ANTITRUST'S INCREASINGLY LONG ARM: (MINORITY) PRIVATE EQUITY INVESTORS BEWARE

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Where do competition, antitrust, and private equity intersect? Once antitrust's favored child compared to strategic buyers, private equity seems to have fallen from competition enforcers' grace. Interestingly, this is part of a broader trend: financial investors in general, from BlackRock to Blackstone, have come into the antitrust spotlight. Being a minority financial investor is no longer reason for antitrust immunity. Economic theory and competition policy have been shifting. Common ownership of small stakes in rival firms by institutional investors, even if passive, can create harm. Rollup acquisitions by active private equity investors may also raise concerns under given circumstances. How is the law reacting to economists' and policymakers' nods? With interest on both sides of the Atlantic. Competition law enforcement signals no empty threats, but rather an eagerness to cover blind spots. What is particularly intriguing is that the US and the EU, for reasons of path dependence and system design, have chosen different legal paths to achieve the same goal. What about politics? It is also here (to stay). Antitrust's recent (over)reach into finance suggests a (renewed) balancing act between competition in product markets and in the market for corporate control, with not only legal and economic underpinnings but also political ramifications.

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I. INTRODUCTION

Who's afraid of antitrust enforcers? Big Tech firms active in digital markets have for one tasted their bite. Yet, zooming out of center stage action, less likely suspects are more recently targeted by antitrusters' guns: Big Finance. First, it was diversified passive institutional investors and index funds with small but significant equity holdings in several publicly listed firms competing in the same product market. The "common ownership" story has sent shockwaves across the asset management industry. While the ink on that debate is yet to dry, one thing is becoming increasingly clear: the antitrust floodgates have opened for financial investors.

Where to now? This time antitrust agencies have stretched out their vision aiming at private equity. But when and how come this happened? Is this the sign of antitrust "hybris" reaching beyond its traditional turf, or an epiphenomenon of our times and the rampant "financialization" of the real economy? Where did competition advocates lost, or found, their "raison d'être" by going after active private equity financiers? From BlackRock to Blackstone, is there in the antitrust enforcer's eyes not that much of a difference?

This short article explores the intersections of competition, antitrust and private equity taking the form of minority investments. Section II tracks recent trends in markets and enforcer's tone that brought private equity to the antitrust spotlight. Section III dissects the economic imprint of private equity on financial and product markets. Section III documents the law's recent aggressive stance towards private equity investors in the U.S. and the EU, with increasing merger control scrutiny and parental liability for cartel activity of portfolio companies. Section IV discusses the politics of private equity, given antitrust's double down on finance, as a renewed balancing act between competition in product markets and in the market for corporate control.

II. MARKET TRENDS AND ENFORCERS' RHETORIC – REAL GAME NOW?

Analysts' buoyant glance is fixed on private equity as the industry is booming and reaching record heights for yet another year. According to McKinsey's annual review, private equity has been "once again the highest-performing private markets asset class" in terms of returns on investment while its assets under management (AUM) "reached an all-time high of $6.3 trillion."[2] A Bain report completes this picture noting that "private equity deal value set a new record in 2021 [with] $1.1 trillion in buyouts doubl[ing] 2020's total of $577 billion and shatter[ing] the old record of $804 billion set back in 2006."[3] The favorable economic environment with low interest rates and government stimulus measures to mitigate the impact of the pandemic have only increased the appetite for private equity and alternative investment opportunities, which have consistently outperformed sluggish public markets. At the same time, 2021 has been an exceptional year for global M&A soaring to their highest levels on record with deal value totaling more than $5.8 trillion, 64 percent higher than the year before and the fastest growth rate since the mid-1990s according to Refinitiv. Private equity groups along SPACS have been considered the major force behind this M&A boom.[4]

Could this conspicuous success be at fault for bringing private equity into the antitrust limelight? In part at least, probably so. The size and frequency of M&A transactions involving private equity firms as a parent entity, minority investor or divestiture buyer as well as the significance of the industry itself within the corporate finance and restructuring ecosystem have raised the stakes and as a corollary antitrust enforcers' awareness of new potential concerns and targets. U.S. public officials made this explicit: "competitive overlaps at the investor level" are a relevant factor for the substantive assessment of mergers and acquisitions of partial ownership interests.[5] While expressing reservations about the general "common ownership" theory targeting large, diversified asset managers, FTC's Acting Director Bruce Hoffman noted examples of competition investigations involving private equity firms as "common owners." Indeed, competitive issues arising from holding minority interests in rivals are recognized in practice when such shareholdings are "substantial" (usually above 10 percent) and coupled with "positions of either influence or access to information" (e.g. right to nominate directors).[6]

So, is this a jaw-dropping moment in antitrust history? Well, not really. Control or influence has always been part of an anticompetitive theory of harm. Active investors have always enjoyed their fair share of antitrust glory. But this is not the full story. What makes antitrusters' interest in private equity intriguing is use of a new language. In a recent memo discussing agency priorities, FTC Chairwoman Lina Khan suggested

2 https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/mckinseys-private-markets-annual-review.

3 https://www.bain.com/insights/private-equity-market-in-2021-global-private-equity-report-2022/.

4 Wiggins Kaye et al, "Dealmaking Surges Past $5.8tn to Highest Levels on Record" Financial Times (30 December 2021).

5 U.S. Federal Trade Commission, "Antitrust in the Financial Sector - Remarks of Acting Director D. Bruce Hoffman at Concurrences Conference" (2 May 2018).

