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The Threshold

Mergers and Acquisitions Committee

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This edition of the Threshold:

- recaps a panel on theories of labor harm in mergers, sponsored by the American Bar Association Antitrust Law Section's Mergers and Acquisitions Committee (beginning on p.1);
- summarizes new regulations in Europe and the United Kingdom that impact merger control, particularly with respect to digital transactions (beginning on p.2); and
- presents the argument that antitrust enforcement should be irrespective of business type in light of the perceived increased scrutiny of transactions involving private equity firms (beginning on p.6).

The Threshold serves as a platform for various perspectives. The opinions and viewpoints expressed in this article are solely those of the authors. Such opinions and viewpoints do not necessarily reflect the opinions or viewpoints of – nor are they endorsed by – the Section, the M&A Committee, or the compilers or editors of this publication.

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2023 Merger Guidelines Addressing Potential Impacts on Workers

By: Matthew Calvin, Conor Foley, and William Morrison (Cornerstone Research)

On March 8, 2024, the Antitrust Law Section hosted a webinar panel titled *Mergers that Create a Better Workplace? Some Practical Considerations Raised by Guideline 10 of the 2023 Merger Guidelines Addressing Potential Impacts on Workers* (the "**Panel**"). Craig Malam, a Principal at Cornerstone Research, moderated the Panel, which featured David Berger, a Professor of Economics at Duke University, Beatriz Marques, an Assistant Attorney General at the Office of the New York State Attorney General, Taylor M. Owings, a partner at Wilson Sonsini Goodrich & Rosati, and Noah Phillips, Co-Chair of the Antitrust practice at Cravath, Swaine & Moore.

After introducing the Panel, Dr. Malam described how in recent year the U.S. antitrust agencies – the Antitrust Division of the Department of Justice and the Federal Trade Commission – have increasingly expressed concern about the impact mergers have on labor markets. In particular, he noted that the agencies have voiced concerns that merged firms may have increased monopsony power that can be used to suppress worker pay.

The panelists discussed important considerations for companies considering transactions regarding assessment of the potential effects of mergers on workers – with a particular focus on the distinctive features of the labor market that can

make it difficult to analyze and quantify the effects of a merger on competition – the role of unions, and recent relevant cases involving theories of harm relating to labor markets.

Professor Berger provided an overview of several economic factors that are important to consider for evaluating the impact mergers have on labor markets that may not be present in product markets. These include high switching costs and "positive assortative matching" – i.e., the preference of the most productive workers to be employed by the most productive firms. He further noted that non-wage considerations are often as important or more important than wages for workers and, given the merger guidelines explicitly contemplate "total compensation" as crucial in evaluating mergers, described that this will make profitability metrics used in hypothetical monopolist tests more complicated to deploy.

Ms. Owings discussed the role of unions in advocating for labor issues, and their implications for investigating the impacts of transactions. In particular, she described how unions often speak with more political power than individual workers on labor concerns, and have the ear of federal agencies, local politicians and stakeholders. Ms. Owings referenced the recently challenged Kroger-Albertsons proposed merger as a timely example because the FTC cited union objections to the merger in its complaint. In that case, the FTC appears to be arguing the proposed merger reduces union bargaining power, limiting the ability of the union and the striking workers to direct customers to competitors' grocery stores. Ms. Owings also noted that parties should take caution when advancing proposed labor-saving efficiencies as benefits of the merger and be clear that any reduced demand for labor does not reflect an exercise of the combined firm's market power.

Ms. Marques provided additional context about potential harms mergers may have on labor markets when discussing the Kroger-Albertsons proposed merger. Ms. Marques highlighted the Colorado AG's complaint to block the Kroger-Albertsons proposed merger, which referenced a long history of conduct concerns, including no-poach and non-solicitation agreements between Kroger and Albertsons. She also discussed how the antitrust laws have always, in principle, covered labor markets and commended the federal antitrust agencies' revised guidelines as a welcome update that offers improved guidance to potential merging companies on labor issues. Ms. Marques also noted the agencies are in the process of revisiting the Hart-Scott-Rodino (HSR) merger filing requirements, including to add new requirements pertaining to firms' labor practices. Such new requirements followed the New York AG's effort, together with 20 other states, to broaden the scope of required information.

