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FTC Addresses Approach to PE Strategic Deals

12 December 2018

In the last decade, private equity sponsors increasingly have pursued “strategic” deals – transactions combining two or more competitors. The U.S. Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have actively enforced the antitrust merger laws in the context of strategic PE deals, including by:

- requiring divestitures of assets or business lines to resolve competitive concerns;
- requiring firewalls or other conduct remedies for the same purpose; or
- filing a lawsuit seeking an injunction (after concluding the proposed remedies are insufficient).

New Dichotomy

Against this backdrop, in the last three months, two newly appointed FTC Commissioners have articulated somewhat diverging views about how the FTC should approach strategic deals involving PE.

First, Democratic Commissioner Rohit Chopra made headlines in September 2018 when he sharply criticized the effect of the “private equity model” on competition, and advocated for the FTC to investigate whether the increase in PE ownership is reducing the overall level of competition across the economy.¹ Commissioner Chopra also called out “roll-up” transactions combining two or more portfolio companies and divestiture acquisitions as areas of potential concern. Commissioner Chopra explained that roll-ups may result in a reduction of competition and/or output, but often escape antitrust review because the transaction and/or enterprise values typically fall below thresholds for pre-merger filings under the Hart-Scott-Rodino Act. With respect to divestitures, Commissioner Chopra suggested some PE buyers lack long-term incentives and

resources to “restore lost competition” from the main deal, which has led to failed divestitures. Following his speech, Commissioner Chopra was the lone Commissioner to vote against divestitures proposed by the parties in an industrial gases deal, primarily because the buyer was a joint venture between an operating company and a PE firm.²

In the wake of Commissioner Chopra’s remarks, Republican FTC Chairman Joseph Simons recently defended PE, and specifically PE divestiture buyers, at a mid-November antitrust bar event.³ Responding to a question about Commissioner Chopra’s remarks during a Q&A session, Chairman Simons said that “it would be a mistake to condemn private equity buyers [as] an entire category” and encouraged the FTC to “evaluate buyers on a case-by-case basis.” In fact, Chairman Simons elaborated on the positive impact that PE management experience and financing can have in the context of a divestiture acquisition. Although Chairman Simons did not address roll-up transactions or the effect of the PE model on the broader economy, the Chairman’s tone and measured response suggests he does not share Commissioner Chopra’s bellicose stance towards PE.

Commissioner Chopra’s criticisms of PE may not be representative of the broader FTC, but any Commissioner has considerable influence over the direction and attention of the FTC. Similarly, the direction of the FTC influences the DOJ (and vice versa), as the Agencies seek to apply the antitrust laws consistently. It is obvious that at least Commissioner Chopra may have skepticism about the business strategies, plans, and long-term competitiveness of PE roll-ups and other competitor transactions. As a result, PE sponsors pursuing strategic deals – whether a roll-up, divestiture acquisition or otherwise – should expect continued scrutiny and plan accordingly.

1. “FTC Commissioner hits out at private equity,” *Global Competition Review*, Sept. 25, 2018,

<https://globalcompetitionreview.com/article/usa/1174735/ftc-commissioner-hits-out-at-privateequity>↔

2. In the Matter of Linde AG, Commission File No. 1710068, Statement of Commissioner Rohit Chopra (Oct. 22, 2018), available at

https://www.ftc.gov/system/files/documents/public_statements-/1416947/1710068_praxair_linde_rc_statement.pdf↔

3. “Simons defends divestitures to private equity,” *Global Competition Review*, Nov. 16, 2018,

<https://globalcompetitionreview.com/article/usa/1176982/simons-defends-divestitures-to-private-equity>↔

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Suggested Reading

- 08 February 2019 Sponsored Event Columbia Business School Private Equity Conference
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