6 *Ibid.*

"targeting root causes rather than looking at one-off effects," in effect "focusing on structural incentives that enable unlawful conduct" such as those originating from "dominant intermediaries and extractive business models."[7] Yet, surprisingly perhaps, reference to gatekeepers did not single out Big Tech companies but instead private equity whose growing role and "business models may distort ordinary incentives in ways that strip productive capacity" warranting closer antitrust scrutiny.[8]

Cheap talk or too much fuss about nothing? The record shows this language and the zeroing in on private equity is no singular occasion. In an interview, DOJ's Assistant Attorney General Jonathan Kanter became more specific aiming at "roll up acquisitions" by private equity buyout groups whose motive might sometimes be "to hollow out or roll up an industry and essentially cash out," highlighting that "[t]hat business model is often very much at odds with the law and very much at odds with the competition [the agencies are] trying to protect."[9] Speaking with particular reference to the health care sector, where private equity investment is extensive, DOJ's Deputy Assistant Attorney General Andrew Forman further clarified that "certain private equity transactions and conduct suggest an undue focus on short-term profits and aggressive cost-cutting… It is also for these reasons that the division often looks more favorably on a market participant as a buyer of assets than a private equity firm."[10]

No more a place to hide in antitrust land, even for temporary or time-limited financial investors? Apparently not. Are strategic buyers to regain ground in the antitrust battleground and the market for M&A over non-industrial financial investors? If enforcers' threat is credible, for instance as said soon to be reflected in guidelines,[11] then this is indeed a remarkable milestone in the evolution of modern competition policy. Is that all new there is? Almost. FTC's Lina Khan warns against missing the big picture: while "[e]very individual transaction might not raise problems, [concerns may arise] as in the aggregate you've got a huge private equity firm controlling [rivals]."[12] This aggregate approach to serial acquisitions echoes a proposal for amending the HSR merger reporting rules to expand the interpretation of the acquiring "person" to include all entities ("associates") within the same family of funds.[13] Among the reasons for the proposed reforms is concern that potential harm stemming from "common ownership" may go unnoticed.[14]

Is this sensible? Very much so. Enforcement follows reality. Nonetheless, the hidden change that this latter development entails is that antitrust scrutiny will not be limited solely to a "single transaction" subject to merger review but may look at an interrelated group of them. Equally, HSR merger filing will not be judged on the basis of a "single controlling entity," say a parent private equity fund with stakes in rivals, but in aggregate for the whole group of separate funds managed by a private equity firm. The new "person" test for M&A reportability is essentially set to capture all entities under "common investment management," although not "common control" in the HSR sense.[15] The practical difference is rather significant.

What does this mean for antitrust's integrity as a discipline then? Let's turn to economics first and then law for some answers.

III. ECONOMICS TO THE RESCUE – LET'S COMPETE BUT FOR WHAT?

Can economics justify the haunting of private equity and more broadly, the recent unorthodox trajectory of competition policy? Maybe. Or said differently, the answer to this question depends on the context and the framing of the issue at hand. Notably, this question is even more pertinent to the U.S. since: (i) it is perceived as "the home" of financial markets – "Wall Street" is a term of art to describe the finance and investment industry; and (ii) U.S. antitrust law has historically taken a back seat in regulating finance.

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7 U.S. Federal Trade Commission, "Memo from Chair Lina M. Khan to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC" (22 September 2021).

8 *Ibid*.

9 Stefania Palma & James Fontanella-Khan, "Crackdown on Buyout Deals Coming, Warns Top U.S. Antitrust Enforcer" *Financial Times* (19 May 2022).

10 U.S. Department of Justice, "Deputy Assistant Attorney General Andrew Forman Delivers Keynote at the ABA's Antitrust in Healthcare Conference, 'The Importance of Vigorous Antitrust Enforcement in Health Care'" (Washington, DC, 3 June 2022).

11 Palma and Fontanella-Khan (n 9); Stefania Palma, Mark Vandevelde and James Fontanella-Khan, "Lina Khan Vows "Muscular" U.S. Antitrust Approach on Private Equity Deals" *Financial Times* (9 June 2022).

12 Palma, Vandevelde and Fontanella-Khan (n 11).

13 U.S. Federal Trade Commission, Notice of Proposed Rulemaking, Federal Register Vol. 85, No. 231 (Tuesday, December 1, 2020): Proposed Rules, 77053-77093. See newly proposed definition of "associate" under section 801.1(d)(2).

14 Anna Tzanaki, "Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy" (2022) 18 Journal of Competition Law & Economics 168, 194–195.

15 See n 13 above; cf Malika Levarlet, Leo Caseria and Ariel Yehezkel, 'HSR and Antitrust Considerations for Private Equity Firms in M&A Transactions' [2018] CPI Antitrust Chronicle July 2018.

In principle, antitrust law applies to financial services firms – as *firms*, not as *investors*. But in case of conflict, federal sector regulation (e.g. securities laws) displaces antitrust in protecting competition in financial markets due to the "implied antitrust immunity" doctrine.[16] This carveout is premised on a marginal cost-benefit analysis: when antitrust enforcement provides little "added value" to competition and consumers.[17] In addition, the key premises underlying this balance – an important one of which is that the sector regulation serves as an "effective steward of the antitrust function"[18] – are empirical in nature. Thus, potentially subject to change over time and context.

