PRIVATE EQUITY AND EU MERGER CONTROL – SELECT ISSUES

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I. INTRODUCTION

Private equity ("PE") refers to investments by funds comprising pooled commitments of private capital in equity in unlisted companies, or in taking listed companies private, and encompasses a diverse range of transactions, from management buyouts ("MBOs") and buyins to leveraged buyouts ("LBOs"), growth capital and secondary buyouts (sale from a PE firm to another PE firm). PE plays an important role in all developed economies and has been a significant driver of the latest "merger waves." In 2016, according to statistics by assets data intelligence firm Preqin, nearly 4,000 PE deals were announced for a total deal value of approx. US$ 319 billion globally and US$ 90 billion in Europe.

As PE funds expand the reach of their activities to new geographies and industries, their deals have come to represent a sizable share of the merger control activity of antitrust regulators across the world. Most PE acquisitions raise fewer concerns than industrial consolidation, given that they often do not involve any overlaps with the target business. However, as PE firms' portfolios grow in scope, antitrust regulators increasingly assess vertical links between the target and the other portfolio companies of the PE acquirer. Competition issues may also arise in the context of "bolt-on" acquisitions by a PE portfolio company, where the PE firm consolidates and restructures several companies active in the same or neighboring segments to maximize the value at the moment of exit.

This article gives a concise overview of three sets of recurring topics in the merger control practice of the European Commission ("Commission") involving PE deals: jurisdictional issues – in particular the different control scenarios over the portfolio companies and the target company –, procedural and substantive issues.

II. JURISDICTIONAL ISSUES

A. Control of the PE Firm Portfolio

Large PE firms are often required to submit merger filings because they exceed the applicable thresholds, despite lacking any real overlap with the target company. This happens because the Commission and many other regulators require that the financial income of the PE funds as well as the revenues from industrial activities of all controlled portfolio companies be

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counted toward the turnover or assets thresholds. In particular, the Commission takes the view that the investment company (often called the "sponsor") that has set up and manages the PE fund usually exercises (indirect) control over the portfolio companies, rather than the fund itself, which is often just an investment vehicle. As explained by the Commission Consolidated Jurisdictional Notice, para 15:

> Typically, on the basis of the organisational structure, in particular links between the investment company and the general partner(s) of the different funds organised as limited partnerships, or contractual arrangements, especially advisory agreements between the general partner or the investment fund and the investment company, the investment company will indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies.

Treating the various portfolios as a single undertaking does not always reflect the reality of PE firms, particularly the bigger ones that may have several funds in operation, each accountable to different groups of investors, in different geographies and with safeguards in place to avoid coordination between portfolio activities (such as non-disclosure agreements or "Chinese walls").

Three jurisdictions stand out as an exception to the "monolithic" view of PE firms: the U.S., Canada and Brazil, which all three follow a "fund-based approach." Brazil, which used to be a frequent filing destination of PE firms, shifted to a fund-based approach only recently. Under current Administrative Council for Economic Defense ("CADE") policy, the revenues of each buyer fund (rather than of the PE firm as a whole) are considered separately and calculated by adding up the revenues of the portfolio companies controlled by the buyer fund and those in which the buyer fund has an interest of at least 20 percent. The revenues of any investors with at least 50 percent of the buyer fund, either individually or by virtue of an investor's agreement, are also included. The revised policy has caused a drop in the number of filings submitted. On the other hand, CADE will continue to look at the entire portfolio of the PE firm when assessing overlaps and vertical links.

B. Sole Control of the Target

Unlike venture capital investments or investments by institutional shareholders, PE acquisitions regularly result in a change of control of the target. In the US and Europe, acquisitions of exclusive control by the PE firm are by far the most common. While the PE firm will normally acquire the entire share capital of the target or a majority interest, sole control may also arise in situations when the PE firm is the only shareholder able to veto strategic decisions in the target business – so-called "negative sole control." For example, the EC concluded in M.5949 *Deutsche Bank/Actavis*, that:

> whilst Deutsche Bank ("DB") does not have the power to on its own to impose decisions regarding the commercial strategy of Actavis, it has the power to appoint three out of seven members of the Board and to block the appointment of the chairman, a power that is not enjoyed by any other shareholder. DB may thus be considered to hold negative sole control over Actavis.

