluded that there was no issue, because sellers could control the bidding process, including requiring transparency of participants and their relationships. With no agency action forthcoming, the only enforcement efforts that have been made were by private plaintiffs, who have brought a handful of private class actions since 2006. In those actions, courts have consistently found that the rule of reason should apply to the agreements to form bidding clubs; this means that, if the club formation were challenged, plaintiffs would have to demonstrate anticompetitive effects in a well-defined economic market, and the pool/club would have to be prepared to demonstrate that there were substantial procompetitive justifications for the agreement to submit a joint bid and that these justifications outweighed any adverse anticompetitive effects.<sup>27</sup> One court has dismissed a Section 1 club dealing claim at the pleading stage based on plaintiff's failure to allege such anticompetitive effects.<sup>28</sup>

*Dahl v. Bain Capital Partners, LLC*<sup>29</sup> is the leading case in analyzing club bidding. Former shareholders of public companies that had gone through leveraged buyouts (LBOs) sued the private equity funds involved in orchestrating and executing the LBOs. The plaintiffs claimed that the defendant private equity funds conspired with one another, through submitting joint club bids and agreeing that some firms would not participate in certain companies' LBOs, in order to drive down the purchase prices for those companies. Given the alleged market allocation and alleged agreement to manipulate LBO purchase prices, the plaintiffs claimed that they were deprived of the true value of their stock during the buyouts. The plaintiffs' case survived a motion to dismiss.<sup>30</sup>

Following discovery, the defendant private equity firms moved for summary judgment, arguing that the club bids were not part of a broad, overarching conspiracy, but rather were commercially beneficial arrangements motivated by many procompetitive justifications. Specifically, the firms asserted that club deals allowed private equity firms to compete for larger transactions than otherwise possible, share business expertise, cut costs, and diversify and minimize risk.<sup>31</sup> The fund defendants argued that, in light of these procompetitive benefits, the transaction was presumptively lawful under the rule of reason. These arguments prevailed as to the claim of an alleged industry-wide scheme.<sup>32</sup>

As to a narrower set of transactions, however, the court refused to grant summary judgment. While acknowledging that defendants' justifications had merit and that club deals very well could be the product of procompetitive business relationships, the court held that it was up to a jury to decide whether the individual club deals in question were lawful under the rule of reason or were instead the product of an anticompetitive conspiracy among defendants not to meddle

in each other's announced proprietary deals.<sup>33</sup> Importantly, in denying summary judgment, the *Dahl* court relied heavily on e-mails among employees at the different funds in which it appeared that certain funds were promising to "stand down"—i.e., not to compete against other funds—for certain bids.<sup>34</sup> In other words, the court left it to the jury to decide whether, for certain deals, the club bids were merely pretext that provided cover for each participant to decide for which bids each defendant would or would not compete.

In short, although club bids by no means automatically violate the antitrust laws—in fact, in most cases, there are substantial procompetitive justifications—they still can be problematic when evidence suggests (as it did in *Dahl*) that certain bids may be viewed as anticompetitive in purpose and effect—e.g., solely agreements not to compete with one another. Eventually, those defendants that were not dismissed in *Dahl* settled, leaving no final decision, but offering another cautionary tale where firms that can properly collaborate may be viewed as crossing the line into impermissible coordination.

### **Clayton Act Section 7: Partial Acquisitions**

The Clayton Act, of course, applies to both full and partial acquisitions. Here, we focus exclusively on those acquisitions that result in one firm holding an ownership share in two competing firms. In certain circumstances, courts have sided with the agencies to enjoin these deals under the Clayton Act. More commonly, though, the agencies have sought and obtained consent decrees to limit the acquisition's alleged anticompetitive impact. As discussed in more detail below, the case law and consent decrees surrounding these partial acquisitions show that the agencies often use three theories when initiating such challenges.<sup>35</sup>

***Transactions that Provide the Acquirer with Control or Influence Through Governance Rights.*** The most obvious theory used by the agencies is that the acquirer will use its partial acquisition to control or influence the targets to coordinate their actions in a way that reduces competition between the two entities.<sup>36</sup> In 2007, for example, the FTC challenged the attempt of The TC Group (Carlyle) and Riverstone Holdings to acquire—through a co-owned fund—a 22.6 percent interest in Kinder Morgan, Inc. (KMI), a gasoline and petroleum terminal provider. Because Carlyle and Riverstone also owned a 50 percent interest in Magellan Midstream Partners, another terminal company that competed extensively with KMI in the Southeast United States, the FTC challenged the acquisition.<sup>37</sup> Although Carlyle and Riverstone did not have a majority stake in either company, the FTC claimed their joint ownership of 22.6 percent and 50 percent in the two companies, respectively, would result in Carlyle and Riverstone having material control or influence over the two competing firms.