So, is there enough market competition? This is a critical consideration not only for the above regulatory balancing and antitrust enforcement in general, but also for assessing the economic import and impact of financial investors' conduct, in our setting private equity firms. Here, there two levels to consider: i) competition between private equity firms themselves as rivals in the provision of financial investment services, ii) competition between industrial firms in the relevant product market, in which private equity firms acquire shareholdings as part of their portfolio of investments. Competition, or concentration, on both levels matters for how efficiently *markets* will operate. Yet, there is a third level that affects how efficiently *firms* will operate: competition in the market for corporate control.[19]

What is the practical relevance of this distinction? Antitrust has traditionally focused on competitive overlaps *at the market level.* Changing economic conditions such as the increasingly prominent role of institutional investors and private equity have forced competition policy and enforcement to shift its look to financial intermediaries as common investors in rival firms and thus start looking at competitive overlaps *at the investor level*. Accordingly, antitrust is now concerned and estimates not only concentration in the relevant market but also due to common shareholding.[20] As regards the third level, i.e. competition among (financial or strategic) bidders for the control of companies through M&A transactions aiming at improving managerial efficiency, this has been left out of antitrust's purview.[21]

The logic being that this latter competition may produce substantial benefits but primarily in the corporate governance of firms. In other words, the "consumers" that are protected by the competitiveness of this market, providing a solution to the problem of "separation of ownership and control," are the company's shareholders.[22] Given the focus on the *internal* affairs and constituencies of firms, it is understandable then why the market for corporate control is subject to regulation by corporate and securities laws rather than antitrust, which is interested in *external* market effects.[23]

Are private equity and common ownership changing this equilibrium? Probably but quietly so. The private equity market is said to have helped reinvent the "market for corporate control," redefining it as competition between "financial" and "strategic" buyers.[24] This is competition whose players are not active within one and the same industry. It is competition between different organizational forms – a territory more familiar to organizational law rather than antitrust. Product market competition (market power) may influence the choice of organization form,[25] but so may a desire to increase efficiency by reducing governance costs (transaction cost economizing) even absent technological synergies.[26] One such organizational efficiency rationale would be enhancing the efficiency of management in an effort to minimize agency costs and improve firm performance. From this perspective, it is no accident that private equity has been warmly embraced by economists who perceived it as a new model of "organizational innovation driven by the rebirth of 'active investors'" solving the perennial principal-agency problem plaguing large public corporations.[27]

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16 Samuel N. Weinstein, "Financial Regulations In The (Receding) Shadow Of Antitrust" (2019) 91 Temple Law Review 447.

17 Abbott B. Lipsky and others, "The U.S DoJ Antitrust Division Public Roundtable Series on Competition and Deregulation, First Roundtable on State Action, Statutory Exemptions and Implied Immunities - Comment of the Global Antitrust Institute, Antonin Scalia Law School" (2018) George Mason Law & Economics Research Paper No. 18-03; Jacob A Kling, "Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine" (2011) 120 The Yale Law Journal 910.

18 Barak Orbach, "The Implied Antitrust Immunity" (2014) Arizona Legal Studies Discussion Paper No. 14-16.

19 Henry G. Manne, "Mergers and the Market for Corporate Control" (1965) 73 Journal of Political Economy 110.

20 José Azar, Martin C Schmalz & Isabel Tecu, "Anticompetitive Effects of Common Ownership" (2018) 73 The Journal of Finance 1513.

21 Edward B Rock, "Antitrust and the Market for Corporate Control" (1989) 77 California Law Review 1365.

22 Fred S. McChesney, "Manne, Mergers, and the Market for Corporate Control" (1999) 50 Case Western Reserve Law Review 245.

23 Anna Tzanaki, "Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law: Looking Through the Past to Return to the Future?" in Marco Claudio Corradi and Julian Nowag (eds), *The Intersections between Competition Law and Corporate Law and Finance* (Cambridge University Press forthcoming).

24 Karen H Wruck, "Private Equity, Corporate Governance, and the Reinvention of the Market for Corporate Control" (2008) 20 Journal of Applied Corporate Finance 8.

25 Benjamin E Hermalin, "Heterogeneity in Organizational Form: Why Otherwise Identical Firms Choose Different Incentives for Their Managers" (1994) 25 The RAND Journal of Economics 518.

26 Oliver E Williamson, *The Economic Institutions of Capitalism* (The Free Press 1985); Oliver E Williamson, "Strategizing, Economizing, and Economic Organization" (1991) 12 Strategic Management Journal 75.

27 Michael C Jensen, "Eclipse of the Public Corporation" (1989) *Harvard Business Review*.

Nonetheless, antitrust is already "sneak peeking" into the market for corporate control at the stage of considering remedies in M&A transactions and specifically when deciding suitable divestiture buyers. Often competition agencies prefer private equity buyers of divested assets to resolve concerns related to a proposed acquisition: taking into account the likely long-term viability of the divested business as an independent competitive force following the financial investor's exit and the short-term organizational improvements in productivity and performance without adding to existing product market concentration. Further, having "an active PE market can trigger mergers between incumbents in a merger-stable industry" as incumbents are triggered to engage in M&A that would be privately unprofitable but socially beneficial in attempt to prevent private equity firms outbidding them and reorganizing their rivals.[28] Indeed, private equity being a relatively temporary owner and non-strategic buyer has been seen a win-win solution to promote competition and enable beneficial restructuring of firms and markets.

The language used by U.S. antitrust officials signals a striking policy reversal, with merger control review now said to favor strategic buyers (industry rivals) and treat skeptically private equity investors. Is the antitrust world turning upside down, and importantly is it for good reasons? Yes and no. *Common* ownership even of minority shareholding investments in rivals by *active* investors such as private equity firms may lead to counterintuitive insights with profound implications. On the one hand, in an environment of common ownership productive efficiencies or synergies for the merging firms cannot be presumed to be the driver for M&A transactions – thus far a solid principle built in the Horizontal Merger Guidelines of the U.S. and the EU.[29] The motive to merge may instead reflect the potential net gains from common shareholdings in the target and non-merging firms in which the common investors have parallel stakes and which may compensate for any losses incurred by the acquiring firm.[30] In this light, it may be justified that strategic acquirers under common ownership (although favored from an industrial organization point of view in its absence) fall from antitrust's grace when reviewing merger transactions.