C. Joint Control

A frequent scenario is that of joint control, for instance by two or more PE funds or by a PE fund and the founders of the target company or a strategic shareholder. The most common form of joint control results from equality in voting rights (a 50/50 joint venture) or equal representation in the decision-making bodies of the target company. However, joint control may also occur when minority shareholders have rights, which allow them to veto decisions that are essential for the strategic commercial behavior of the joint venture. These rights, which may be granted in the by-laws of the joint venture or in a shareholders agreement, must be related to strategic decisions on the business policy of the joint venture as well as go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests. Veto rights that typically confer joint control include veto rights over decisions on matters such as the budget, the business plan, major investments or the appointment of senior management.

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The existence of joint control over the target business increases the likelihood that the parties will have to request approval for the transaction in the EU and in other jurisdictions. Under EU merger control rules, as well as in other important jurisdictions like China or Turkey, a filing is triggered when "at least two parties" are above certain turnover or asset thresholds. When big PE firms are involved in the acquisition, the condition may well be met by the parent companies alone, regardless of the (lack of) revenues or assets of the target. For example, in M.7386 *KKR/Riverstone/ Trinity*, KKR and Riverstone had to report the acquisition of joint control over Trinity River Energy, which had oil and gas assets in the U.S. but had no sales in Europe. The Commission is currently reassessing whether to continue requiring notification of so-called "zero revenue joint ventures" and it is hoped that it will follow the more pragmatic approach of the authorities in Brazil and Germany, where joint ventures with no revenues in the country will escape the need for a filing even if technically the turnover thresholds are exceeded.

Finally, it must be stressed that a minority shareholding, even if significant, is unlikely to give rise to joint control without the ability to formally veto strategic decisions, particularly when the holder of the shares is a PE firm rather than strategic shareholder. An example is M.7987 *Ardian France/F2i SGR/F2i Aeroporti*, where joint control over F2i Aeroporti was acquired by a shell company in which the PE firms Ardian and Crédit Agricole Assurances ("CAA") held respectively 60 percent and 40 percent of the shares. The Commission ruled out joint control by CAA on the basis that the company did not have a full-fledged veto right on the strategic commercial decisions of the target but rather a mere right of consultation.

D. Management Control

Another frequent occurrence in PE transactions is that the PE firms pay part of the purchase price by granting shares to the founders or the management (so called "rolled equity" or "management rollover"). This ensures an alignment in the interests of the buyer and the sellers, and continuity in the management. Under EU merger control rules, individuals such as founders and managers may acquire sole or joint control of an undertaking if they are classified as economic undertakings in their own right or if they control at least another undertaking (see Article 3(1)(b) of the EU Merger Regulation and para 151 of the Consolidated Jurisdictional Notice. For an application in the PE context, see M.7987 *Towerbook Capital Partners/Infopro*).

Even when this requirement is satisfied, for management control to arise, the individuals in question must have the ability to veto strategic commercial decisions of the business. The mere appointment of the individual to a management position, even in conjunction with a shareholding in the company, is not *per se* sufficient to grant control if it can be revoked unilaterally by the majority shareholder, nor are veto or consultation rights on non-strategic matters. Another frequent scenario involves managers pooling their interests in a management vehicle to act as a single voice and facilitate decision-making. The question in those scenarios is whether control is acquired by these individuals (provided that they satisfy the requirement of Article 3(1)(b) of the EU Merger Regulation) or by the joint venture itself. Paragraphs 152 and 147 of the Consolidated Jurisdictional Notice suggest that when the jointly owned vehicle is created specifically for the purposes of acquiring an interest in the target company, the Commission will look at the individuals behind the company as the real players.

E. No Control

Not all transactions that involve several investors result in sole or joint control under EU law. In fact, it may happen that the company does not have a majority investor, and the required majority to adopt strategic business decisions can be reached by different combinations of minority investors ("shifting majorities"). The key difference between a no-control scenario and a joint-control situation is that the first will not give rise to a "concentration" and will not require an EU notification (although it may trigger other filing requirements, for instance in jurisdictions which review minority shareholdings regardless of control, such as Austria, Brazil, Germany, India, Japan, South Korea and Taiwan). In M.1366 *Paribas/CDC/Beaufour*, the Commission concluded that it had no jurisdiction over the transaction because none of the parties involved acquired control.