Specifically, the FTC focused on two ways in which Carlyle and Riverstone might exert control over the firms to reduce the competition between them: (1) seeking representation on both entities' boards of directors, and/or (2) exer-

cising veto power at Magellan.<sup>38</sup> The FTC argued that Carlyle and Riverstone could use these tools to control the firms' operations and thereby implement practices that would reduce competition between them. The consent decree forced Carlyle and Riverstone to remove their agents from the Magellan board and also prevented the firms from controlling or influencing (or attempting to control or influence) Magellan's operations.

In 2011, similar concerns drove the DOJ to challenge Deutsche Börse's proposed acquisition of the stock exchange NYSE Euronext. At the time of the acquisition, Deutsche Börse owned 31.5 percent of and also possessed significant governance rights over Direct Edge, the operator of the fourth-largest stock exchange in the United States (and thus a clear competitor of Euronext). The DOJ claimed that Deutsche Börse could use its significant governance rights and veto rights over Direct Edge (as well as its representation on the Direct Edge board) to restrict Direct Edge's future competition against Euronext post-transaction. As a condition to resolving the dispute, the DOJ required Deutsche Börse to divest its holdings in Direct Edge and to refrain from participating in the governance or business of Direct Edge before the divestiture.<sup>39</sup>

**Transactions that May Alter Existing Competitive Incentives.** But proof that the acquirer will directly control or influence the competing firms after the transaction is not always necessary. Indeed, invoking the Horizontal Merger Guidelines, the agencies have also successfully argued that partial acquisitions of competing firms are anticompetitive when they adversely alter the competing firms' competitive incentives (i.e., the firms themselves will not be motivated to compete against one another as aggressively as they had been before the deal).<sup>40</sup> This is because, in large part, the acquirer could increase one firm's post-transaction prices when the second firm—which the acquirer also owns—would recoup some of the first firm's lost sales. The agencies grow particularly concerned when the acquirer holds partial ownership of two firms in a concentrated industry, given that the competitive options for consumers—aside from the two co-owned firms—are inherently limited in such circumstances.<sup>41</sup>

The most instructive case on this point has been the Sixth Circuit's decision in *United States v. Dairy Farmers of America, Inc.*<sup>42</sup> There, the DOJ challenged Dairy Farmers of America's (DFA) 50 percent interest in Southern Belle Dairy Co., LLC, a dairy processing firm, on the ground that DFA already owned a 50 percent share in National Dairy Holding, L.P., one of the only other milk processing firms competing with Southern Belle. According to the DOJ, Southern Belle and National Dairy were the only milk processing firms that submitted bids for school milk contracts in 42 school districts in Kentucky. Given that the two firms were the only two options for those school districts (and thus faced no competitive pressure beyond one another), the DOJ argued that the firms would have greater incentives to increase price if they shared a common owner.

The Sixth Circuit agreed. Critical to the Sixth Circuit's decision was expert testimony offered by the DOJ's economist, who testified that the acquisition would skew Southern Belle's incentives and, as a result, alter its existing behavior in the marketplace by causing it to compete less aggressively against National Dairy. In other words, all parties would have a strong incentive to suppress competition with each other post-transaction because "DFA, National Dairy and Southern Belle all profit from the elimination of competition between the dairies."<sup>43</sup> The court found persuasive the DOJ expert's final conclusion: "[T]o think that the nature of the interaction between the two dairies will not change is naive, because that would be contrary to the economic incentive of all parties."<sup>44</sup>