Mr. Phillips discussed how the antitrust agencies have considered theories of harm relating to labor markets in the past. During his tenure as a Commissioner of the FTC, Mr. Phillips acknowledged that the FTC considered a theory of harm based on labor markets when assessing the Lifespan-Care New England proposed merger in 2022. He and Commissioner Christine Wilson determined the evidence in that case did not support pursuit of such a theory and would have added unnecessary complexity to the enforcement action to achieve the desired antitrust enforcement—i.e., the parties abandoning the merger based on the product market challenge. Mr. Phillips further explained that the agencies must balance utilization of limited agency resources with advancing new or less common theories of harm.

President Biden has said that he wants to be most "pro-union president in history," Mr. Phillips remarked during the Panel, which may suggest increased investigations and enforcement on labor market grounds. With more focus on labor markets during merger review, the agencies are likely to become more efficient in analyzing potential harms to labor markets and develop suitable analytical tools for labor-related theories of harm.

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Full Steam Ahead on Changes for Tech Mergers in the UK and EU

By: Jenny Patroclou (Weil, Gotshal & Manges (London) LLP)

2024 brings sweeping changes for tech mergers with the UK's Digital Markets, Competition and Consumer Bill ("**DMCC**"), heralding a regime that is expected to come into force in autumn 2024, and the EU's Digital Markets Act ("**DMA**"), which entered into full force on 7 March 2024.

Although these two new regimes will most significantly impact large tech companies, particularly those in the US, these changes in the UK and EU signal increased scrutiny for M&A deals. This article outlines the key changes that businesses and their advisors should be aware of.

I. Reporting Requirements under the DMCC

The DMCC signifies a major shift in the UK competition regime – the most significant since the creation of the UK Competition and Markets Authority ("**CMA**") in 2014. The DMCC (a) further expands the CMA's remit and ability to intervene in mergers, particularly as compared to its prominent counterparts in the EU and US and (b) updates and expands the scope of UK merger control.

Royal Assent for the DMCC Bill is expected in April 2024 and the first designation investigations are expected to kick in during autumn of this year.[1]

A. New Reporting Requirements for Digital Transactions

Enforcement of the digital aspects of the DMCC will be led by the Digital Markets Unit ("**DMU**"), which operates within the CMA.

Although the substantive tests for assessing digital mergers will remain the same as for other sectors,[2] the DMCC regime will impose new merger reporting requirements for firms designated as having Strategic Market Status ("**SMS**"). Firms will be deemed to have SMS by the CMA where they have:

(1) "*substantial and entrenched market power*" and "*a position of strategic significance*" in respect of a digital activity linked to the UK;[3] and

(2) global turnover above £25 billion or UK turnover above £1 billion.

The CMA has announced that it expects to start 3 to 4 SMS investigations within the first year of the new regime. Following designation by the CMA, the DMU will publish tailored rules for the conduct of each SMS firm, for the benefit of start-ups, smaller firms and consumers. It will have the ability to fine SMS firms up to 10% of their global turnover for non-compliance with those rules. Firms will be able to appeal decisions under judicial review standards, as they are under the CMA's existing markets and mergers functions. Designated SMS firms will also be able to appeal on the merits the imposition and size of any fines the CMA decides to impose for breaches of the requirement placed on them.

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[1] *See Overview of the CMA's provisional approach to implement the new Digital Markets competition regime*, Jan. 11, 2024, (link available here). Although unrelated to the DMCC, in parallel, the CMA has also proposed changes to its phase 2 merger control process, in particular to account for its changed workload following Brexit. The CMA has not yet published its revised guidance, following a consultation which closed in January 2024.