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III. PROCEDURAL ISSUES

The majority of PE deals are financial investments in companies with growth potential and with no overlaps or relationships with the PE firm's portfolio. Such deals are often eligible for simplified or "fast-track" procedures in the EU and in other jurisdictions. Still, in many jurisdictions the procedural burden and the delay on the transaction remain hard to justify.

In 2016, out of the 362 cases notified to the Commission, approximately 35 percent involved at least one PE firm. Of the 245 cases approved under the simplified procedure, approximately 45 percent involved at least one PE firm. Conversely, none of the eight 2016 decisions raising "serious doubts" under Article 6(1)(c) of the EU Merger Regulation involved a PE buyer.

The 2013 Simplification Package adopted by the Commission has simplified and accelerated the review process, without any apparent impact on the effectiveness of EU merger control. Other antitrust authorities around the world have made similar attempts at simplifying the procedures for unproblematic transactions. In April 2014, China's MOFCOM released its Guiding Opinion on the Notification of Simple Cases of Concentrations of Business Operators (For Trial Use), setting out a provisional framework for reviewing "simple cases," i.e. transactions with minimal or no overlaps or vertical links. "Simple cases" are now authorized in around 30 days (counting from the "acceptance" of the notification, which can take an additional 4-8 weeks, where MOFCOM verifies the eligibility for the "simple case" procedure). Likewise, the "fast-track" applicable to uncomplicated cases in Brazil allows parties to have their transaction approved in a maximum of 30 days.

Despite these efforts, there is still room for further simplification without compromising the effective application of merger control rules. The Commission itself acknowledged this need in its 2014 White Paper where it proposed "[…] 3. Making procedures simpler for certain categories of mergers that normally do not raise competition concerns" and launched two public consultations polling the views of practitioners, businesses and any other interested stakeholders. The most recent consultation was launched in 2016 and a report is still to be published. One of the aspects the consultation seeks to evaluate is "the treatment of certain categories of cases that do not generally raise competitive concerns" inviting suggestions for simplification. Various categories of transactions which often involve PE firms could benefit from this revamping effort, in particular the so-called "zero-revenues joint ventures" and PE transactions in the real estate sector. An example of the unnecessary burden posed by the latter category of cases (which benefit from a blanket exemption from notification under the Hart-Scott-Rodino Act in the U.S.) is the Commission decision in M.8387 *AXA/Caisse des Depots et Consignations/Cible (II)* which involve the joint acquisition by two financial investors of "two real estate developments for commercial use in a shopping mall in the Région Provence-Alpes-Cote d'Azur" – hardly a matter of antitrust significance, let alone at EU level.

IV. SUBSTANTIVE ISSUES

While the substantive assessment of transactions involving PE firms is largely in line with the standard framework used by the Commission, as set out in the guidelines on horizontal and non-horizontal mergers, certain features of PE firms justify some adjustments at the margins. The deviations consist in a more pragmatic approach to market definition, vertical relationships and spill-over effects. The treatment of horizontal overlaps, on the other hand, sees no difference from any other concentration, and can of course result in lengthy and detailed reviews.

A. Identifying Relevant Overlaps and Vertical Relationships

The Commission will identify relevant overlaps and vertical relationships with the target within the entire portfolio of the PE firm. The approach tends to err on the cautious side and requires discussion in the notification form of companies that are only potentially vertically related or that are active in service lines which can hardly be seen as critical to any business (such as the outsourcing of non-core business processes) or for which supply is fragmented (such as corporate finance or certain IT applications).

An example of the wide net cast by the Commission is the decision M.8274 *Cinven/Permira/Allegro/Ceneo*, which concerns the joint acquisition by the PE firms Cinven and Permira of the online shopping marketplaces Ceneo and Allegro. In the decision, the Commission identified the possible vertical relationship between the target and certain portfolio companies

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of the PE firms that supply IT services such as web hosting, EAS and CRM, none of which seems to be even remotely an "important input" (in terms of impact on total costs and differentiating value) for any business.

The Commission considers it irrelevant that a horizontal overlap or vertical relationship arises with a portfolio company owned by a different fund from the one that will carry out the acquisition. Equally irrelevant to the Commission is the fact that the PE firm is about to exit the investment in the overlapping portfolio company: until the exit transaction is completed, the Commission will review the overlap as an existing one (see the decision M.8274 *Cinven/Permira/Allegro/Ceneo*).