More recently, in response to the Hikma Pharmaceuticals PLC's acquisition of Roxane Laboratories, Inc., the FTC obtained a consent decree on similar grounds. There, Hikma was fully acquiring Roxane but also owned 23 percent of a company called Unimark, which is currently developing a drug that, after FDA approval, will compete with Roxane's drug. Because Hikma would be selling Roxane's drug post-transaction, but would still have a 23 percent share in Unimark (along with the marketing rights for Unimark's in-development drug), the FTC claimed Hikma would have the incentive to slow Unimark's introduction of that drug. Thus, even though Hikma did not control Unimark, the FTC still argued that both firms' incentives would be adversely altered post-acquisition. The resulting consent decree required Hikma to return its marketing rights in the drug back to Unimark, and also sell its entire 23 percent equity interest in Unimark.<sup>45</sup>

**Transactions that Provide the Acquirer with Access to Competitively Sensitive Information.** The agencies have also given close attention to partial acquisitions that could result in the anticompetitive exchange of commercially sensitive information. These actions are premised on the notion that such information can lead to both coordinated and unilateral anticompetitive behavior.<sup>46</sup> Typically, the agencies cite access to competitively sensitive information as just a supplemental ground on which to challenge transactions that are already suspect for other reasons. Yet it is a concern that the agencies often seek to remedy through consent decrees. For example, in response to the Carlyle and Riverstone acquisition of KMI (discussed above in the context of an acquirer gaining control over two competitors), the FTC also required in its consent decree that the funds establish firewalls to block the exchange of competitively sensitive information between KMI and Magellan.<sup>47</sup>

Likewise, in response to Boston Scientific Corporation's acquisition of Guidant Corporation, the FTC imposed a firewall between Boston Scientific and Cameron, a company in which Boston Scientific owned 10–15 percent. There, Guidant was one of the three providers of implantable cardioverter defibrillators (ICDs). Although Boston Scientific did not make ICDs itself—and thus did not compete with

Guidant to sell them—Cameron *was* in the process of developing a new ICD. Further, in addition to its 10–15 percent ownership, Boston Scientific also had an option to acquire Cameron, which provided Boston Scientific with certain information-access and control rights prior to exercise of the option.

Given that Boston Scientific would own Guidant’s ICD business after the transaction—and also have a small ownership share in Cameron (and the ability to access Cameron’s information related to ICDs)—the FTC thought Guidant could use its option over Cameron for anticompetitive ends. Accordingly, the FTC’s consent decree imposed limits on Boston Scientific’s access to Cameron information by requiring establishment of a firewall limiting the circumstances in which Boston Scientific could receive Cameron information and also limiting the individuals at Boston Scientific who could receive such information.<sup>48</sup>

**Collaborations Among Underlying Portfolio Companies.** Understandably, if a PE fund has partial ownership in two competitors (even only minority interests), the fund might assume it makes business sense to coordinate its portfolio companies’ behavior to allocate resources in the most efficient manner. But unless the two companies are majority-owned (as we discussed above in the context of *Copperweld’s* application to BAM’s majority ownership of both Ainsworth and Norbord), such behavior can have legal implications because the two partially owned firms may be considered independent competitors under Section 1. In fact, because minority ownership does not provide legal control (and thus does not trigger *Copperweld’s* single-entity status), any coordination between minority-owned firms must be analyzed under the agencies’ Antitrust Guidelines for Collaborations Among Competitors and relevant case law.<sup>49</sup> Section 3.34 of the Collaborations Guidelines provides the following factors to guide whether a proposed collaboration would be lawful under Section 1:

- the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates;
- the extent to which participants retain independent control of assets necessary to compete;
- the nature and extent of participants’ financial interests in the collaboration or in each other;
- the control of the collaboration’s competitively significant decision making;
- the likelihood of anticompetitive information sharing; and
- the duration of the collaboration.<sup>50</sup>

Applying these six factors, PE firms should be cautious about coordinating the activities of their minority portfolio companies (and, for that matter, with independent competitors). Depending on the PE firm’s role in competitive decision making (which is often significant), coordination among the companies—as well as more tacit conduct like

information sharing—may very well expose the PE firm to antitrust liability. In the European Union, for example, a PE firm has been found liable for its portfolio companies’ antitrust violations under the theory of “parental liability,” even though the PE firm itself did nothing, and knew nothing, about the underlying conspiracy.<sup>51</sup> Given prior enforcement efforts to block partial acquisitions in competing portfolio companies from even being consummated, it is safe to assume that the agencies would actively prosecute coordination among such companies when they think the coordination will cause anticompetitive effects that outweigh procompetitive benefits.