The key proposals are designed to improve the quality of engagement between merger parties and the CMA throughout phase 2, to increase transparency and efficiency throughout the process and to facilitate early remedy discussions where necessary, which will also help with international mergers. Again, the legal tests to assess mergers will remain unchanged. For a recap of these proposed changes, *see* Weil, Gotshal & Manges (London) LLP, *Let's Keep Talking: Major UK Merger Procedural Reforms Promise Better Engagement and Transparency for Complex Deals*, Dec. 2023 (link available here).

[2] At Phase 1, the CMA's test for reference (its "duty to refer") is met if the CMA has a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that the merger will lessen competition substantially. At Phase 2, an independent Inquiry Group is then required to base its decisions on whether the merger will lessen competition substantially on the balance of probabilities (further guidance on the CMA's legal and substantive thresholds for the approval of a merger can be found here and here).

[3] The CMA has identified several features of digital markets that can lead to substantial and entrenched market power, for example:

(a) Digital products and services that become more valuable as users increase;

(b) Switching costs, with users preferring to continue using one product or service so to not lose their data (e.g., contacts);

(c) Costs falling as output rises;

(d) Access to large volumes of data that are disproportionately valuable for improving products and services.

Following Royal Assent, the CMA will publish draft guidance for consultation setting out how it will assess substantial and entrenched market power and how it will determine whether a firm has a position of strategic significance. The guidance will also set out how it will identify what a digital activity is and our procedural approach to SMS investigations.

At a minimum, and unlike the ordinary CMA regime which is voluntary, SMS firms will be under an obligation to report mergers to the CMA *before completion*,[4] where they:

(1) acquire equity or voting shares of more than 15%;

(2) have a value of £25 million or more; and

(3) have a UK nexus, *i.e.* where the target carries out activities or supplies goods/services in the UK.

For now, once the regime takes effect, the CMA will only require information to help it determine whether a transaction warrants a merger investigation under its normal merger review powers, and therefore the information expected of SMS firms will be much less than that required in a merger notice. Such a report will need to be deemed as "sufficient" by the CMA and merger parties will need to wait for five working days following such confirmation before closing.

B. Updating UK Merger Control Thresholds and Expanding CMA Jurisdiction

Companies should take note that changes under the DMCC for merger control are not limited to digital activities; the changes have wider implications for merging parties active in all sectors. The DMCC will also:

(1) increase the current UK target turnover threshold, in light of inflation, from £70 million to £100 million;

(2) introduce a new small business exception, applicable where the UK turnover of each party to the transaction is less than £10 million in its most recently completed fiscal year; and

(3) expand the CMA's jurisdiction, capturing deals where the acquirer supplies at least 33% of a good or service in the UK and has above £350 million of UK turnover, while the target business is carried on by a UK business or body, at least part of its activities are in the UK, or it supplies goods or services in the UK. This change is designed to capture so-called "killer acquisitions," where the target's value will not necessarily be reflected in its low turnover.

While the CMA's merger control process is technically voluntary, businesses active in any sector should be vigilant to avoid being caught off guard by regulation enforcement by the CMA, which has proven that it is not shy to intervene in deals it may consider problematic using "*evolving theories of harm.*"[5]

II. Reporting Requirements under the DMA

The EU's DMA, like the DMCC, establishes rules that designated "gatekeepers" must comply with. "Gatekeepers" are defined as firms providing "core platform services" ("**CPS**") such as online search engines, social networking and operating systems. To be designated as "gatekeepers" by the European Commission ("**Commission**"), firms must:[6]

(1) either (i) achieve an annual turnover in the European Economic Area ("**EEA**") equal to or above €7.5 billion in each of the last 3 financial years or (ii) provide a CPS in at least 3 Member States where its average market capitalisation or equivalent fair market value amounted to at least €75 billion in the last financial year;

(2) control an important gateway for business users towards final consumers. This is presumed satisfied if the firm operates a CPS with 45+ million monthly active end users established or located in the EU and 10,000+ yearly active business users established in the EU in the last financial year; **and**

(3) have an entrenched and durable position (which is the case if the firm meets the second criterion in each of the last three financial years).