The lesson to draw for businesses is that they need to carry out a proper mapping of any potential horizontal and vertical relationships, even if in different geographic areas, and in parallel gather all the facts that could help quickly rule out any concern at the stage of the substantive assessment.

B. Horizontal Overlaps

The Commission will identify horizontal overlaps, as in any "industrial" concentration, by looking at the competitive relationships between the firms under "any plausible market definition." An example is M.7862 *TDR Capital/Euro Garages*, where the overlap arose only under a narrow market definition.

In the context of PE acquisitions, this approach can lead to the identification of multiple overlaps, often in fringe activities or in territories where only one of the parties operates and the other is only a potential entrant. However, the practice shows that the Commission is able to quickly dispose of overlaps that do not appear problematic on their face. One example is the case M.7537 *Ardian France/F2i SGR/F2i Aeroporti*, which concerns that acquisition of joint control by the PE firm Ardian over FA, a company under sole control of another PE firm, F2i. Two portfolio companies of Ardian, Altares and RGI, were active on a broad market for the provision of IT solutions, where Software Design, a subsidiary of the target, was also active. The Commission carried out a shorthand analysis of the possible overlap by noting that Software Design was active in a niche where Altares and RGI were not present and that in any case even if an overlap existed the combined share of the three entities would be below 20 percent.

PE firms often carry out so-called "bolt-on" acquisitions, i.e. acquire additional businesses in the same or a complementary product line, with a view to integrating the two, acquiring a critical mass or an attractive product range, and increasing their value at the moment of exiting the investment. Bolt-on acquisitions are treated by competition authorities in the same way as any other industrial consolidation.

The financial nature of the ultimate shareholder of the buyer does not affect at all the framework of analysis, which will include a review of the overlaps between the target and the portfolio company that carries out the acquisition as well as, if applicable, other companies in the PE firm's portfolio. One example of a bolt-on acquisition that required a detailed analysis of horizontal and vertical links between the portfolio company and the target company is the case M.6665 *Sun Capital/Rexam Personal and Home Care Packaging Business*. Another example is M.8287 *Nordic Capital/Intrum Justitia*, where Nordic Capital ultimately had to divest certain overlapping businesses in the Nordics to address concerns raised by the Commission.

The Commission will follow the standard horizontal analysis also in the different scenario where a fund of the PE firm acquires a target which is active in the same market as a portfolio company which is owned by a different fund of the same PE firm. The Commission has never endorsed the argument that since the two companies will be owned by, and their management would be accountable to, different individual investors, their respective shares should not be combined when assessing the impact of the acquisition. The Commission will instead consider all the portfolio companies of the same PE firm active in the same market as part of the same "undertaking" for the purposes of the competitive assessment. The fact that the PE firm has no plans for integrating the two companies, which will retain their independent management and brands, is also regarded as irrelevant. In short, the fact that the companies are part of the same "undertaking" under merger control rules prevents any further discussion of their relationship post-merger: the Commission will simply assume that the two will operate as a single entity on the market.

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A corollary to this reasoning should be that any post-merger coordination between two portfolio companies owned and controlled by different funds of the same PE firm escapes the application of rules on unlawful agreements or concerted practices, having a pure intragroup nature. Lacking a specific precedent concerning portfolio companies of a PE group, the reasoning should nonetheless follow from the judgment of ECJ in Case C-73/95P *Viho Europe v. Commission.*

C. Vertical Relationships

The Commission will also closely review any actual or potential vertical relationship between the target of the PE acquisition and the PE buyer's portfolio companies. The Commission reviews not only actual but also potential vertical relationship between a portfolio company and the target (see point 6.3 Affected Markets of the Form CO, which includes in the definition of affected markets vertical relationships "regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration").

Depending on the size and breadth of the PE firm, this expansive approach can potentially result in several relevant vertical relationships requiring disclosure in the Form CO and investigation by the Commission, something which can significantly increase the information burden on the notifying parties and the length of the approval process.

While the Commission expects to be informed of the full universe of potential/actual vertical relationships, it is typically willing to deal with them in a pragmatic way at the stage of the substantive assessment. Four "filters" seem particularly relevant in this task.

First, the Commission will take a closer look at actual (rather than merely potential), existing vertical relationships between the portfolio company and the target company. When the vertical relationship is merely potential, the risks of a foreclosure strategy may be remote. It is rather just as possible that after the merger the two companies will find in their best interest to continue trading with third parties as done up to that point.