On the other hand, common minority ownership of rivals by diversified financial investors, in private or public markets in the absence of larger dominant shareholders in their corporate governance, may make "selective intervention" (that Williamson thought impossible in a standard merger context from an organizational point of view) attainable but in a novel way: due to "effective" partial integration based on "across-firm" *diversification* rather than "within-firm" *integration*.[31] Assuming common investors have some form of partial control even if factual in their commonly held firms, they could intervene only when the net expected gains exceed the costs. As a result, "common ownership could act as a (partial) merger substitute with the additional advantage that "selective intervention" is possible."[32] Seen from this perspective, common ownership by private equity investors may have an organizational efficiency rationale that would suggest a favorable treatment by antitrust and merger control enforcers. At least as a potential credible alternative to a market power motive.

Therefore, in comparative terms financial acquirers may deserve a more friendly attitude vis-à-vis strategic acquirers given a common ownership setting: the former may demonstrate an (organizational) efficiency rationale for the acquisition whereas for the latter a beneficial motivation (productive synergies) may be more doubtful. Anticompetitive effects arising from either additional concentration due to common institutional ownership or due to industrial market consolidation respectively will also need to be compared, in magnitude and likelihood, to draw more concrete conclusions on the overall effects. In short, common ownership complicates significantly not only the substantive effects analysis of mergers and acquisitions but also the assessment of structural remedies and efficiencies. For instance, "out of market" remedies and efficiencies (e.g. corporate governance or capital markets benefits) are not typically credited by antitrust enforcers, however in the presence of common ownership either by private equity or otherwise, these become significant and commonplace.[33]

How to apply this analytical framework to private equity? An economic assessment essentially will need to consider all three levels of competition outlined above – competition in the private equity industry, competition in the relevant product market, and competition in the market for corporate control – rather than just the first two. This means that given the extent and increasing importance of common institutional ownership, antitrust enforcement may not reasonably disregard the market for corporate control as it has consistently done in the past. The integrity of the discipline is threatened more by failing to update its approach rather than by not adhering to the traditional paradigm. Such competition policy updating would reflect changes in the actual ownership and organizational ecosystem and the overall economy.

As regards the specific effects of private equity buyouts and investments in rivals, the empirical evidence is mixed. These will hinge on the particular market and other factual conditions. Indeed, to assess the impact of private equity acquisitions on consumers, competition au-

28 Pehr-Johan Norbäck, Lars Persson & Joacim Tåg, "Private Equity Buyouts: Anti- or Pro-Competitive?" (23 February 2018) https://papers.ssrn.com/abstract=3128858.

29 José Azar & Anna Tzanaki, "Common Ownership and Merger Control Enforcement" in Ioannis Kokkoris & Claudia Lemus (eds), *Research Handbook on the Law and Economics of Competition Enforcement* (Edward Elgar Publishing 2022).

30 Miguel Antón et al, "Beyond the Target: M&A Decisions and Rival Ownership" (2022) 144 Journal of Financial Economics 44.

31 Tzanaki, "Varieties and Mechanisms of Common Ownership" (n 14) 221.

32 *Ibid.*

33 Azar & Tzanaki (n 29).

thorities need to consider, "in addition to the concentration of markets where acquisitions occur," the "competitive sensitivity" of acquirers: given that "PE-owned facilities exhibit greater competitive sensitivity, [they] compet[e] more aggressively when competitive incentives are strong and exploit market power more aggressively when competitive incentives are weak."[34] Yet such high powered incentives may prove counterproductive in industries such as healthcare where quality is not only an important competitive parameter but also of special public policy relevance.[35] At the same time, some studies find that private equity may have beneficial effects, especially for smaller and capital constrained firms, under tough economic conditions (e.g. credit, pandemic or crisis).[36] Further, the effectiveness and efficiency of antitrust enforcement will also matter for determining whether private equity may be of pro- or anticompetitive nature.[37] Closer scrutiny of private equity may thus be justified depending on the specifics, but a case-by-case analysis will need to be conducted.[38]

IV. LAW FIXED ON DIFFERENT MEANS – WITH GREATER POWER COMES MORE SCRUTINY?

To what extent does the law follow along these economic insights or the public officials' warning statements? Antitrust enforcers seem to walk the talk as experience shows. Heightened scrutiny and liability of private equity is a fact of antitrust enforcement practice both in the U.S. and the EU. Notably, such enforcement action is observed not only for full acquisitions or wholly owned subsidiaries but also regarding minority investment interests. What is particularly interesting, however, is that the two jurisdictions pursue this task by using different antitrust tools and legal pathways. More specifically, in their pursuit of common *minority* ownership of rivals, U.S. agencies rely on their broad and flexible merger control jurisdiction (under Section 7 Clayton Act)[39] whereas European authorities have chosen as of late to extend the parental liability doctrine (under Article 101 TFEU) to private equity firms.[40]

