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Private Equity and Competition—Comparing U.S. Agency Views to Recent Policy and Empirical Evidence

By Kenneth Schwartz, Michael Singer, and Isabel Tecu

The Biden-era Federal Trade Commission ("FTC") and Department of Justice, Antitrust Division ("DOJ") have made no secret of their intention to closely scrutinize the involvement of private equity investors in mergers and acquisitions. This increased scrutiny—paired with general skepticism of private equity incentives—comes amidst ever-increasing private equity activity. This article suggests that the U.S. antitrust agencies' recent concerns regarding private equity mark a significant divergence from long-standing agency policy and do not account for empirical evidence highlighting the procompetitive benefits of private equity investment.

We start out by summarizing agency leaders' recent statements that suggest that private equity investment is harmful to competition and show that these statements conflict with previous agency policy and leadership opinion. We then highlight empirical economic evidence suggesting that a blanket negative view of private equity in the competition context is misplaced. First, we summarize a selection of empirical studies of private equity investment on business productivity, quality, resiliency, and innovation, as well as an empirical study on asset divestitures, all of which suggest procompetitive effects. Second, we highlight that allegedly "problematic" roll-up acquisitions and interlocking directorates are by no means unique to—or inherently more problematic in—private equity deals.

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A Change in Agency Views on Private Equity

Since the U.S. administration change in 2021, antitrust agency rhetoric on private equity has ramped up significantly, both in frequency and aggressiveness. Indeed, recent FTC and DOJ commentary has suggested private equity transactions/behavior warrant close scrutiny and should perhaps even be evaluated differently.[1] Specifically, agency leadership has expressed concerns that a perceived private equity focus on short-term profits and aggressive cost-cutting at the expense of long-term strategic growth ultimately harms consumers. For example, FTC Chair Lina Khan, in her 2021 "Priorities" Memo, argued explicitly that "[private equity firms'] business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition."[2]

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[1] *See* Andrew Forman, The Importance of Vigorous Antitrust Enforcement in Health Care, Keynote at the ABA's Antitrust in Healthcare Conference (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust (stating "the division often looks more favorably on a market participant as a buyer of assets than a private equity firm"); Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, File No. 2110140 (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf (discussing how the decision imposes higher obligations on the private equity industry than others).

[2] Memorandum, From Chair Lina M. Khan to Commission Staff and Commissioners, Vision and Priorities for the FTC (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

The agencies' increased attention to, and scrutiny of, private equity has specifically manifested in a greater focus on so-called industry "roll-ups," increased skepticism of private equity firms as merger-related divestiture buyers and more aggressive enforcement of perceived potential anti-competitive board interlocks. "Roll-ups"—the practice of serially buying and integrating multiple small or mid-sized businesses in the same industry—are, according to DOJ Assistant Attorney General Jonathan Kanter, "designed to hollow out [an industry] . . . and essentially cash out," a practice "very much at odds with the law, and very much at odds with the competition [the DOJ is] trying to protect."[3] Ryan Danks, currently the Director of Civil Enforcement at the Antitrust Division, has gone so far as to suggest that private equity firms "are existential threats to [the DOJ's] merger enforcement program" due to their alleged consistent failure to observe HSR filing protocol, particularly in the context of bolt-on transactions.[4]

With respect to merger-related divestitures, both Chair Khan and AAG Kanter have questioned whether private equity buyers are incentivized to aggressively compete using the divested assets,[5] and, in turn, whether they are suitable buyers for those assets. According to Chair Khan, regulators should be "skeptical" when private equity firms take on the divested assets so as to not "miss the bigger picture" that an industry may have "a huge private equity firm controlling [it]."[6] The DOJ was equally critical of private equity's incentives—and the parties' proposed private equity divestiture buyer—in its challenge to the UnitedHealth/Change Healthcare merger in 2022, arguing that private equity firms are allegedly poor divestiture buyers because "[t]heir incentives or commitments to innovation are not always aligned with those of the strategic buyer."[7] This view was ultimately rejected by the court in its ruling in favor of the merging parties.[8]

Further, the agencies have signaled a renewed focus on Section 8 of the Clayton Act, which prohibits anticompetitive board interlocks (i.e., where an individual concurrently serves on the boards of independently-owned competitors). For example, AAG Kanter has publicly advocated for Section 8 as "[o]ne tool that I think we can use more" and stated that the DOJ "will not hesitate to bring Section 8 cases to break up interlocking directorates."[9] These investigations recently culminated in numerous directors resigning from multiple U.S. public company boards.[10] Director

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[3] Stefania Palma and James Fontanella-Khan, *Crackdown on buyout deals coming, warns top US antitrust enforcer*, FINANCIAL TIMES (May 18, 2022), https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1.