There are several examples in the Commission practice of this nuanced approach to vertical relationships in the PE context. The potential rather than actual nature of a vertical relationship was used to rule out concerns in M.7015 *Bain Capital/Altor/EWOS* in relation to supplies of threonine from a portfolio company of the buyer to the target, as well as in the case of M.8274 *Cinven/Permira/Allegro/Ceneo.*

At the same time, the existence of an actual vertical relationship is not *per se* a reason for concern. The Commission will look at the relationship to assess whether the concentration will change the companies' incentives to allow third parties to access the "important input." An interesting case in this context is M.7671 *KKR/FIBA/WMF*, which concerns the acquisition by the PE firm KKR of joint control with FIBA over WMF, a manufacturer of automated coffee machines. The case raised vertical concerns due to KKR's control of Selecta, a vending machines operator, and FIBA's control of BWT, a supplier of filter cartridges used in coffee machines. Two competitors of BWT expressed concerns that post-transaction access to WMF vending machines and to vending machines operated by Selecta could be restricted. In regard to the first vertical relationship, the Commission's decision notes that BWT had been already an almost exclusive supplier to the target for many years and "as purchases from third parties have been immaterial in the last two years, the transaction is not likely to have any effect on WMF's purchasing policy." Regarding the second vertical link, the Commission's reasoning moved from opposite facts – Selecta had been buying stable volumes from another supplier for two years – to reach the same conclusion that the transaction would not alter the incentives of Selecta. This example shows that at least as far as customer foreclosure is concerned, a long-standing supplier relationship may soften the competitive impact of a full integration between portfolio company and target and can help rule out serious competitive issues. The same approach was applied in M.7614 *CVC Capital Partners/Royal DSM*, where a vertical relationship was seen as non-problematic also in view of the fact that the target company had bought a certain input exclusively from a portfolio company of the buyer.

Second, the Commission applies the requirement of the "important input" to rule out vertical concerns. The breadth of PE firms' portfolios is such that almost inevitably there is one or more companies that could supply an input to the target.

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However, an input can only be exploited for a foreclosure strategy when it is critical to the downstream company. As stated in the Commission Guidelines on the assessment of non-horizontal mergers:

> Input foreclosure may raise competition problems only if it concerns an important input for the downstream product. This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market, or it may represent a significant source of product differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high. (point 34).

Three decisions exemplify the application of the test in the PE context. In M.6296 *Triton/COMPO*, the Commission ruled out a risk of foreclosure because the contract manufacturing services provided by the portfolio company Schirm were only a small share of the cost of the downstream product produced by the target. Another example is M.6738 *Goldman Sachs/KKR/QMH*, where, already at the stage of the market definition, the Commission identified as important inputs for a target active in hotel management, products like food and drinks wholesaling and linen rental and laundry services. Since none of the two PE firms acquiring control had activities in these segments, the transaction did not raise vertical issues. Finally, in M.7987 *Towebrook Capital Partners/Infopro Digital* the target was active in the supply of written press and in professional databases for the construction sector in France, while Towerbrook was active in real estate development through the portfolio company GSE. Despite the related nature of the segments, the Commission agreed with the parties that the target's products were not "important input" as they represented a small fraction of the total purchasing costs of GSE and were not necessary for GSE to carry out its activity.

Third, the Commission is willing to more leniently apply the requirement that the vertical relationship be examined across all plausible market definitions, including the narrowest ones, when the vertical relationship as a whole does not seem problematic.

An example is the case M.5243 *CVC/RAG/Evonik*, which concerns the acquisition of joint control by CVC, a PE firm, over Evonik. One of CVC's portfolio companies, Univar, was active as a distributor of a range of chemical products, while the target Evonik was a specialty chemicals producer, and there were potential and actual vertical links between the two. The parties argued that the definition of the relevant product markets for the numerous products manufactured by Evonik that were, or could be, distributed by Univar was unnecessary and disproportionate, given the lack of horizontal overlaps and the limited market share of Univar (below 25 percent). The Commission followed the approach and assessed the vertical links on the basis of an overall market for "chemical manufacture/distribution," which is a clear departure from the product-by-product approach adopted in other transactions in the chemical sector.

Fourth, the Commission disposes quickly of actual or potential vertical relationships that have a *de minimis* nature or that do not show any potential for further development. The elements relied upon by the Commission are the total value of sales in the EEA by the upstream company, the total value of purchases of the input by the downstream company, the ratio between the latter and total production costs of the downstream company.

