5 Antitrust Trends for Private Equity to Watch

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We examine: increasing focus on non-controlling stakes, burdensome document production requests, heightened enforcement of gun jumping rules, examination of vertical deal overlaps, and ongoing political developments.

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In a continually evolving antitrust landscape, we consider five key trends that PE deal teams should be aware of.

Focus on Non-Controlling Stakes in Competing Companies

Antitrust authorities are paying closer attention to "common ownership", the simultaneous ownership of non-controlling stakes in competing companies, with the EU's Competition Commissioner, Margrethe Vestager, publicly stating that the European Commission is looking "carefully" into the issue. While public companies were the initial focus, we expect that private companies will face a similar level of scrutiny. As co-investment deals and non-controlling acquisitions become more common, deal teams should not assume that acquiring a minority position will mean that antitrust issues cannot arise.

Increasingly Burdensome Document Production Requests

Burdensome document requests from the European Commission and the UK's Competition and Markets Authority (CMA) have become more frequent – both regulators are now adopting a more fulsome US-style approach to document production. PE firms need to consider communications made in preparation for and during a deal, and how these may be viewed by competition authorities. Requests for third-party reports, sale documents, and even emails between buyers, sellers, shareholders, and customers are not uncommon. When faced with document requests, firms need to engage in early coordination to handle authorities' information requests, manage carefully the search and production of discovery materials, and address attorney-client privilege protections and data privacy safeguards. Even if transactions ultimately

do not raise substantive concerns, fines can be imposed and delays to transaction timetables can occur as a result of non-compliance.

Heightened Enforcement of "Gun-Jumping" Rules

Both established and newer antitrust regulators are increasingly imposing fines on parties that close transactions or take steps to integrate their businesses prior to competition approval, often referred to as "gun-jumping". There is currently heightened enforcement of the gunjumping rules: in 2018 alone, we are aware of at least 30 reported decisions around the globe in which parties were fined for "jumping the gun", with 14 of the decisions imposed by EU authorities. This heightened enforcement environment means that deal teams need to exercise even greater caution in structuring obligations between signing and closing. In particular, gap covenants need to leave the vendor with sufficient control to operate its business in the ordinary course, and a purchaser cannot exert operational control over the target business before closing. Although integration planning is permitted, the purchaser cannot even partially implement those plans until after closing. For especially sensitive deals, buyout firms should consider establishing "clean team" arrangements to ensure that only certain individuals have access to sensitive operational information.

Examination of Vertical Issues

Historically, antitrust regulators have primarily focused on the horizontal impact of a deal, and how it affects direct competitors. In our view, there is an increased focus on vertical overlaps, and whether a deal impacts parties at different levels within a sector, such as suppliers and producers. Authorities have also begun to look more closely at how transactions impact related markets. Such scrutiny could bring opportunities for buyout firms in the e-commerce/internet space, as regulators seek to challenge and break up incumbents.

Monitoring Political Developments

Absent foreign investment issues, transactions that present no or minor overlaps in the parties' activities and therefore pose no substantive concerns are being cleared in increasingly short time frames. However, political developments could lead to change. France and Germany have suggested a loosening of EU competition rules following the European Commission's recent rejection of the Siemens/Alstom merger. Further, following Brexit, certain transactions may require notification to an additional authority (i.e., the UK CMA in addition to the European Commission), and the UK merger control regime could start to diverge from the EU regime. PE firms should keep the influence of political developments on deals under review.