[4] Dan Papscun, *Private Equity Deal Disclosures Fall Short, DOJ Official Says*, Bloomberg Law (February 2, 2023), https://news.bloomberglaw.com/antitrust/private-equity-deal-disclosures-fall-short-doj-official-says.

[5] *See, e.g.,* Jonathan Kanter, Antitrust Enforcement: The Road to Recovery, Keynote at the University of Chicago Stigler Center (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler (questioning whether private equity firms "are incapable or uninterested in using [the divested assets] to their full potential").

[6] Stefania Palma, Mark Vandevelde & James Fontanella-Khan, *Lina Khan vows 'muscular' US antitrust approach on private equity deals*, FINANCIAL TIMES (June 9, 2022), https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797.

[7] United States v. UnitedHealth Grp. Inc., No. 1:22-cv-0481 (CJN) (D.D.C. 2022).

[8] As the court noted, "the evidence at trial established . . . that [the divestiture buyer's] incentives are geared toward preserving, and even improving, [the divested business's] competitive edge." Memorandum Opinion, *United States of America v. UnitedHealth Group Inc.*, 1:22-cv-0481 (D.D.C.). The court went on to cite the DOJ's Merger Remedies Manual, which recognized the many benefits private equity buyers bring to the table as divestiture buyers. The Remedies Manual was rescinded by the DOJ shortly after publication of the judge's opinion.

[9] Jonathan Kanter, Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[10] Press Release, Dep't of Justice, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially; Press Release, Dep't of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (March 9, 2023), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.

Danks echoed this sentiment, noting recently that "private equity companies should not consider nominally independent directors to be automatically safe [from Section 8 issues]."[11]

The largely anti-private equity views expressed by Chair Khan and AAG Kanter are, however, not necessarily consistent with previous agency policy, opinions of past agency leadership or even, in the case of Chair Khan, other current FTC commissioners (at least until Commissioner Christine Wilson's recent resignation). In fact, the antitrust agencies historically held the view that private equity—especially in the divestiture context—can be a positive competitive force. For example, the recently revoked DOJ Merger Remedies Manual included a statement that "in some cases a private equity purchaser may be [a] preferred" divesture buyer.[12] In 2018, FTC Chair Joseph Simons defended private equity firms' participation in merger-related divestitures as providing needed liquidity and management expertise without a significant risk of anticompetitive effects.[13] More recently, former DOJ AAG Makan Delrahim warned that viewing private equity ownership as inherently suspect "actually will harm consumers and competition,"[14] and pointed to multiple academic studies suggesting that private equity is both good for competition and helps companies survive—and sometimes thrive—in adverse economic conditions.[15] Similarly, former Obama administration Treasury Secretary Larry Summers recently stated that he is concerned about the "generalized feeling of hostility and outrage towards business" at the FTC and DOJ and does not understand why "whether a firm is owned by public shareholders or private equity shareholders" should affect the outcome of a merger review.[16]

Former FTC Commissioner Christine Wilson, the lone Republican commissioner among the 3-1 Democratic majority until her recent resignation, maintained a skepticism of Chair Khan's arguments regarding the negative impact of private equity on competition. In a November 2022 dissenting statement, Commissioner Wilson suggested that the Commission's proposed expansion of its authority under Section 5 of the FTC Act,[17] which portends greater private equity-related enforcement, "resemble[d] the work of an academic or think tank fellow who dreams of banning unpopular conduct and remaking the economy."[18] In an article announcing her resignation, Commissioner Wilson called recent FTC actions "a tax on all mergers" set up to "substitute[] for

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[11] Khushita Vasant, *Independent directors not immune from antitrust scrutiny as crackdown on interlocking directorates continues, DOJ official says*, MLex Market Insight (February 3, 2023), https://mlexmarketinsight.com/news/insight/independent-directors-not-immune-from-antitrust-scrutiny-as-crackdown-on-interlocking-directorates.

[12] Antitrust Div. of DOJ, Merger Remedies Manual, (September 2020), https://www.justice.gov/atr/page/file/1312416/download.