### Clayton Act Section 8: Interlocking Directorates

Private equity firms often place agents on the boards of the companies in which they invest in order to manage their investments and create value. Indeed, in many instances, a fund’s employees have substantial experience with specific industries and thus can offer beneficial guidance on how their investments should be operated. But antitrust issues will arise when a fund places the same employee on boards of competing firms. Practitioners often refer to this situation as a “direct interlock,” and it is flatly prohibited by Section 8 of the Clayton Act.<sup>52</sup>

Importantly, Section 8’s prohibition against director interlocks do not apply to all overlaps, as there are *de minimis* thresholds that apply as follows:

- Each firm has profits that do not exceed \$31,841,000;
- Each firm has competitive sales that do not exceed \$3,184,100;
- The competitive sales of either firm are less than 2 percent of that firm’s total sales; and
- The competitive sales of each firm are less than 4 percent of the firm’s total sales.<sup>53</sup>

Section 8 surfaced in the technology industry as recently as 2010, when John Doerr—who served as a director for both Google and Amazon—stepped down from his role as an Amazon director to cure the direct interlock.<sup>54</sup> Section 8 also caused Eric Schmidt to resign from the Apple board (because he also served as a director and Chief Executive Officer for Google at the time) and Arthur Levinson to resign from the Google board (because he also served as a director for Apple at the time).

A more complicated scenario, however, is indirect interlocks. In this scenario, the same individual does not sit on two boards; instead, two individuals hold the respective director seats, but the two individuals are employed by or affiliated with a common entity (here, the PE firm). The most instructive case on this issue is *Reading International, Inc. v. Oaktree Capital Management LLC*.<sup>55</sup> There, Oaktree Capital owned minority positions—40 percent and 17 percent, respectively—in two competing movie theaters, and Oaktree placed its president on one theater’s board and its principal on the other theater’s board. When confronted with the question of whether such an arrangement could state a cognizable

Section 8 claim, the court held that it could and refused to dismiss the claim. It reasoned that the term “person” in the Clayton Act applied to both a natural person and a legal person and that Oaktree very well could have violated Section 8 by placing two of its employees on competing boards.<sup>56</sup> Although use of the indirect interlocks theory is uncommon, the Agencies had in fact applied this theory before *Oaktree*, and they will not hesitate to do so in the future.<sup>57</sup> In sum, *Oaktree* makes clear that a fund should not place the same employee or different employees on the boards of two competing firms (at least not if Section 8’s thresholds are satisfied).

### Practice Pointers

As with many areas of antitrust, one of the keys to advising PE clients is to recognize potential issues as early as possible. Certainly, many (if not most) PE-related transactions are non-strategic and will not present any antitrust issues. But, at the same time, finding issues late in an M&A process, especially for strategic deals premised on achieving synergies and efficiencies, can be costly, time-consuming, and potentially make the deal not worth pursuing (e.g., if the execution risk is too high or would require divestitures).

What to look for is straightforward. Advisors to PE firms need to understand, from the onset of the engagement, the PE firm’s structural relationship to its portfolio companies (e.g., ownership, governance, participation in management) as well as the underlying marketplace positions of the companies involved in the proposed transaction or collaboration. With that background, it will be fairly easy to identify antitrust issues, assess the risk, and recommend a course of action. Without that early preparation, both the PE clients and their corporate advisors may be surprised and unhappy when an otherwise manageable antitrust issue becomes an unwelcome hurdle. ■

<sup>1</sup> Garrett James Black, *What Does PE’s Nearly \$750B in Capital Overhang Foretell?*, PITCHBOOK (Aug. 19, 2016), <http://pitchbook.com/news/articles/what-does-pes-nearly-750b-in-capital-overhang-foretell>.

<sup>2</sup> ERNST & YOUNG, PRIVATE EQUITY CAPITAL BRIEFING: MONTHLY INSIGHTS AND INTELLIGENCE ON PE TRENDS 4 (2016) (“PE continues to build capital that is ready for deployment. The industry ended July with buyout dry powder up 12% versus a year ago, to US\$540.4b. The PE industry appears to be ready to put more of its reserves to work starting in the second half of 2016 . . .”).