Really? Oh yeah. How come? There is a long and quirky history of antitrust enforcement against minority shareholdings across the Atlantic. The very term minority shareholdings implies that the equity positions held are "non-controlling": typically, when the ownership stake in the firm is less than 50 percent of its equity capital, absent special circumstances, this entails having less than 50 percent of the voting rights.[41] So no "legal control" or the ability to exercise "decisive influence" over the company, using the legal jargon applying in U.S. antitrust and EU competition law respectively. In the U.S., legal control is key to determine the scope of the "Copperweld immunity" doctrine pursuant to which a parent and a subsidiary company, or other affiliate sister companies controlled by the parent, cannot be found to conspire with each other in violation of Section 1 of the Sherman Act. Such group of companies is considered a "single economic unit" in the eyes of U.S. antitrust law. In the EU, we have a similar "single economic entity" doctrine to determine the number of economic actors liable for the application of EU competition law. Furthermore, we use the "decisive influence" criterion to capture and scrutinize mergers under the EU Merger Regulation (Article 3 EUMR) but also to assign intra-group liability in case of violation of Article 101 TFEU (the equivalent of Section 1 of the Sherman Act). As a rule, both the test of legal control and decisive influence translate in plain terms as having majority ownership and control rights. Hence, when companies come under *common majority* ownership and common control, we scrutinize them as *ex ante* under merger rules and we immunize them from

34 Ashvin Gandhi, YoungJun Song & Prabhava Upadrashta, "Private Equity, Consumers, and Competition" (12 June 2020) https://papers.ssrn.com/abstract=3626558.

35 Atul Gupta et al, "Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes" (NBER Working Paper No 28474, February 2021); Rohit Pradhan and others, "Private Equity Ownership of Nursing Homes: Implications for Quality" (2014) 42(2) Journal of Health Care Finance; Richard M Scheffler, Laura M Alexander & James R Godwin, "Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk" (18 May 2021) https://petris.org/soaring-private-equity-investment-in-the-healthcare-sector-consolidation-accelerated-competition-undermined-and-patients-at-risk/.

36 Steven J Davis et al, "The (Heterogenous) Economic Effects of Private Equity Buyouts" (2019) NBER Working Paper 26371; Shai Bernstein, Josh Lerner & Filippo Mezzanotti, "Private Equity and Portfolio Companies: Lessons from the Global Financial Crisis" (2020) 32 Journal of Applied Corporate Finance 21; John Gilligan & Timothy Galpin, "Rethinking the M&A Process: Learning Private Equity's Secret to Outperforming Corporate Strategic Acquirers" (2022) 50 Strategy & Leadership 21.

37 Norbäck, Persson & Tåg (n 28).

38 Cf U.S. Department of Justice (n 10).

39 James A. Keyte & Kenneth B. Schwartz, "Private Equity and Antitrust: A New Landscape" (2016) 31 Antitrust 21; Kara Kuritz & Matthew Wheatley, "An Antitrust Roadmap for Private Equity Investment" (2020) 34(3) Antitrust 70. Seminal recent cases include In the Matter of *Red Ventures* Holdco and Bankrate (2018): https://www.ftc.gov/legal-library/browse/cases-proceedings/1710196-red-ventures-holdco-bankrate-matter; In the Matter of *ValueAct* (2016): https://www.justice.gov/atr/case/us-v-va-partners-i-llc-et-al; In the Matter of *Third Point* (2015): https://www.ftc.gov/news-events/news/press-releases/2015/08/third-point-funds-agree-settle-ftc-charges-they-violated-us-premerger-notification-requirements; In the Matter of TC Group, LLC., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, LP, and Carlyle/Riverstone Global Energy and Power Fund III, LP ("*Kinder Morgan*") (2007): https://www.ftc.gov/legal-library/browse/cases-proceedings/0610197-tc-group-llc-riverstone-holdings-llc-carlyleriverstone-global-energy-power-fund-ii-lp.

40 Vasiliki Fasoula, "Extending the Presumption of Decisive Influence to Impute Parental Liability to Private Equity Firms for the Anticompetitive Conduct of Portfolio Companies" (2021) 4 Nordic Journal of European Law 101.

41 Annex I "Economic Literature on Non-Controlling Minority Shareholdings ('Structural links')" to European Commission, Staff Working Document, "Towards More Effective EU Merger Control," SWD(2013) 239 final, para 19.

ex post antitrust liability for anticompetitive agreements among several actors as they are (to become) one entity – one unified *economic* entity under common management regardless of whether consisting of more separate *legal* entities.

Antitrust law counts "economic units" so to say. This is the basic principle. At this high level, it is all simple and clear, and U.S. and EU competition rules are congruent and consistent. But there are a few complications. One relates to the "intra-group" liability of affiliates for violations of other companies within the same business group, the second relates to "non-controlling" minority shareholdings. Under the so called "parental liability" doctrine, the EU competition law regime can impose vicarious (strict) liability on parent companies for violations of their subsidiaries, simply because they are part of the same economic entity, and the former are in a formal position to control the latter. In the EU, there is in fact a rebuttable presumption for such parental liability in case of wholly owned or wholly controlled subsidiaries. The latter legal principle was in fact recently established in a case involving a private equity firm as a parent, which held the majority (but not all) of the share capital but the totality of voting rights in the subsidiary.[42] Despite the technicalities and its practical significance, no major surprise lurks in this extension of the presumption.