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[4] *See* para. 5.23 of *Overview of the CMA's provisional approach to implement the new Digital Markets competition regime*, Jan. 11, 2024 (link available here).

[5] *See* Speech by Sarah Cardell, Chief Executive of the CMA, *20 years of UK merger* control, Feb. 27, 2024 (link available here).

[6] *See* European Commission, *Questions and Answers: Digital Markets Act*, last updated Sept. 6, 2023 (link available here).

The Commission has already designated 6 gatekeepers — Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft.[7] Booking.com and X may also join the list soon.[8] If the Commission designates such firms' as gatekeepers, they will have six months to ensure full compliance with the DMA obligations for their respective designated CPS. Some obligations under the DMA will apply from the moment of designation, including the obligation to inform the Commission of **all "digital" transactions** involving a CPS, any service in the digital sector, or service that enables the collection of data.[9]

The Commission has promised to publish a non-confidential summary of notified transactions "*on a rolling basis, not earlier than four months after receipt of the information.*"[10] It has confirmed that three transactions were notified between September and December 2023[11], and has already publicised Apple's purchase of IP and assets from Blueye Limited, a provider of transcription technology, and Microsoft's acquisition of Activision Blizzard.[12] The Commission's reporting should provide merging parties with at least some transparency on the types of transactions that the Commission may be interested in reviewing.

Although transactions that are notified may not meet the EU's merger thresholds (or indeed EU Member State thresholds), it may still choose to review them (even if they are not notified via the DMA), call them in or intervene through the use of its Article 22 powers under the EU Merger Regulation, by asking national competition authorities in the EU to refer the transaction to it, even after a deal has closed (much like the CMA's power to call-in cases).[13] Recent examples of the Commission's use of Article 22 include Illumina/Grail, Qualcomm/Autotalks and EEX/Nasdaq.[14]

III. Impact for US firms

DMCC reporting requirements are meant to "*increase the visibility of some large transactions,*" [15] and the same can be said for the DMA to some extent. However, the general view among commentators in the US is that the DMCC and the DMA will dampen competition for US firms. There is less concern around the DMCC compared to its EU equivalent, primarily because of the DMA's blanket regulation approach,[16] whereas the DMCC's impact is expected to be more limited considering it is more tailored to each SMS firm. The US's own efforts to introduce scrutiny of big tech via the proposed "American Innovation and Choice Online Act", still yet to reach a vote on the floor of the House, are quiet on merger control. Nevertheless, it is clear that dealmakers should keep in mind that it appears that a new status quo has emerged, in particular in the UK and the EU, with new thresholds and reporting requirements that could make or break their transactions.

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[7] *See* European Commission, *Gatekeepers*, last accessed Mar. 8, 2024 (link available here).

[8] *See* MLex, *Booking, X, ByteDance notify potential gatekeeper services under EU's DMA rules*, Mar. 2, 2024 (link available here).

[9] Article 14 DMA.

[10] European Commission, *Gatekeepers, List of acquisitions*, last accessed Mar. 11, 2024 (link available here).

[11] *See* European Commission, *Annual Report on the Digital Markets Act*, Mar. 6, 2024 (link available here).

[12] *See* MLex, *Apple reports deal with Blueye to EU regulators under DMA obligations* and *Microsoft briefed EU's DMA team on Activision deal*, (links available here and here).

[13] *See Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases* 2021/C 113/01 (link available here).

