

# Antitrust Issues Facing Private Equity Entities

## AntitrustConnect Blog

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Within the last week, the federal district court in Washington, D.C. has approved a U.S. consent decree resolving Department of Justice Antitrust Division concerns over public relations software provider Cision's acquisition of PR Newswire, a company that distributes company press releases to the media. Because Cision is owned by private equity firm GTCR Fund X/A AIV LP, the transaction—valued at more than \$800 million—serves as a good example of the types of deals involving private equity firms that raise federal antitrust challenges.

In addition to the Cision/PR Newswire deal, there have been some recent high-profile enforcement actions involving private equity firms. One example is the Federal Trade Commission's conditional approval of the combination of supermarket operators Albertson's and Safeway, which was announced by the agency in 2015. Cerberus is the majority owner of Albertson's.

Yet the federal antitrust agencies conclude that many of the transactions involving private equity firms do not threaten competition. Consequently, the Department of Justice Antitrust Division and Federal Trade Commission do not bring challenges to these deals, and the agencies do not comment on them. The European Commission, on the other hand, routinely announces clearances in these types of matters, explaining that the relevant acquisitions by firms controlled by private equity firms do not raise competition concerns.

Thus, the Cision/PR Newswire deal can offer some much-needed guidance for advisors of private equity entities on how the federal antitrust agencies confront

relevant deals. The Justice Department action against GTCR, Cision, and PR Newswire's parent, UBM plc, challenged a transaction in which a private equity firm was acquiring a company that competed with one of its holdings. Cision US Inc. is reported to be the dominant media contact database provider in the United States through its flagship public relations workflow software suite. PR Newswire is a leading provider of commercial newswire services, and its Agility business has been identified as the nation's third-largest media contact database provider.

The government was concerned that the transaction would create a duopoly in the U.S. market for media contact databases, which identify journalists and other influencers for public relations purposes. Under the terms of a final judgment, approved September 14, 2016, the parties to the transaction were required to divest PR Newswire's "Agility" media database, monitoring, and analysis business.

Given their focus on acquisitions and investing, private equity firms (and their advisors) need to be aware of the antitrust risks in mergers, such as the Cision/PR Newswire deal. In addition, they must understand the importance of compliance with the premerger notification process under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act).

***Private Equity Antitrust Handbook.*** A brand new resource from the American Bar Association Section of Antitrust Law can help private fund advisors to avoid antitrust pitfalls. Much of the ABA's new *Private Equity Antitrust Handbook* is focused on explaining the U.S. and foreign premerger regimes.

There is general information on the HSR Act requirements. In addition, topics of particular interest to private equity firms are considered. For example, the book discusses the investment-only exemption to the HSR Act rules.

There has been much discussion about the scope of the investment-only exemption since the government challenged hedge fund ValueAct's unreported acquisitions of over \$2.5 billion of voting securities of Halliburton Company and Baker Hughes Inc. during their now-abandoned merger effort, as violations of the HSR Act. In July, the Justice Department announced that ValueAct agreed to pay a record \$11 million in civil penalties and to be bound by injunctive relief designed to prevent future violations. As the enforcement action came down after the first addition of the book was wrapped up, it might be considered in a later addition.

The book also offers insights on premerger reporting obligations and procedures in

Brazil, Canada, China, the European Union, India, and the United Kingdom. The threshold requirements, filing fees, and waiting periods are noted in a quick-reference guide.

In addition to offering instructions on navigating the merger control regimes of the most relevant jurisdictions, and substantive merger review under U.S. law, the *Private Equity Antitrust Handbook* considers interlocking directorate issues under Section 8 of the Clayton Act and conspiracy issues under Section 1 of the Sherman Act. There is a brief, but interesting discussion, of so-called “club deals” or joint efforts by private equity firms to pursue investment opportunities collaboratively.

Considered among other cases is *Dahl v. Bain Capital Partners, LLC*, a class action brought by shareholders against private equity firms for rigging bids and restricting the supply of private equity financing, fixing transaction prices, and dividing up the market for private equity services for leveraged buyouts. The defendants were not able to win summary judgment on all of the claims, and settlements followed. Final settlements and a supplemental allocation plan were approved by the federal district court in Boston in that action in 2015.

“[T]he *Dahl* case is a cautionary reminder of how burdensome and expensive antitrust litigation can be with potential treble damage exposure on a joint and several liability basis without any right of contribution,” the book’s authors note.