What is most striking is that in *Goldman Sachs* the European Commission and Courts went one step further: parental liability may be also be established as a matter of fact even when the parent is a private equity firm that only holds a *minority ownership* interest in the subsidiary but actually exercises decisive influence over it *as a general matter*. A finding of actual control automatically implicates parental liability as the parent and the subsidiary are considered to form a single economic unit. Direct involvement in the subsidiary's commercial management relating to, or awareness of, the subsidiary's antitrust infringement is not necessary. What is required is only that overall the parent is found to exercise decisive influence over that company's business decisions.[43] For a finding of *actual* (and not presumptive) decisive influence, therefore, rather than merely relying on the (full) level of ownership or voting rights, EU authorities need to take into consideration "*all* the relevant factors relating to the economic, organizational and legal links which tie the subsidiary to the parent company" including both formal and informal relationships such as personal links.[44] Importantly, the EU Courts confirmed that the Commission's conclusion also applied in the post-IPO period in that same case, when the private equity parent had reduced its previously majority ownership-control position to a minority equity stake. [45]

Breaking news in other words for private equity whose business as usual is having minority shareholdings in industrial firms whose governance and operations seek to influence. The Rubicon has been crossed? Hell yeah! The circumstances of the Goldman Sachs case,[46] where this principle was set, were indeed particular, among others because the parent private equity firm, albeit a minority financial investor, in practice had adopted a business strategy and conduct that approximated that of a strategic acquirer-owner. According to the Court, its governance rights and levels of influence went beyond those normally enjoyed by minority shareholders to protect their financial interests.[47] The particularities of the case notwithstanding, this now stands as active EU law, and the precise limits of the principle are to be tested. Private equity firms cannot hide behind their formalistic labelling as financial investors. They may well be exposed to parental antitrust liability as long as they exercise actual control over subsidiaries. This ultimately remains a factual question. "Substance over form" is the take-home message signaled by EU authorities.

In the U.S., by contrast, this is plainly unthinkable given the current structure of antitrust law as influenced by corporate or organizational law. Under U.S. antitrust law if anything there is a presumption against parental liability for violations of its subsidiaries, even if wholly owned: a separate legal entity or "person" cannot be held vicariously liable for actions of another, even a parent company may only be found to be personally and directly liable when it has active participation in the infringement but not based on the mechanistic application of the "legal fiction" of control. The strong principle of separate "legal personhood" in corporate law, which prevents piercing the corporate veil in all but exceptional cases, carries over in antitrust law. In fact, U.S. antitrust law is addressed to "persons," both physical and legal, whereas EU competition law is targeting "undertakings," i.e. only business economic actors but not actual persons. These fundamental structural and contextual differences in the antitrust laws of the two jurisdictions may partially explain the different emphasis and application of the rules on parental liability. The latter requires more than legal control in the U.S. while in the EU *de facto* control based on minority shareholding may suffice. Having said that, a notable development observed during private antitrust enforcement litigation involving a parent private equity firm whose subsidiary has been accused of antitrust violations is that U.S. courts may not be so formalistic either anymore: in *Packaged Seafood*,[48] the court did not immediately dismiss a private claim against the private equity owner which may indicate some flexibility in interpretation as to whether the private equity parent went

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42 Case T-419/14 The Goldman Sachs Group, Inc. v European Commission [2018] ECLI:EU:T:2018:445; confirmed on appeal by the European Court of Justice, Case C-595/18 P The Goldman Sachs Group Inc. v European Commission [2021] ECLI:EU:C:2021:73.

43 Case T-419/14 The Goldman Sachs Group, Inc. v European Commission [2018] ECLI:EU:T:2018:445, para 152.

44 *Ibid*, para 82.

45 *Ibid*, para 137.

46 See n 42 above.

47 Case T-419/14 The Goldman Sachs Group, Inc. v European Commission [2018] ECLI:EU:T:2018:445, para 132.

48 In re Packaged Seafood Products Antitrust Litigation, 338 F. Supp. 3d 1118 (S.D. Cal. 2018).

beyond "activities that […] are consistent with the parent's [financial] investor status.[49] Again, the factual details of the case here may matter but arguably signs of approximation between the EU and the U.S. may be seen.

What about the second complication? The EU and the U.S. have historically approached differently cases of potentially anticompetitive "non-controlling" minority shareholdings. Although the two regimes have evolved, they continue to do so. The reason has been distinct structural limitations in the law of each jurisdiction that in practice favored certain antitrust tools and provisions over others. Given the above doctrinal limits and generally more demanding legal requirements in applying Section 1 of the Sherman Act, U.S. antitrust enforcement has pursued minority ownership interests that raised antitrust concerns under its merger control laws. Compared to the EU and other jurisdictions, the U.S. merger control regime is the most far reaching as it relies on a flexible "effects-based" test to capture and challenge M&A transactions.[50] The Horizontal Merger Guidelines have a separate section devoted to "partial acquisitions" which explicate that minority shareholdings may be subject to enforcement depending on their effects in each case if they: i) enable the acquirer to *influence* the target's conduct, ii) alter the acquirer's *incentives* to compete, or iii) provide access to the target's competitive sensitive *information*.[51] While there is a "solely for investment" exemption from substantive liability and merger filing for shareholdings up to 10 percent, this requires absolute passivity and any *ex post* action aiming to influence the target (e.g. board seats, nominating directors, soliciting proxies) will be construed as contrary to the alleged *ex ante* passive intent. This is so even for financial investors, which are not excused from exposure to liability unless completely passive.[52] Hence, the exemption may have little practical relevance for private equity investors that seek to follow active investment strategies.

In short, any form of *de facto* control (sole or joint) or even pure financial interests that may be found likely to change the parties' structural incentives and conduct post-merger may be liable under Section 7 of the Clayton Act. As long as there is a credible theory of harm and sufficient evidence to show effects, U.S. merger law is malleable in its application. Arguably, even "diffuse" common minority shareholdings in rivals held by passive institutional investors may be subject to merger control enforcement based on their aggregate anticompetitive effects assuming those common investors-shareholders have joint de facto control in their commonly held portfolio firms.[53] In this light, threats by U.S. antitrust enforcers that they may go after "serial" or "roll up" acquisitions of competitors in concentrated markets by private equity firms, as a potentially problematic business strategy in case of cumulative anticompetitive effects, should not be read as an empty threat or necessarily be taken lightly. One interpretation of this policy pronouncement could be that the law is adapted to catch up with new emerging finance and industry realities.