<sup>3</sup> Just recently, it appears the DOJ has taken issue with the PE firm Vista Equity Partners’ \$1.65 billion buyout of Cvent because it already owns Lanyon Solutions, which sells a software product similar to Cvent’s. See Gillian Tan, *Next Contestant on Antitrust Jeopardy: Cvent*, BLOOMBERG GADFLY (Sept. 16, 2016), <https://www.bloomberg.com/gadfly/articles/2016-09-16/vista-plays-antitrust-roulette-with-software-firm-cvent>.

<sup>4</sup> Critically, antitrust liability can flow not just from government enforcement actions brought by the FTC or the DOJ but also from private class action litigation. Although we often refer to “the Agencies” as the enforcer of the antitrust laws, this article discusses cases in which the government and/or private litigants have raised antitrust challenges to conduct that could be applicable to PE firms.

<sup>5</sup> *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

<sup>6</sup> *Id.* at 771–72, 772 n.18.

<sup>7</sup> See, e.g., *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990) (holding that two subsidiaries wholly owned by the same parent should be treated as a single entity under *Copperweld*).

<sup>8</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (2010), <http://ftc.gov/os/2010/08/100819hmg.pdf>.

<sup>9</sup> Press Release, U.S. Dep’t of Justice, *Louisiana-Pacific Corp. Abandons Its Proposed Acquisition of Ainsworth Lumber Co. Ltd.* (May 14, 2014), <https://www.justice.gov/opa/pr/louisiana-pacific-corp-abandons-its-proposed-acquisition-ainsworth-lumber-co-ltd>. The authors worked on this matter for Ainsworth.

<sup>10</sup> The DOJ defined another geographic market as the Pacific Northwest, where the merger would have been 4-to-3. *Id.*

<sup>11</sup> Brief of the United States as Amicus Curiae Supporting Petitioners, *Copperweld*, 467 U.S. 752 (No. 82-1260), 1983 U.S. S. Ct. Briefs LEXIS 398, at \*20 n.29.

<sup>12</sup> *Id.* at \*21 n.31 (“The fact that a parent corporation and its controlled subsidiaries are ‘held out’ as, or appear to the public to be, competitors does not provide an antitrust policy reason to treat them as independent economic decision makers.”).

<sup>13</sup> *Novatel Commc’ns, Inc. v. Cellular Tel. Supply, Inc.*, No. Civ. A. C85-2674A, 1986 WL 798475 (N.D. Ga. Dec. 23, 1986).

<sup>14</sup> *Id.* at \*9.

<sup>15</sup> *Id.*; see also *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997) (holding that a parent and its majority-owned subsidiary were viewed as a single entity because the parent “manage[d] and own[ed] fifty-one percent” of the subsidiary and the plaintiff had “not presented any evidence that Defendants had any distinct business interests”).

<sup>16</sup> See *Century Oil Tool, Inc. v. Prod. Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) (extending single entity treatment to two companies owned by three different men because “[b]oth corporations were under the common ownership and control of these three men” (emphasis added)); see also *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344 (N.D. Ill. 1997) (“[M]ajority ownership with its centralized power to control, whether or not apparently exercised in detail on a day-to-day basis, presumptively creates a single entity for antitrust purposes.” (emphasis added) (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1467a (1986))); *Coast Cities Truck Sales, Inc. v. Navistar Int’l Transp. Co.*, 912 F. Supp. 747, 765 (D.N.J. 1995) (Even though the subsidiaries had a president running their day-to-day operations, which gave them “[s]ome modicum of independence,” this did not change the fact that the parent “owned at all relevant times enough of the voting shares in each [subsidiary] to dictate the objectives and actions of each [subsidiary].” (emphasis added)).

<sup>17</sup> *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702 (N.D. Cal. 1994).

<sup>18</sup> *Id.* at 706 (“Under the reasoning of *Copperweld* and its progeny, it is not necessary to conduct a factual inquiry to determine whether a parent and a subsidiary over which the parent has legal control [qualify as a single entity because] . . . a parent and a subsidiary over which the parent has legal control . . . share a unity of interest and common corporate consciousness . . .”).