[13] Ben Remaly, *Simons defends divestures to private equity*, Global Competition Review (November 16, 2018), https://globalcompetitionreview.com/gcr-usa/article/simons-defends-divestitures-private-equity.

[14] Makan Delrahim, *Antitrust Attacks on Private Equity Hurt Consumers*, Wall Street Journal (July 31, 2022), https://www.wsj.com/articles/antitrust-attacks-on-private-equity-hurt-consumers-lina-khan-ftc-recession-competition-management-expertise-capital-11659271442.

[15] *See* Steven J. Davis et al., The (Heterogeneous) Economic Effects of Private Equity Buyouts (Jul. 8, 2021), https://ssrn.com/abstract=3465723 (finding that private equity buyouts are associated with higher productivity and job growth); Shai Bernstein et al., *Private Equity and Portfolio Companies: Lessons from the Global Financial Crisis*, vol. 32, issue 3, Journal of Applied Corporate Finance, p.21, pp.22-23, (Summer 2020) (finding that private equity backed companies in the 2008 crisis were able to weather the economic conditions well).

[16] Chris Anstey, *Summers Warns on 'Hipster Antitrust' Push Eyeing Private Equity*, Bloomberg Law (May 21, 2022), https://www.bloomberg.com/news/articles/2022-05-20/summers-warns-on-hipster-antitrust-push-eyeing-private-equity?leadSource=uverify%20wall.

[17] Section 5 of the FTC Act grants the FTC broad enforcement authority to address "unfair methods of competition" and "unfair or deceptive acts or practices."

[18] Dissenting Statement of Commissioner Christine S. Wilson, Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act", Comm'n File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

It is certainly far from a well-established fact (as current agency leadership contends) that private equity involvement necessarily leads to reduced incentives to compete.

unfulfilled [Progressive] legislative desires."[19] Commissioner Wilson was also highly critical of the FTC's reimplementation of prior approval requirements in connection with divestitures, a policy which disproportionately affects private equity firms given their generally acquisitive business model. Specifically, Commissioner Wilson stated in public remarks at the 19th Annual International Mergers and Acquisitions Conference in June 2022 that "[l]abeling an acquirer a recidivist and penalizing it with a broad and burdensome prior approval requirement . . . is a substantial change in the accepted process for merger review."[20]

In sum, the anti-private equity approach endorsed by Chair Khan and AAG Kanter represents a substantial change in FTC and DOJ policy. It is certainly far from a well-established fact (as current agency leadership contends) that private equity involvement necessarily leads to reduced incentives to compete—in fact, as noted above, private equity ownership may have significant *procompetitive* benefits. As we explain further below, the antitrust agencies' current approach to private equity is not only a substantial—and suspect—enforcement shift, but also lacks unambiguous empirical support.

Empirical Evidence For Pro-Competitive Effects of Private Equity Ownership

As noted above, while recent DOJ and FTC statements on private equity are not grounded in long-standing agency precedent, they also lack consistent empirical support. One common criticism of the private equity business model in the competition context is that private equity firms are typically focused on a near-term investment horizon that does not prioritize long-term, sustainable growth[21] (though it is important to note that private equity ownership does not necessarily equate to a short investment horizon by default).[22] Another is that private equity access to a wide variety of financing options leads to highly leveraged—and unstable—investments that are vulnerable to economic swings. A third is that private equity management lacks specific hands-on industry experience required to effectively run the acquired business.

[T]he antitrust agencies' current approach to private equity is not only a substantial—and suspect—enforcement shift, but also lacks unambiguous empirical support.

From the perspective of economic principles, there is no reason to expect these characteristics—even if they were true, for argument's sake—to necessarily result in anticompetitive effects. For example, in standard economic oligopoly models, a focus on short-term profits can result in *more aggressive* competition because firms have increased incentives to under-cut competitors

[19] Christine Wilson, *Why I'm Resigning as an FTC Commissioner*, Wall Street Journal (February 14, 2023), https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d.

[20] Christine S. Wilson, An Update on FTC Merger Enforcement, Remarks at International Bar Association's 19th Annual International Mergers and Acquisitions Conference (June 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CWilsonUpdateMergerEnforcement.pdf.

[21] *See, e.g.* Andrew Forman, *supra* note 1 (stating "Second, we are focused on whether certain private equity investments may chill fierce competition on the merits. Specifically, whether certain private equity investments may either blunt the incentive of the target company to act as a maverick or a disruptor in health care markets or otherwise cause the target company to focus solely on short-term financial gains and not on advancing innovation or quality.").