In the EU, on the other hand, a similar pronouncement would be a dead letter or simply unrealistic. EU merger control is strongly rooted around the concept of "decisive influence," a legal criterion that is inherently more formalistic compared to an economics-based "effects" test such as the one under U.S. merger law. While M&A transactions including minority shareholdings that give rise to sole de facto control may be captured under the EUMR, joint *de facto* control in particular by common financial investors is all but unlikely to be found to amount to decisive influence according to the implementing guidelines explaining the scope of the EU merger rules.[54] Thus, unlike the U.S. and other merger control regimes, there is a formalistic control jurisdictional threshold embedded in the EUMR constraining its application to "non-controlling" minority shareholdings of strategic or financial acquirers. But the EU story has a twist. When one looks to history before the adoption of the pan-European merger control system, EU authorities had actually made aggressive use of Article 101 TFEU to scrutinize minority shareholdings that although formally not *controlling* could serve as an instrument for *influencing* the target's conduct.[55]

In the pre-EUMR time, controlling majority acquisitions could be liable under Article 102 TFEU whereas non-controlling minority acquisitions could be scrutinized under Article 101 TFEU. That meant that minority shareholdings that gave rise to *de facto* control (influence) but were not completely passive need not go unchecked. That flexible and creative EU competition law enforcement era belongs though to the history books, as the Commission had to commit to give up its jurisdiction under Articles 101 and 102 TFEU that operated as a *de facto* merger statute in order to convince Member States to agree to adopt an EU-wide merger control regime.[56] One thing to note from the limited case law from the pre-EUMR era, however, is the remedies that the Commission requested to eliminate concerns while "settling" a case: in *Philip Morris*,[57] EU

49 Colin R. Kass & David Munkittrick, "Private Equity in the Antitrust Crosshairs" *Financier Worldwide* (September 2022) https://www.financierworldwide.com/private-equity-in-the-antitrust-crosshairs.

50 Tzanaki, "Varieties and Mechanisms of Common Ownership" (n 14) 193.

51 U.S. HMG 2010 §13.

52 Kuritz & Wheatley (n 39); Levarlet, Caseria & Yehezkel (n 15).

53 Tzanaki, "Varieties and Mechanisms of Common Ownership" (n 14).

54 Commission Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings [2008] OJ C 95/1.

55 Alec J. Burnside, "Minority Shareholdings: An Overview of EU and National Case Law" (2013) e-Competitions Bulletin N° 56676.

56 Anna Tzanaki, "The Regulation of Minority Shareholdings and Other Structural Links between Competing Undertakings: A Law & Economics Analysis" (Doctoral Thesis, UCL (University College London) 2017).

57 Joined Cases 142 and 156/84, BAT and Reynolds v. Commission [1987] ECR 4487 ("*Philip Morris*").

antitrust enforcers had the parties agree not only to restructure their shareholdings (so that they are not symmetric) and abandon some related governance rights (board representation, limited voting rights), but also to "prophylactic" commitments enabling future administrative control and constraining their future conduct (notification to and prior approval by the Commission in case of any increase of Philip Morris' shareholding in a competitor or its voting rights above 25%).[58] Such are exactly the "novel conditions" or "strict limits" on future acquisitions of competing firms that U.S. antitrust agencies very recently imposed on private equity acquirers in order to approve their proposed transactions.[59] Thus, going back to the time before the EU even had a proper merger control regime, we can find relevant precedent under EU competition law and some similarities to current U.S. merger control enforcement practice. At least as regards the type of remedies imposed, their proportionality is another (case specific) question.

To wrap up, if one abstracts from the technical details and legalese, the substance of the formula employed and its elements to enable antitrust enforcement against minority shareholdings is one and the same: minority ownership plus at minimum *de facto* control, while the possibility of future *ex ante* approval commitments (for further acquisitions) as a prophylactic remedy is not excluded. This latent and perhaps surprising convergence across the Atlantic may allude to and be explained by the same root concerns: a fear of circumventing the law by having present *actual* rather than legal control based on minority shareholdings and a fear of acquiring future *legal* control in or across rivals in an industry in a way that goes unnoticed and unchecked. Another counterintuitive insight follows from the preceding legal analysis set in historical perspective: when it comes to antitrust enforcement against minority shareholdings, control still matters – in fact, it matters quite a lot albeit in different forms, and the law has expanded and adapted to capture and assess that reality accordingly.

Same aims, different ways? Yes. In a sense, both in the U.S. and the EU, with greater power attached to minority shareholdings, even if factual and held by financial investors, greater antitrust scrutiny follows. What is truly fascinating is the different legal rules and doctrines applied to capture any such harmful cases, also when specifically applying to private equity: merger liability for partial acquisitions in the U.S. whereas parental liability of a private equity firm for antitrust violations of any portfolio company over which it actually exercises control even if as a minority shareholder. This very generalized broad picture of juxtaposition between U.S. antitrust and EU competition laws is depicted in the table below.