<sup>19</sup> *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477 (D. Or. 1987).

<sup>20</sup> *Id.* at 1486.

<sup>21</sup> *Sonitrol of Fresno, Inc. v. AT&T Co.*, No. 83-2324, 1986 WL 953 (D.D.C. Apr. 30, 1986).

<sup>22</sup> *Id.* at \*3.

<sup>23</sup> *Id.* at \*5.

<sup>24</sup> *Bell Atlantic Business Systems Services*, 849 F. Supp. 702.

<sup>25</sup> Section 7A(c)(3) of the HSR Act (Title II, sec. 201) provides an exemption for “acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to

- such acquisition.” 15 U.S.C. § 18a(c)(3). Moreover, a rule adopted pursuant to the statute—the “Intraperson Transactions” rule—holds that “[a]n acquisition . . . in which the acquiring and at least one of the acquired persons are the same person by reason of § 801.1(b)(1) of this chapter . . . is exempt from the requirements of the Act.” 16 C.F.R. § 802.30(a). Section 801.1(a)(1) defines the term “person” as “an ultimate parent entity and all entities which it controls directly or indirectly.” 16 C.F.R. § 801.1(a)(1).
- <sup>26</sup> Section 1 of the Sherman Act typically provides for two standards of review: (1) the per se rule, which applies to very specific types of agreements that have long been understood to be anticompetitive (e.g., price fixing, market allocation, group boycotts, etc.) and are therefore automatically unlawful if proven, and (2) the rule of reason, which applies to all other agreements and requires a full blown economic analysis, under which the court reviewing the agreement must weigh the agreement’s procompetitive benefits against its anticompetitive effects.
- <sup>27</sup> See *Dahl v. Bain Capital Partners, LLC*, 937 F. Supp. 2d 119, 136 (D. Mass. 2013) (recognizing that club deals are “established and appropriate business practices” and “beneficial . . . for a number of reasons” and thus granting summary judgment for some defendants on multiple club deals); see also *Pa. Ave. Funds v. Borey*, 569 F. Supp. 2d 1126, 1133–34 (W.D. Wash. 2008) (holding per se rule did not apply to Section 1 club deal claim because club deals offer a host of procompetitive justifications and thus “promote rather than suppress competition”).
- <sup>28</sup> *Pa. Ave. Funds*, 569 F. Supp. 2d at 1134 (dismissing Section 1 claim in club bid context because plaintiff failed to prove that defendant private equity funds had market power in the market for “corporate control of WatchGuard [the target] and other technology companies” and therefore failed to prove that club deal caused anticompetitive effects).
- <sup>29</sup> *Dahl*, 937 F. Supp. 2d 119.
- <sup>30</sup> See *Dahl v. Bain Capital Partners, LLC*, 589 F. Supp. 2d 112, 114 (D. Mass. 2008).
- <sup>31</sup> *Dahl*, 937 F. Supp. 2d at 126.
- <sup>32</sup> *Id.* at 138.
- <sup>33</sup> See *id.* at 145.
- <sup>34</sup> *Id.* at 131–33, 145–46.
- <sup>35</sup> Section 7 also contains a passive investor exemption, which excludes from the statute transactions that are made “solely for investment.” 15 U.S.C. § 18; see *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093, 1102 (C.D. Cal. 1979) (declining to enjoin partial acquisition because it fell “squarely within the investment exemption and thus no violation of Section 7 of the Clayton Act can be shown”); see also *Anaconda Co. v. Crane Co.*, 411 F. Supp. 1210, 1216, 1218–19 (S.D.N.Y. 1975) (applying the passive investor exemption to the transaction because the acquirer agreed not to vote its shares to anticompetitive ends). Because a private equity fund typically seeks to manage companies in which it purchases ownership—unlike, say, mutual funds whose investments are purely passive—this article does not explore the scope of that exemption.
- <sup>36</sup> Daniel P. O’Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559, 563 (2000) (recognizing that “a central part of the analysis of partial ownership is an assessment of which owners have what type of control over the corporation and how this control translates into management decisions”).