[22] *See* Bain & Company, *Global Private Equity Report 2022* (July 13, 2022), p. 20, https://www.bain.com/globalassets/noindex/2022/bain_report_global-private-equity-report-2022.pdf. In fact, there is evidence that the average private equity holding period has increased in recent years. *See, e.g.* Juha Joenväärä, Juho Mäkiaho, & Sami Torstila, *Prolonged Private Equity Holding Periods: Six Years Is the New Normal,* Journal of Alternative Investments, p.1 (2022), finding a holding period of about 6 years for European private equity investments between the beginning of the financial crisis though 2015, and similar figures reported for the U.S. by Pitchbook (*see* Adam Lewis, *PE hold times keep going up*, Pitchbook (November 15, 2017), https://pitchbook.com/news/articles/pe-hold-times-keep-going-up). Furthermore, some studies point to private equity's relatively *long* investment horizon when compared to the quarterly evaluation of publicly-traded companies. *See, e.g.* Shai Bernstein, Josh Lerner & Filippo Mezzanotti, *Private Equity and Financial Fragility During the Crisis,* vol.32, iss.4, The Review of Financial Studies, p.1309, (Apr. 2019).

[E]conomic literature on the effects of private equity ownership is robust and, seemingly contrary to recent FTC and DOJ opinion, often finds a positive correlation between private equity ownership and improved company performance that is indicative of procompetitive effects.

and gain market share.[23] Furthermore, a company that reduces marginal costs and increases productivity would be expected to pass through at least some of those savings to consumers in the form of lower prices.[24] Greater alignment between the incentives of firm management and private equity ownership may also lead to more efficient management, cost savings, and focused R&D, which are also likely to increase a firm's ability to compete.

In fact, private equity plays an important role in disciplining incumbent firms and corporate leadership to maximize profit in the interest of their shareholders—if management of a public company underperforms, the company becomes an attractive target for private equity investors and management risks being replaced.[25] This threat by itself serves to keep management on their toes. Private equity investors may also be willing and able to invest in companies that few other investors would—for example, merger-related divestitures, mis-managed or neglected carve-outs, start-ups, or smaller businesses from which the owners are seeking to exit. Increasing the hurdles for private equity acquisitions would likely lead to overall less efficient allocation of capital and managerial skills. While the articles referenced in this section are focused on effects at individual companies that were acquired by private equity and not at the macroeconomic level, these articles also illustrate the impact of a well-functioning market for corporate control.

The effects of private equity ownership on the performance and competitive behavior of portfolio companies is ultimately a question that can be addressed empirically and is the one we examine below. It is important to note, however, that empirical studies face a number of challenges. First, a particular study's findings may be difficult to generalize to other settings or industries. Second, it may not be clear that a firm's ownership is really causing the identified effects—i.e., typical private equity targets may differ from other companies in important ways, not all of which may be observable.[26] Finally, in many settings and industries, pricing data and other measures of consumer welfare are not readily available, making it impossible to study effects on these metrics directly. Notwithstanding these caveats, however, economic literature on the effects of private equity ownership is robust and, seemingly contrary to recent FTC and DOJ opinion, often finds a positive correlation between private equity ownership and improved company performance that is indicative of procompetitive effects.

Positive Effects on Labor Productivity and Employment. The most comprehensive study of the economic effects of private equity ownership is likely a study by Davis et al. that uses firm- and establishment-level data from the U.S. Census to study approximately 6,000 private

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[23] *See, e.g.,* Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright, & Jean Tirole, *The Economics of Tacit Collusion: Implications for Merger Control*, vol. 282, The Political Economy of Antitrust, pp. 217-239 (Ghosal, J. Stennek, Contributions to Economic Analysis, (2007)) (p.220: "Collusion is sustainable if and only if firms put sufficient weight on future profits.").

[24] *See, e.g.* Jeremy I. Bulow & Paul Pfleiderer, *A Note on the Effect of Cost Changes on Prices*, vol. 91, no.1, Journal of Political Economy, pp.182-185, (Feb., 1983); Orley Ashenfelter, David Ashmore, Jonathan B. Baker & Signe Mary McKernan, *Identifying the Firm-Specific Cost Pass-Through Rate* (1998), FTC Bureau of Economics Working Paper 217, https://www.ftc.gov/reports/identifying-firm-specific-cost-pass-through-rate) (p. 6: "The second order condition guarantees that the firm-specific passthrough rate is non-negative. Thus, Staples will raise price when its firm-individuated costs rise and lower price when its firm-individuated costs decline.").