The Commission analysis in the PE context is in line with the approach to industrial transactions and can be very detailed (see, among many, the cases M.6922 *Triton/Logstor*, or M.6778 *Advent International Corporation/Cytec Resin Business*, where the Commission reviewed links with upstream and downstream portfolio companies of the buyer).

The arguments successfully used for ruling out vertical concerns in PE cases tend to be fact-based and focus on the lack of ability/incentive to foreclose (due to a non-essential input or a low share in the upstream market) or the presence of strong alternatives.

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Companies have often argued that PE funds lack, by definition, the ability and incentive to engage in a foreclosure strategy, because post-merger the portfolio companies will continue to be independently managed and/or owned by different funds and accountable to different investors. An example is the case M.7058 *EQT VI/Terveystalo Healthcare*, where the parties sought to rule out a vertical concern on the basis that the portfolio company and the target would be controlled by different funds, each with separate and independent business cases, different investors and exit horizon. While the Commission did not expressly dismiss the argument, it ruled out the concern exclusively on economic grounds at the end of a standard foreclosure analysis.

While the outcome of these cases is not disputed here, it is submitted that a theory of harm focused on a joint foreclosure strategy between portfolio companies belonging to different funds of the same PE firm makes no economic sense. By definition, a foreclosure strategy involves a trade-off between the revenues foregone in the upstream market and the extra profits that would be accrued in the downstream market following the foreclosure of the competitors. This strategy may have sense, depending on the circumstances, when implemented by two business units of the same corporate group, with consolidated P&L accounts. In the PE context, the same strategy would only benefit the investors in the downstream portfolio company while causing a straight loss to the different investors in the upstream company. This strategy would have no justification for the investors of the upstream company and potentially expose the management to liability.

At all events, while the Commission has reached the correct outcome in these cases – finding no vertical issues, this search comes at the cost of very burdensome notification processes. It is noteworthy that in the entire history of EU merger control, the Commission has rarely blocked or sought commitments on the basis of vertical issues, and has *never* done so in a PE transaction. Requiring extensive disclosure of potential vertical relationships within ever-broadening PE firm portfolios is a burden with no practical justification. For these reasons, at a minimum the Commission should sharply reduce its requirements for vertical information in the context of PE deals.

D. Spill-Over Effects

PE transactions are often carried out by consortia of PE firms. PE consortia allows different firms to pool resources and bid for assets, which they would be unable to acquire independently. Consortia also allows a target company to benefit from different and complementary expertise or the geographic footprint of the PE funds involved.

Cooperation between PE firms at the bidding stage could raise several distinct antitrust issues, some of which were considered in the 2007 litigation regarding PE consortium bidding practices, which ultimately recognized the legitimacy of PE consortium bidding. From a merger control perspective, the analysis is instead similar to any acquisition of joint control, and will require an assessment of any spill-over effects of the concentration in addition to any horizontal overlap and vertical link. Given the breadth of activities of PE firms, spill-over effects can be considerable as it is more likely than not that the two or more PE buyers will have overlapping activities. However, these overlaps are only going to raise concerns if they occur in markets related to where the target is active.

An example of the Commission's methodology in the field can be found in M.6738 *Goldman Sachs/KKR/QMH*, involving the acquisition by two PE firms of joint control over QMH. The Commission excluded out any competition concerns on the basis that the two PE buyers were not present at the same time in a market upstream, downstream or closely related to that where the target operated. The Commission also found it relevant that the joint venture only represented a small part of the parent portfolios so that coordination through the joint venture would be highly unlikely. A further example of the same approach is M.5968 *Advent/Bain Capital/RBS Worldpay*, where the two PE buyers overlapped in a market that was completely unrelated to the target company. Interestingly, in M.6819 *Ratos/Ferd/Aibel Group*, the Commission dismissed spill-over concerns on the basis that the joint PE acquisition had "purely financial character" and that the PE firms' overlapping portfolios were "separate and independent entities, whose stake in [target company] Aibel will be managed as a portfolio company stake, separately from other Ferd or Ratos holdings." This suggests that the reasoning based on the separate ownership and management of portfolio companies, thus far rejected in the assessment of horizontal overlaps and vertical links, can find a limited application in the analysis of possible spill-over effects.

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