- <sup>37</sup> The FTC also focused on the highly concentrated nature of the market, noting that KMI and Magellan were the only two terminal providers in certain markets and, in other markets, were two of the three companies providing such services. See Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment, In the Matter of TC Group L.L.C., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III, L.P., FTC File No. 061-0197, at 4 (Jan. 25, 2007), <https://www.ftc.gov/sites/default/files/documents/cases/2007/01/analysis.pdf>.
- <sup>38</sup> *Id.*
- <sup>39</sup> Press Release, U.S. Dep’t of Justice, Justice Department Requires Deutsche Börse to Divest Its Interest in Direct Edge in Order to Merge with NYSE Euronext (Dec. 22, 2011), <https://www.justice.gov/opa/pr/justice-department-requires-deutsche-b-rse-divest-its-interest-direct-edge-order-merge-nyse>.
- <sup>40</sup> See generally Horizontal Merger Guidelines, *supra* note 8, § 13.
- <sup>41</sup> Directorate for Financial & Enterprise Affairs, Competition Committee, Antitrust Issues Involving Minority Shareholding and Interlocking Directorates—United States, at 3–4 (Feb. 19, 2008), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/uswp3minor.pdf>.
- <sup>42</sup> *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850 (6th Cir. 2005).
- <sup>43</sup> *Id.* at 854.
- <sup>44</sup> *Id.* at 862 (citation omitted).
- <sup>45</sup> See Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Hikma Pharmaceuticals PLC, FTC File No. 151-0198, at 3 (Feb. 26, 2016), <https://www.ftc.gov/system/files/documents/cases/160226hikmaanalysis.pdf>.
- <sup>46</sup> See Horizontal Merger Guidelines, *supra* note 8, § 13.
- <sup>47</sup> Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment, In the Matter of TC Group L.L.C., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III, L.P., *supra* note 37, at 6.
- <sup>48</sup> Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of Boston Scientific Corporation and Guidant Corporation, FTC File No. 061 0046, at 6 (Apr. 20, 2006), <https://www.ftc.gov/sites/default/files/documents/cases/2006/04/0610046analysis060420.pdf>.
- <sup>49</sup> Critically, any collaboration among a PE firm’s minority-owned companies with respect to market price, market output, or geographic market presence is categorically unlawful under the per se rule.
- <sup>50</sup> Federal Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors § 3.34 (2000), [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf).
- <sup>51</sup> In 2014, for example, the European Commission pierced the corporate veil to hold Goldman Sachs’s private equity arm jointly and severally liable for the conduct of one of its portfolio companies, Prysmian, which (unbeknownst to Goldman Sachs) had engaged in an unlawful cartel. See Alex Barker, *Goldman Fined €37m by EU over Subsea Cable Investment*, FIN. TIMES, Apr. 2, 2014.
- <sup>52</sup> Section 8 of the Clayton Act provides that “[n]o person shall, at the same time, serve as a director or officer in any two corporations . . . that are . . . competitors [such] that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.” 15 U.S.C. § 19(a).
- <sup>53</sup> These threshold figures are updated annually and therefore should be evaluated regularly.
- <sup>54</sup> Miguel Helft & Brad Stone, *F.T.C. Role Seen in Exit at Amazon*, N.Y. TIMES, Apr. 1, 2010.
- <sup>55</sup> *Reading Int’l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301 (S.D.N.Y. 2003).
- <sup>56</sup> *Id.* at 327 (“There is thus no ground for disputing that corporations are subject to the prohibitions of [S]ection 8.”). All but one defendant in this case settled after the court denied defendants’ motion to dismiss. By the time the court decided the remaining defendant’s summary judgment motion, the indirect interlock had been cured by one of the directors’ resignation. The court granted summary judgment, holding that plaintiff’s Section 8 claim was moot. See *Reading Int’l, Inc. v. Oaktree Capital Mgmt. LLC*, No. 03 Civ. 1895 (PAC), 2007 WL 39301 (S.D.N.Y. Jan. 8, 2007) (granting remaining defendant summary judgment opinion).
- <sup>57</sup> See, e.g., *United States v. Int’l Ass’n of Machinists & Aerospace Workers*, Civ. A. No. 94-0690, 1994 WL 728884 (D.D.C. June 14, 1994) (The DOJ challenged a union’s decision to place two representatives on different boards of competing firms.).