[25] *See, e.g.,* Henry G. Manne, *Mergers and the Market for Corporate Control*, vol.73, Journal of Political Economy, pp.110-120 (Aug. 1965) (p.113: "Only the take-over scheme provides some assurance of competitive efficiency among corporate managers and thereby affords strong protection to the interests of vast numbers of small, non-controlling shareholders.").

[26] We refer to potentially unobserved differences (by the researcher) between private equity targets and otherwise similar companies as "private equity selection bias" in the discussion below.

equity acquisitions between 1980 and 2013.[27] The authors specifically examine employment and productivity changes at companies acquired by private equity firms relative to observationally similar companies, and relative to the company's own growth history.[28] The study finds that labor productivity, measured as revenue per worker, generally increases substantially after a company is acquired by a private equity firm.[29] In the case of previously privately-held targets, the target company, on average, added jobs. In the case of previously publicly-held targets, the target company, on average, saw job reductions. These different effects between privately-held and publicly-held targets are consistent with the economic literature finding that publicly-traded companies are more likely to be bloated, while privately-held companies are more likely hampered in their expansion due to difficulties in accessing capital. Private equity investors are able to address both of these problems by providing access to capital for privately-held firms and greater managerial oversight for publicly-held firms. In sum, this study suggests that private equity management typically leads to more efficient production, which in turn has obvious positive competitive effects.

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Positive Effects on Quality. Further evidence of private equity ownership leading to better operational efficiency is documented in a study of the restaurant industry conducted by Bernstein and Sheen.[30] Using data on close to 50,000 Florida restaurants from 2002 to 2012, the authors compare changes in health inspection outcomes at restaurants within the same zip code that were acquired by private equity vs. those not acquired by private equity.[31] The study finds that after the private equity acquisition, the number of critical violations found by surprise health inspections decreased significantly relative to the control group restaurants that were not acquired by private equity. Digging further into how private equity firms achieved these improvements, the study finds that they are likely attributable to the operational expertise provided by the private equity firm: private equity restaurant acquisitions where at least one responsible partner had previous experience in the restaurant industry saw particularly large improvements in quality.

The above study paints a data-based picture that is at odds with qualitative statements by agency leadership that suggest private equity ownership leads to lower quality. On the contrary, the study shows that private equity ownership tends to enhance quality, which is a significant procompetitive benefit. It also casts doubt on the very premise of these agency statements—that a supposed short-term investment horizon necessarily means lower quality and an otherwise lessened ability or incentive to effectively compete. The quality gains reflected above are neither indicative of a nearsighted strategy nor suggestive of reduced competitiveness.

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27 Steven J. Davis et al., *supra* note 15. An earlier version of this study, using data through 2005 only, was published as "Private Equity, Jobs, and Productivity" (vol.104, no.12, American Economic Review, pp.3956-90 (2014)). This study, as well as most other empirical studies mentioned in this article, identify private equity acquisitions using data from CapitalIQ, including the categorization of the transaction by CapitalIQ.

28 To mitigate private equity selection bias, the study matches private equity targets to companies that were not acquired by private equity but that operate in the same industry and are of similar age and size. In addition, the study controls for the target's own pre-acquisition growth history in the two years after the acquisition.

29 The data do not allow the authors to decompose this effect into higher markups vs higher physical productivity.

30 Shai Bernstein & Albert Sheen, *The Operational Consequences of Private Equity Buyouts: Evidence from the Restaurant Industry,* vol. 29, no. 9, the Review of Financial Studies, p.2387, (September 2016).

31 To address private equity selection bias the study controls for a large number of parameters, effectively comparing changes over time between restaurants in the same zip code. The study also compares directly owned restaurants to franchised restaurants within the same restaurant chain and finds improvements in health inspections for directly owned restaurants only, suggesting that the improvements in health inspections are due to direct private equity ownership.