[14] M.10188 – *Illumina/Grail*, M.11212 – *Qualcomm/Autotalks* and M.11241 – *EEX / Nasdaq Power*; *see also* Weil, Gotshal & Manges (London) LLP, *Merger Reviews of Non-Reportable M&A Deals: How Can Dealmakers Manage the Increasing Risks?*, Aug. 2023 (link available here).

[15] *See* n.6, *supra*, Speech by Sarah Cardell, Chief Executive of the CMA, *20 years of UK merger* control.

[16] *See* Washington Post, *Big Tech Howled Over E.U. Antitrust Law. The White House Declined A Rescue*, Mar. 7, 2024 (link available here); U.S. Chamber of Commerce, *Letter to the White House on EU Digital Markets Act*, Sept. 8, 2024 (link available here); Politico, *US Pushes to Change EU's Digital Gatekeeper Rules*, Jan. 31, 2024 (link available here).

The Private Equity Enigma: Should Antitrust Enforcement Differ for Private Equity?

By: Shane Bryan and Alyx Klotz (Ropes & Gray LLP)

In recent years, the Department of Justice and Federal Trade Commission (collectively, the "**Agencies**") have taken special aim at transactions and practices involving private equity companies. The Agencies argue that private equity's focus on short-term profits and cost-cutting measures distinguish these forms of ownership from other market participants.[17] Over the past year, however, the animus toward private equity has evolved beyond public outcries by the Agencies and academics and manifested in novel challenges to private equity transactions. AAG Jonathan Kanter and Chair Lina Khan have vocally expressed concerns regarding the perceived risks associated with private equity and alleged competitive harms that private equity buyers cause across industries.[18] On just March 5, the Agencies, together with the Department of Health and Human Services, hosted a virtual public workshop scrutinizing private equity's impact in health care (the "**Virtual Workshop on Private Equity in Healthcare**").

The outsized distrust of private equity begs the question of whether antitrust enforcement should differ depending on ownership—private equity or otherwise— and if so, how.

UNPACKING AGENCY ANIMUS TOWARD PRIVATE EQUITY

This distrust of private equity has led to heightened scrutiny targeting various practices purportedly employed by private equity firms. In particular, the Agencies have taken issue with "roll-up" strategies, characterized by the consolidation of companies through a series of small transactions which, when nonreportable, may avoid Agency review.[19] Additionally, proposed changes to Hart-Scott-Rodino ("**HSR**") reporting requirements signal a concerted effort to identify and address "interlocking directorates" among private equity investments, where one firm has representatives on the boards of competing companies. There has also been skepticism around the suitability of private equity companies as divestiture buyers.[20]

Any inclination to disfavor private equity ownership contradicts the longstanding principle that U.S. antitrust law treats all organizational forms equally.[21] Moreover, the intensified scrutiny of private equity seems to extend beyond the typical concern of heightened market concentration or anticompetitive effects, the traditional focus of antitrust merger enforcement. Instead, the apparent focus is on isolated instances of undesirable outcomes in specific industries – outcomes that may not necessarily result from a reduction in competition or anticompetitive behavior within those industries – and which have no causal connection to private equity ownership (instead of traditional public or private company ownership).[22]

ANTITRUST ENFORCEMENT SHOULD NOT DIFFER BASED ON PRIVATE EQUITY OWNERSHIP

Disproportionate suspicion of private equity transactions risks conflating ownership structure with antitrust concerns that would exist regardless of organizational form. Moreover, it overlooks the reality that there is no "singular" private equity business model and discounts empirically demonstrated benefits of private equity investment and ownership.

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[17] Andrew Forman, Keynote Remarks, *ABA Antitrust in Healthcare Conference*, June 3, 2022 (link available here).

[18] Memorandum from Chair Lina M. Khan, *Vision and Priorities for the FTC*, Sept. 22, 2021 (link available here); Stefania Palma and James Fontanella-Khan, *Crackdown on Buyout Deals Coming, Warns Top US Antitrust Enforcer*, Financial Times, May 18, 2022 (link available here).