Jurisdiction / *Scrutiny*	**U.S.**	**EU**
Partial acquisitions (Merger liability)	Minority ownership (*de facto* control-)	Majority ownership (legal control-)
Single economic entity (Parental liability)	Majority ownership (legal control+)	Minority ownership (*de facto* control+)

In that sense, U.S. policymakers are quite on point then when they suggest that it is "common management" rather than formal "common control" one needs to look out for when motivating their proposed reforms of the merger reporting rules, especially given the growing presence of common ownership of rival firms by financial investors. As antitrust enforcement seems to "go global" and break tradition in an effort to close legal gaps, the next big act of the antitrust play is to take place in the U.S. Private equity and common ownership are included as specific topics in the recent request for public comments relating to the ongoing process about potential revision of the U.S. merger guidelines.[60] Any upcoming changes in line with the preceding analysis would not be wholly without ground.

What about the repeatedly professed relative preference of strategic over financial acquirers by U.S. public officials lately? One the one hand, the economic analysis drawn above suggests thinking twice before embarking on such categorical policy revision. On the other hand, a look at the corporate law origins of antitrust points to a practice of treating more favorably mergers between horizontal competitors, which were thought to have a more justifiable corporate "purpose."[61] Perhaps this early U.S. corporate law permissive view on horizontal strategic acquirers reflects what economists describe as the potential of creating "synergies" due to the merger. Yet, industrial organization today universally accepts that horizontal mergers are also the most likely to cause competition harm in concentrated markets; hence, efficiencies and pro-competitive rationales may be more prominent in non-horizontal merger cases. Based on this economic learning, modern antitrust law provides a more

58 Tzanaki, "The Regulation of Minority Shareholdings and Other Structural Links between Competing Undertakings" (n 56) 105-109.

59 U.S. Federal Trade Commission, "Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter & Commissioner Alvaro M. Bedoya Regarding JAB Consumer Fund/SAGE Veterinary Partners" (13 June 2022); In the Matter of *JAB Consumer Partners/National Veterinary Associates/SAGE Veterinary Partners:* https://www.ftc.gov/legal-library/browse/cases-proceedings/2110140-jab-consumer-partnersnational-veterinary-associatessage-veterinary-partners-matter.

60 U.S. Department of Justice and U.S. Federal Trade Commission, 'Request for Information on Merger Enforcement' (18 January 2022) https://www.ftc.gov/policy/studies/submit-comment-merger-enforcement-request-information.

61 Tzanaki, 'Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law' (n 23).

favorable treatment of non-horizontal compared to horizontal mergers, essentially reversing the earlier corporate law-based principle for merger scrutiny. To add to these considerations, while a shift in the law may have some theoretical grounding in pre-existing law and modern economics abstracting from everything else, the presence of common ownership as discussed earlier significantly complicates and potentially subverts a simplistic conclusion on this theme.[62] A deeper analysis is required that goes well beyond private equity.

V. CONTROL AND THE POLITICS OF PRIVATE EQUITY – ANTITRUST'S COMING OF AGE OR PROMETHEUS UNCHAINED?

Where are we left and where to go? Adding a dose of politics to the mix, one may think of three narratives of how we reached this moment in antitrust's history and what it may mean for the future. First, the "pragmatist" scenario would suggest that the recent verbal and enforcement attacks on private equity and other institutional investors is no antitrust revolution. It is simply a realigning of the law to ensure it addresses current surrounding reality. It signals antitrust's maturity, updating it to focus on substance over form. Second, the "populist" scenario would ascribe less naïve motives to regulators who may seek to appeal to rhetoric more than science by targeting prominent in size or activism financial investors. The ethos and logos of antitrust could be compromised in order to nurture the pathos of its wide consumer audience. Third, the "anarchist" scenario would foreshadow antitrust's self-directed inflation as a countermovement to the financialization of product markets and take the populistic account to the next level. Disregarding their historical boundaries or its limiting principles, antitrust could be seen to cross into corporate law and governance territory. By intervening in the "market for corporate control" (e.g. in an attempt to prevent private equity investors from influencing corporate management and hence market outcomes),[63] antitrust could take a "pro-manager" flavor as its enforcement could in practice shield executives while targeting (potential) controlling shareholders. Such turn would expose antitrust's and corporate law's radically antithetical aims and policy directions on common themes of interest. To avoid any unprincipled use or misuse of antitrust in this area, a more thorough analysis and rebalancing of policies would be required by going back to first principles.

And now? We can choose which way we may want to go. Modernizing antitrust law and policy to keep abreast of contemporary developments in the changing financial and ownership landscape is imperative to keep it alive. Overdoing it, however, may be a hazardous or life-threatening exercise. Where to start then? A sensible first step would be by antitrust policymakers and enforcers talking to corporate and financial law regulators. Rather than artificial silos and sweeping broad-brush reforms, we need targeted antitrust strategies when real issues of harm may exist in congruence or dialogue with corporate law experts. The aim should be safeguarding competitive markets without endangering competitive companies. It is instructive how old debates come back in vogue with a different glossing. Antitrust started as a (populist) public interest enterprise to tackle an unprecedented wave of mergers and acquisitions and holding structures ("trusts") between competing companies leading to detrimental market outcomes.[64] Common ownership and minority shareholding return us back to that history and the corporate law origins of antitrust.[65] As such, this momentum should not be seen as a threat but be seized as an opportunity for rapprochement of antitrust laws across the Atlantic, in tune with new economic learning, while aiming at increasing cooperation with corporate laws. Politics may be part of that bargain but not all at that.

Let the dice be cast!

62 See n 33 above and surrounding text.

63 Michael C Jensen, 'Corporate Control and the Politics of Finance' (1991) 4 Journal of Applied Corporate Finance 13; Wruck (n 24).

64 *Ibid.*

65 *Ibid.*

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