Positive Effects on Responding to Financial Crises. A study by Bernstein, Lerner and Mezzanotti investigates the ability of private equity-owned firms to respond to substantial macroeconomic changes and economic crises by looking at the financial decisions and performance of private equity-owned companies during the 2008-2009 financial crisis.[32] The study sample consists of almost 500 private equity-owned companies and over 1,000 observationally similar control companies headquartered in the U.K.[33] The study finds that companies generally decreased their capital investments substantially during the financial crisis; however, private equity-owned companies reduced these investments significantly *less* than companies not owned by private equity, and saw a resulting boost in their sales relative to the industry.[34] In connection with the study, the authors conducted a survey of private equity firms, which confirmed that many of these firms actively assisted their portfolio companies during the financial crisis by, e.g., arranging financing that was otherwise difficult to obtain.[35] The survey respondents also cited freedom from the demands placed on public companies to deliver short-term results and answer to shareholders as beneficial in facilitating a rapid response to a changing economic environment (interestingly, the survey respondents indicate that it was *public companies* that are required to focus more on short-term gains, which is opposite of the agencies' concern regarding private equity). These results provide strong evidence that private equity ownership increases—or at the very least, sustains—the competitive viability of portfolio companies during financial crises.

Positive Effects on Product Variety and Availability. A recent study by Fracassi, Previtero, and Sheen investigates the effects of private equity ownership on product market outcomes.[36] The study uses supermarket scanner data on nearly 2 million consumer products sold between 2006 and 2016 in the U.S. 236 manufacturers in the sample were acquired by private equity firms during the relevant time period.[37]

The study finds that sales revenues increased dramatically for private equity-acquired companies in the years following the acquisition. Critically, this growth was not driven by higher prices

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[32] Shai Bernstein, Josh Lerner & Fillippo Mezzanotti, *supra* note 22.

[33] The U.K. provides an ideal setting for this study because it collects and makes available data on privately-held companies to a much greater extent than the U.S. The authors show that private equity investments in the U.K. exhibit similar characteristics to private equity investments in other countries, to alleviate concerns that their findings are not generalizable to other countries. The study mitigates private equity selection bias by using control companies that are matched to a particular private equity-owned company and that are in the same industry and of similar size, leverage, and profitability in 2007. Prior to the crisis, these control companies exhibit similar trends as the private equity-owned companies in terms of investment, revenue, return on assets, equity contributions, and debt issuance. Thus, observed differences that emerge during the crisis can likely be attributed to differences in ownership rather than other, financial characteristics.

[34] Similar to capital investments, equity contributions and debt issuances decreased during the crisis, but less so for private equity-owned companies. At the same time, the relative cost of debt decreased for private equity-owned companies. Private equity-owned companies were no more likely to go out of business or into distress than non-private equity owner companies and were more likely to be targeted in potentially profitable M&A transactions.

[35] For example, the positive effects of private equity ownership are stronger for companies that are likely more financially constrained, and among private equity-owned companies, companies whose private equity investors had greater resources at the beginning of the crisis increased their investments more.

[36] Cesare Fracassi, Alessandro Previtero, & Albert Sheen, *Barbarians at the Store? Private Equity, Products, and Consumers,* vol.77, iss.3, The Journal of Finance, p.1439, (April, 2022).

[37] To address private equity selection bias this study goes beyond matching private equity-acquired companies to observationally similar control companies and also matches observations based on product categories and stores. For example, the study compares canned green beans manufactured by a private equity-acquired company to canned green beans manufactured by a non-private equity acquired company sold at the same store. As the authors acknowledge, this research design does not fully eliminate selection effects if one specific brand of canned green beans is expected to grow faster than a different brand sold at the same store.

(which increased minimally),[38] but rather by expansion in the number of products sold and the geographic sales area.[39] In particular, private equity-acquired manufacturers launched new products in existing—as well as new—product categories and expanded the availability of products across retail chains and geographies.[40] Consistent with certain of the studies discussed above, this study presents further evidence suggesting that private equity investors are often well-positioned to grow consumer goods companies by alleviating financing constraints and providing managerial experience, which in turn make these companies more competitive.[41]

These results suggest that private equity firms generally do not sacrifice long-term investment for short-term gain, but rather tend to implement a greater focus on R&D efforts that are essential to the company's growth.

Positive Effects on Innovation. A study by Lerner, Sørensen, and Strömberg investigates the effects of private equity ownership on innovation by looking at changes in patent activity by private equity-acquired companies, comparing the period before and after the acquisition.[42] The study's sample consists of close to 500 companies that were acquired by private equity firms between 1986 and 2005, and over 6,000 patents applied for by these companies over an eight year period, spanning from three years prior to the acquisition until five years post-acquisition.[43] The study finds evidence that the patents applied for after the private equity acquisition are both more important, as measured by patent citations, and more focused on the company's core technologies. At the same time, the study finds no evidence for substantial decreases in the total number of patents or in the patents' originality or generality. These results suggest that private equity firms generally do not sacrifice long-term investment for short-term gain, but rather tend to implement a greater focus on R&D efforts that are essential to the company's growth.