[19] In the Matter of JAB Consumer Partners, Commission File No. 2110174; FTC v. U.S. Anesthesia Partners, Inc., Commission File No. 2010031.

[20] Jonathan Kanter, *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit*, Apr. 4, 2022 (link available here).

[21] Tomas Philipson and Richard Posner, *Antitrust in the Not-for-Profit Sector, National Bureau of Economic Research*, Mar. 2006, (link available here).

[22] *See e.g.*, *Remarks by Chair Lina M. Khan As Prepared for Delivery Private Capital, Public Impact Workshop on Private Equity in Healthcare*, Mar. 5, 2024 (link available here).

Do private equity firms fundamentally differ from other profit-maximizing entities and warrant disparate antitrust treatment?

Statements made by current antitrust enforcers suggest that private equity firms' purportedly short-term investment model leads to price increases and job cuts as part of an effort to generate large profits as fast as possible, harming consumers and workers.[23] The irony, of course, is that public companies were long thought to be too focused on short-run returns to appease Wall Street investors who themselves are more focused on short-run returns. Because private owners both own and control their portfolio companies, they can pursue whatever strategy is likely to optimize the long-term profitability of the business, or its saleability if and when it is sold to another owner. Indeed, the value creation thesis for a private equity firm taking a public company private is not infrequently so that it can make investments on a *longer* horizon than the public company itself would be willing to do given concerns about the short term accretiveness of investments and their effect on public stock price.

Nevertheless, the suspect belief that private equity has only short-run focus continues to be a core theme of critical rhetoric. For example, at the FTC's recent Virtual Workshop on Private Equity in Healthcare, Chair Khan pointed to cautionary anecdotes concerning private equity ownership as justification for increased enforcement of private equity acquisitions.[24] In particular, Chair Khan suggested that exploitative strategies used to maximize profits to private owners have impacted union nursing jobs, the doctor-patient relationship, and nursing home mortality rates. However, the reality is that non-private equity firms engage in the same profit-maximizing tactics as private equity firms.

Critics also view private equity, and particularly roll-up acquisition strategies by private equity firms, as leading to higher prices and lower quality of products and services. Yet this is nothing more than a theory of harm applicable to any series of acquisitions that give rise to market power, whether by private equity owners, public or private companies, or non-profits.

The FTC's challenge against Welsh Carson's acquisition of U.S. Anesthesia Partners ("**USAP**") embodies a law enforcement challenge alleging roll-up strategies by a company with private equity investors. The FTC's primary allegation is that USAP acquired more than a dozen large anesthesiology practices over a decade and raised subsequently acquired groups' rates to existing USAP practice's higher rates, resulting in a substantial markup for doctors. Even though the FTC premised the suit on a somewhat unique combination of conduct and market concentration, the agency has sought to send a deterrence message to other companies employing roll-up strategies.[25]

Despite the frequent association of roll-up strategies with private equity ownership, roll-up tactics are used by numerous types of acquirers in product markets involving smaller local or regional markets – an unsurprising business tactic given distributional, operational and other economies of scale that often present themselves in such businesses. For example, the FTC, in its opposition to Kroger's acquisition of Albertsons – in an industry widely acknowledged for operating on thin margins – alleged that both grocers achieved their size through a series of mergers over the past three decades as part of a broader trend of significant consolidation in the U.S. grocery industry.[26] Notably, consolidation in the grocery industry has occurred with both privately and publicly owned companies.[27]

Consequently, policymaking and enforcement in response to certain industry consolidation concerns or profit-maximization tactics should remain owner-agnostic. This viewpoint, momentarily acknowledged by one panelist at the FTC's Virtual Workshop on Private Equity in Healthcare, was otherwise absent from the discussion.[28]

[23] Harris Meyer and KFF Health News, *Lina Khan Speaks Out About FTC's Private Equity Lawsuit: 'We're putting the market on notice'*, Nov. 17, 2023 (link available here).