Positive Effects on Divestitures. The studies discussed above generally look at acquisitions of entire firms by private equity. A specific concern about private equity in the merger context, however, is whether private equity buyers are "good" buyers of assets that merging firms need to divest in order to mitigate antitrust concerns. Although not focused on merger-related divestitures, a study by Hege et al. investigates the performance of operating assets sold to private equity using a sample of approximately 500 sales of operating assets by public companies ("divisional buyouts") that occurred between 1994 and 2006, of which 161 were purchased by private equity.[44] The study finds that the enterprise value of the divested assets in the hands of private equity investors on average grows faster than public companies in the same industry and of similar size.[45] The

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[38] While evaluating consumer welfare is beyond the scope of the study, the finding of only small price increases coupled with increased product variety and availability, which are generally valued by consumers, suggests that consumers are unlikely to be meaningfully harmed by private equity acquisitions of privately-held consumer good manufacturers.

[39] Interestingly, findings are starkly different for public-private acquisitions, of which there are only a few in the sample: Public companies that are taken private by private equity tend to increase prices and lose sales. This observation is consistent with the findings by Davis et al and with private equity investors improving the alignment of incentives between owners and managements at previously public firms.

[40] In response, competing products seem to increase prices marginally and lose shelf space.

[41] For example, results are stronger for companies that are more likely to be financially constrained prior to the acquisition, and for private equity investors with growth expertise. While private equity-acquired companies achieve some of this growth via subsequent acquisitions, the study also finds significant growth for companies that do not engage in acquisitions.

[42] Josh Lerner, Morten Sørensen, & Per Strömberg, *Private Equity and Long-Run Investment: The Case of Innovation*, vol.66, no.2 Journal of Finance, p.445, (2011).

[43] Private equity selection bias is alleviated by the observations that the private equity-backed companies in the sample are mostly "old economy" companies, for which innovation and intellectual property are arguably less central to the private equity investment decision, and that most of the positive effects do not appear in the year of the transaction but only one or two years later.

[44] Ulrich Hege, Stefano Lovo, Myron B. Slovin, & Marie E. Sushka, *Divisional Buyouts by Private Equity and the Market for Divested Assets,* vol.53, Journal of Corporate Finance, pp.21-37, (2018).

[45] Value creation is particularly large for assets that private equity investors sell via IPO or to strategic buyers.

authors conclude that these empirical findings are consistent with private equity investors having restructuring capabilities that allow them to pay more for the acquired assets—and grow their value more—than corporate acquirers.

[I]t is not accurate to assume that "roll-up" acquisitions are inherently anticompetitive—indeed, small, incremental acquisitions often generate the largest efficiencies (these acquisitions may also generate economies of scale that could not otherwise be achieved).

Empirical Studies of Antitrust Issues Associated with Private Equity Acquisitions But Not Unique to Private Equity

As noted above, current agency leadership has suggested that "roll-up" transactions and Section 8 issues are particularly relevant to the private equity space. However, a number of studies suggest that these issues are not unique to private equity firms and do not merit special treatment when they do implicate the private equity space.

Roll-Ups. "Roll-up" acquisitions are currently under particular scrutiny, in part, because they may not trigger reporting requirements and thus can "fly under the radar" of the antitrust agencies. As an initial matter, "roll-ups" are far from the norm—according to Bain, only about one fifth of private equity transactions globally have been acquisitions that "add" to existing portfolio companies (which presumably includes "roll-up" acquisitions, but may also include acquisitions that add new capabilities or have a vertical component).[46] The concern is also not exclusive to private equity. As several economic studies have found, firms in numerous industries and settings structure deals in ways intended to minimize antitrust risks. For example, Kepler et al. looked at all U.S. mergers and acquisitions announced from January 2001 through February 2020 (with the exception of very small deals and certain regulated industries), including both public and private targets and acquirers, and found a large concentration of deals right below the HSR filing thresholds.[47] From an economic perspective, this behavior is hardly surprising—one would expect firms to respond to incentives created by the regulatory environment. Importantly, however, Kepler et al. also found that a relatively large proportion of transactions bunched right below the HSR filings thresholds was comprised of acquisitions of privately-held targets by publicly-held firms, while a relatively small proportion was comprised of acquisitions of privately-held firms by other privately-held firms, suggesting that private equity acquisitions are unlikely to be a major component of this number.

Additionally, it is not accurate to assume that "roll-up" acquisitions are inherently anticompetitive—indeed, small, incremental acquisitions often generate the largest efficiencies (these acquisitions may also generate economies of scale that could not otherwise be achieved). A 2019 McKinsey study found that companies engaged in many small deals that accrue to a meaningful amount of market capitalization over multiple years achieved higher excess total shareholder returns compared to companies that engaged in other M&A strategies.[48] Such acquirers typically have well-established organizational infrastructure and integration/management best practices, which may explain the success of this strategy. While this study was limited to large public companies, it supports the idea that efficiencies may be particularly large for small acquisitions that are part of a "roll-up" approach.

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[46] Bain & Company, *supra* note 22.

[47] John D. Kepler, Vic Naiker & Christopher R. Stewart, Stealth Acquisitions and Product Market Competition, Journal of Finance, (August, 26, 2021), https://www.gsb.stanford.edu/faculty-research/working-papers/stealth-acquisitions-product-market-competition.

[48] Jeff Rudnicki, Kate Siegel, & Andy West, *How lots of small M&A deals add up to big value*, McKinsey Quarterly (2019), https://www.mckinsey.com/~/media/mckinsey/business%20functions/strategy%20and%20corporate%20finance/our%20insights/repeat%20performance%20the%20continuing%20case%20for%20programmatic%20m%20and%20a/how-lots-of-small-m-and-a-deals-add-up-to-big-value.pdf

[D]espite recent statements from FTC and DOJ leadership to the contrary, the notion that private equity investment is "bad" for competition is a relatively recent—and novel—theory.

Interlocking Directorates. This issue of interlocking directorates is similarly not unique to private equity. Looking at companies in the S&P 1500, Nili found that, in 2016, over 80% of these companies had at least one director on their board who concurrently served on the board of another company in the same industry. Additionally, over one quarter of companies had at least one director on their board who concurrently served on the board of another company in the same four-digit SIC code.[49] Firms operating in the same four-digit SIC code may not necessarily be competitors, but directionally these findings suggest that interlocking directorates are also a significant issue for publicly traded companies as well as private equity firms. A study by Manjunathet et al. also supports this point—there, the authors found a substantial number of director interlocks in publicly traded life science companies.[50]

Conclusion

It is critical to remember that, despite recent statements from FTC and DOJ leadership to the contrary, the notion that private equity investment is "bad" for competition is a relatively recent—and novel—theory. As we have demonstrated in this article, the mere fact that private equity firms may have a different investment strategy or operating philosophy than public companies or other privately-held businesses does not mean private equity-owned portfolio companies will be less competitive or sacrifice long-term competitive viability in the interest of making a "quick buck." In fact, some of the present concerns with private equity, such as a focus on short-term profits, can also produce procompetitive benefits. Previous FTC and DOJ leadership—and longstanding FTC and DOJ policy—recognized as much and acknowledged the many benefits private equity offers from a competition standpoint, including the fact that private equity ownership can actually *enhance* long-term competitive success by providing relief from adverse macroeconomic conditions. Empirical evidence also supports the notion that private equity ownership allows for faster growth and greater investment in critical R&D, and improves a company's ability to respond to shifting market conditions. The goal of many private equity firms—to generate returns for investors—is not at odds with competitive growth; lest we forget, public companies have a similar duty to maximize value for their shareholders, and yet current agency leadership has not subjected public company boards to the same criticism. It is important to remember that the recent flurry of agency skepticism regarding private equity does not represent long-standing policy—or even consensus opinion—and, at the very least, is inconsistent with empirical and academic studies that recognize the competitive benefits of private equity ownership. ●

It is important to remember that the recent flurry of agency skepticism regarding private equity does not represent long-standing policy—or even consensus opinion.

[49] Yaron Nili, *Horizontal Directors,* vol.114, no.5, Nw. U. L. Rev., p.1179, p.1214, (2019).

[50] Anoop Manjunath, Nathan Kahrobai, Mark A. Lemley & Ishan Kumar, Analysis of over 2,200 life science companies reveals a network of potentially illegal interlocked boards (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4253144.