[24] Transcript, *Private Equity Healthcare Workshop*, Mar. 5, 2024 (link available here).

[25] Press Release, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas*, Sept. 21, 2023 (link available here).

[26] Complaint, *In the Matter of Kroger/Albertsons*, Docket No. D-9428.

[27] Keith Loria, *What is Fueling Grocery Consolidation?*, Grocery Dive, Jan. 3, 2017 (link available here).

[28] *See* Transcript, *Private Equity Healthcare Workshop*, Mar. 5, 2024 (link available here).

Critics often overlook the fact that private equity-sponsored companies are no different than public firms in the diversity of investment approaches and operation strategies. Where some private equity firms focus on short-term passive investments, many others prioritize serving as long-term business partners to their portfolio companies and providing expert resources to improve and expand access to companies' products and services. Many private equity firms, large and small, provide support to portfolio companies to help set and implement strategic priorities and make operational improvements. Furthermore, many portfolio companies are focused less on roll-up strategies, and are instead focused on growing companies organically by making capability-expanding vertical and adjacent acquisitions.

The variation of private equity approaches, many of which are procompetitive, raises questions about the logic of a broad formal or informal enforcement policy based on behavioral assumptions of private equity firms (or worse, cartoonish characterizations of them) instead of evaluating transactions or practices or firms on a case-by-case basis. In fact, Goldman Sachs recently highlighted both the variety of PE approaches to portfolio company management, and the possibility that interest-rate-driven headwinds will require many PE sponsors to take different approaches to ownership and growth, including focusing on organic growth in lieu of merger and acquisition strategies.[29]

APPLYING BEHAVIORAL ASSUMPTIONS BASED SOLELY ON NATURE OF FIRM OWNERSHIP IS MISGUIDED AND HARMFUL

Unsupported assumptions and aggressive enforcement towards private equity is misguided and risks inadvertently harming industries and consumers. Criticisms of private equity's short investment horizon overlook the potential benefits of private equity investment and ownership. Shorter-term investments are not unique to private equity or private ownership more broadly and do not necessarily indicate adverse competitive effects under any antitrust theory.

Private equity firms' investment strategies and desire for profitability do not imply that private equity portfolio companies will be less competitive. Even if private equity's investment implied a shorter-term focus, economic models show that a focus on short-term profits can actually result in more aggressive competition. One study examining the effects of private equity ownership on consumers using price and sales data shows an increase in product variety and availability (geographic expansion) following investment by private equity.[30] Further, private equity companies may be particularly well-suited as buyers in divestitures and carve-outs, due to their ability to provide both capital and managerial expertise to companies that would be considered unattractive by other investors' standards.[31] Scholarship suggests that, particularly in times of financial downturn, private equity backed companies have access to more capital and will invest more than non-private equity backed peers.[32]

It is important to recognize that private equity firms and public companies share comparable competitive motivations and strategies. Narrowing the focus on private equity based on broadly painted behavioral assumptions poses significant risks. Such an approach could deter investment in developing and distressed businesses, potentially limiting access to vital resources that play an important role in fostering competition and consumer benefits across industries.

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The M&A Committee's Threshold is compiled and edited by Rubin Waranch, Kate Maxwell Koegel and Lucy Chambers.

[29] *How Private Equity Strategies are Changing Amid Higher-For-Longer Rates*, Goldman Sachs, Nov. 22, 2023 (link available here).

[30] Cesare Fracassi et al, *Is Private Equity Good for Consumers?*, Apr. 2017 (link available here).

[31] Ben Remaly, *Simons Defends Divestitures to Private Equity*, Global Competition Review, Nov. 16, 2018 (link available here).

[32] Berstein, Lerner & Mezzanotti, *Private Equity and Financial Fragility During the Crisis*, National Bureau of Economic Research Working Paper 23626, 2017 (link available here).